DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D. R. M. - In Loss of Nationality Proceedings

Decided by the Board June 30, 1986

Appellant, a native-born United States citizen, moved to Canada in 1969 with his wife and child, also United States citizens, to study for a doctorate at the University of Calgary. After he was awarded his degree, appellant remained in Calgary, teaching at the University. He obtained naturalization in 1975 upon his own application and obtained a Canadian passport which he used to travel to Mexico. Later he found other employment but by 1983 he had lost that job. He visited the Consulate General in 1983 to inquire about immigration. After processing appellant's case the Consulate General executed a certificate of loss of nationality in his name, concluding that he had expatriated himself under section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his application. A month later the Department approved the certificate. A timely appeal was filed.

Held: Appellant's naturalization was voluntary. He submitted no evidence to support his claim that he could find no employment in the United States and might have lost his position at the University if he had not obtained Canadian citizenship. Furthermore, he did not establish that his ability to subsist was threatened and that the only course open to him was naturalization. If, as appeared likely, he meant that he could not readily find a job in his preferred field unless he became naturalized, such a factor could not be deemed to be coercive. He might have faced a difficult choice, but no one forced him to seek naturalization and so to risk his United States citizenship.

The issue of whether appellant intended to relinquish his United States citizenship was very finely balanced. In many respects, appellant's case resembled those of other appellants who obtained naturalization in Canada without making a renunciatory oath of allegiance and who did nothing for a good many years to evidence an interest in or claim to United States citizenship. In a number of such cases, the Board found the scales to be in equilibrium, and resolved ambiguities in the evidence in favor of the citizen.

In the instant case, however, there was evidence that appellant held himself out exclusively as a Canadian citizen

after naturalization. He obtained a Canadian passport, while at the same time his American citizen wife obtained a U.S. passport from the Consulate General in the city where they lived to accompany appellant on a trip abroad. If he considered himself still an American citizen, it was strange, the Board thought, that he did not apply for a United States passport. Furthermore, as a consular officer reported, in 1983 appellant inquired about "immigration" to the United States. He took no exception to this characterization of his visit by the Department in its reply brief to which he submitted no reply.

On balance, the Board believed the Department had met its burden of proof that appellant intended to relinquish his United States citizenship.

The Board affirmed the Department's determination that appellant expatriated himself.

****

D. R. M. appeals an administrative determination of the Department of State that he expatriated himself on March 27, 1975 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

The appeal presents two issues: whether appellant's naturalization was voluntary; and, if it be so found, whether it was accompanied by an intention to relinquish his United States citizenship. It is our conclusion that appellant became a citizen of Canada of his own free will, and that it was his intention to relinquish his United States citizenship. We thus affirm the Department's determination of appellant's expatriation.

I

M. became a United States citizen by birth at [redacted] He received B.Sc. and M.A. degrees from California State College. During his college days he states he served in the California National Guard. He obtained a United States passport in 1963 which he did not renew when it expired.

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, . . .

In August 1969 M. moved to Canada with his American citizen wife and child. He entered Canada as a landed immigrant to study for a doctorate in biology at the University of Calgary. He was awarded a doctorate of philosophy in 1972. In 1973 a second child was born. For several years after he obtained his Ph.D. M. was employed by the University of Calgary and held other part-time positions. He applied for naturalization as a Canadian citizen and on March 27, 1975 was granted a certificate of Canadian citizenship. On the occasion of the grant of citizenship he made the following oath of allegiance:

> I, . . ., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.
>
> So Help me God.

M. obtained a Canadian passport in 1975 which he allegedly used only once, to visit Mexico. His wife obtained a United States passport at the same time from the Consulate General at Calgary. M. states that for several years after 1977 he was employed by an engineering firm.

In May 1983 M. visited the Consulate General at Calgary. The consular officer who interviewed him informed the Department that M. said he had lost his job and wanted to move to the United States to reside. The consular officer described the visit in the following terms: "He has inquired about the process of immigration." (Emphasis added). M. completed two forms for determining United States citizenship. Based on the interview and the forms M. completed, the consular officer executed a certificate of loss of nationality on August 16, 1983. 2/ The officer

---

2/ 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.

certified that M. acquired United States citizenship at birth; that he obtained naturalization in Canada upon his own application; and concluded that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on September 2, 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. The appeal was entered on August 24, 1984. M. contends through counsel that he was forced to obtain Canadian citizenship because of economic pressures, and that he did not intend to relinquish his United States citizenship.

II

There is no dispute that M. duly obtained naturalization in Canada upon his own application, and so brought himself within the reach of the statute. Performing a statutory expatriating act, however, will not result in expatriation unless the act was voluntary and accompanied by an intention to relinquish United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

With respect to the issue of voluntariness, the statute prescribes that performance of any one of the acts specified in section 349(a) of the Immigration and Nationality Act shall be presumed to be voluntary, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntary. 3/

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

(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after 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. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

In one of the forms he completed in May 1983, M. asserted that after he completed his doctorate in 1972 he attempted to return to the United States but could not find any work. He believed jobs in Canada would be easier to find if he had Canadian citizenship, adding "actually it didn't make any difference since none of my employment required Canadian citizenship."

In his opening brief of October 1984 (he did not file a reply brief), M. made the following allegations about the involuntariness of his act:

> After graduation in 1972, Appellant spent over one year attempting to obtain employment in the United States. Over two hundred resumes were mailed to potential employers, but to no avail.
>
> Appellant was forced to remain in Canada and seek employment there. By this time, appellant's wife had given birth to another child, which was born in Calgary. Appellant worked at the University and other part time positions. It soon became apparent that the University was dismissing American faculty members in favor of Canadians, and those remaining were not being promoted.
>
> Feeling uncertainty about his faculty position, Appellant decided to obtain Canadian citizenship to protect his position and future.
>
> ...
>
> Appellant feared the loss of his job unless he were to become a Canadian. Since he had attempted to find employment in the United States and failed, this possibility posed a real danger to the well being and self-preservation of Appellant and his family, who relied on his support. He sought naturalization to maintain his job.
>
> It was only out of economic necessity that Appellant and his family remained in Canada after completing his education....

We do not think M. has shown by a preponderance of the evidence that his naturalization was involuntary.

The allegations in his brief that he could not find employment in the United States and that he might have lost his position at the

University had he not become a Canadian are unsupported by any evidence. Furthermore, they are not wholly consistent with the statements he made a year earlier in completing one of the citizenship questionnaires in which he answered a question as to whether he acted voluntarily by stating simply: "I attempted to return to the U.S. after finishing my degree at U. of Calgary but could not find any work. I believed it would be easier to find work in Canada if I had Canadian citizenship.".

To sustain a defense of economic duress, one must show that one's ability to subsist was threatened by forces over which one had no control and that the only course of action was to perform an expatriative act to alleviate that situation. See Stipa v. Dulles, 233 F. 2d 551 (3rd Cir. 1956) and Insogna v. Dulles, 116 F. Supp. 473 (D.D.C. 1953). Those cases stand for the proposition that an expatriative act done out of a concern for self-preservation is not voluntary. M.'s case, even as he posits it, is, however, vastly different from those of petitioners in Stipa and Insogna. On the facts, we cannot accept that he could not find any kind of employment in the United States or Canada. If he means, as we suspect he does, that he could not readily find a job in the field he preferred, that is not duress. Surely, one as young and well-educated as M. could have found some kind of employment that would have sustained him and his family.

Possibly M. did face a difficult choice. But no one forced him to seek naturalization and risk his United States citizenship, instead of trying to find another way to satisfy his economic and professional needs. Where one has the opportunity to make a free choice, the mere difficulty of the choice is not deemed to constitute duress. See Prieto v. United States, 298 F. 2d 12 (5th Cir. 1961), and Jubran v. United States, 255 F. 2d 81 (5th Cir. 1958). Similarly, Jolley v. Immigration and Naturalization Service, 441 F. 2d 1241, 1245 (5th Cir. 1971): "But the opportunity to make a decision based upon personal choice is the essence of voluntariness."

To choose foreign citizenship for economic reasons that objectively fall far short of dire necessity cannot be considered to be involuntary. M. has failed to show that naturalization was forced upon him by factors he could not control. Accordingly, we conclude that he became a Canadian citizen of his own free will.

III

Even though we have concluded that appellant voluntarily obtained naturalization in Canada, "the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship." Vance v. Terrazas, 444 U.S.

at 270. Under the Statute, 4/ the Government must prove a person's intent by a preponderance of the evidence, 44 U.S. at 267. Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260.

The intent the Government must prove is the person's intent at the time the expatriating act was performed. Terrazas v. Haig, 653 F. 2d 285, 287 (7th Cir. 1981).

Performing a statutory expatriating act may be highly persuasive evidence of intent but it is not conclusive evidence, and it is impermissible to presume from performance of the act that the citizen intented to relinquish citizenship. Terrazas, 444 U.S. at 268. Thus, although appellant's actions in obtaining Canadian citizenship may strongly evidence an intent to abandon United States citizenship, something more must be proved to sustain the conclusion that appellant intended to expatriate himself.

M. alleges that when he applied for naturalization he specifically asked a Canadian immigration judge whether he would be required to renounce his United States citizenship, and was assured that he would not have to do so. That inquiry, appellant suggests, shows a lack of intent to relinquish his United States citizenship. His contention, which is unsupported by anything in the record, was made eight years after he obtained naturalization. Without calling into question appellant's good faith, we are unable under the circumstances to accord his latter day statement significant evidentiary value.

The only substantiated contemporaneous evidence bearing on M.'s intent at the relevant time is his act of obtaining naturalization and his swearing an oath of allegiance to Queen Elizabeth the Second. Performing a statutory expatriating act and swearing an oath to a foreign sovereign may be highly persuasive evidence of an intent to relinquish United States citizenship but it is not conclusive evidence of such intent. Vance v. Terrazas, 444 U.S. at 261, King v. Rogers, 463 F. 2d 1188 (9th Cir. 1972). Other evidence of intent to abandon citizenship must therefore be adduced before a finding of expatriation can be sustained.

4/ Section 349(c) of the Immigration and Nationality Act. Text Supra, note 3.

Since performance of a statutory expatriating act is in itself inconclusive evidence of intent and since we are unable to accord appellant's assertion that he showed a concern in 1975 to retain United States citizenship significant weight, we must examine appellant's conduct after he became a Canadian citizen to determine whether it is more likely than not that it indicates an intent in 1975 to abandon United States citizenship.

The Department submits that a combination of factors confirms unambiguously appellant's intent in 1975 to relinquish his United States citizenship. Although the Department concedes that appellant may have expressed concern in 1975 about retaining his United States citizenship, it finds it curious that he did not consult United States consular authorities in Calgary to get an authoritative opinion on the effect of naturalization upon his United States citizenship and seek advice on how he might protect citizenship. The Department points out that from 1975 to 1983 M. did not discharge any civic responsibilities he owed the United States, and did not register himself or his child born in Canada in 1973 as a United States citizen, or renew his United States passport, issued in 1963.

The Department considers that M.'s intent to relinquish citizenship is further evidenced by the fact that he only consulted United States authorities about his case in 1983 because he had recently lost his job and wished to move to the United States to live, not because of any strong attachment to the United States.

A crucial element in the Department's case is that M. obtained a Canadian passport in 1975 which he used to travel to Mexico with his wife. This the Department finds especially significant on the issue of intent because M.'s wife, a United States citizen, went to the United States Consulate General at Calgary to obtain a passport in 1975 to accompany her husband to Mexico. As the Department observed in its brief: "It makes no sense that he would travel on a passport bearing a different nationality than his wife's unless he did not consider himself to be an American, as she was."

We are not satisified that appellant's failure to perform the civic responsibilities of a United States citizen or to take steps to assert a claim to United States citizenship are in and of themselves sufficient to show that in 1975 he intended to relinquish his United States citizenship. As the Board has said in a number of opinions, the indicia cited above could support inferences of an intent to relinquish United States citizenship, but inferences of a renunciatory intent are not the only rational inferences that might be drawn therefrom. The citizen

might have acted as he did out of lack of knowledge, inertia, or any number of other reasons that have no bearing on his intent at the time he was naturalized as a Canadian with respect to United States citizenship.

In such cases, the Board has found the scales to be equilibrium, there being no preponderance of the evidence one way or another. Under such circumstances, equipoise must be resolved in favor of retention of citizenship.

In M.'s case, however, additional factors distinguish it from the kind of case just described. First is the fact that appellant affirmatively held himself out exclusively as a Canadian citizen. He has presented no evidence that he either described himself as a U.S. citizen to anyone on any occasion and he attested to the fact that on no occasion since his naturalization in Canada did he inform any official of Canada or the U.S. that he was a U.S. citizen. The record shows that he obtained a Canadian passport in 1975; he has presented no explanation for failure to obtain a U.S. passport rather than a Canadian passport. As the Department fairly observes, it is very strange that appellant did not apply for a United States passport when his wife did so in order to accompany him on the same trip to Mexico. If M. considered himself not to have lost or jeopardized his United States citizenship when he obtained naturalization in Canada, why, it must be asked did he not at least also assert his right to a United States passport? While there may be occasions when a United States citizen's use of the passport of a foreign country whose nationality he has acquired should not be deemed to evidence a renunciatory state of mind, here it seems clear that M.'s use of a Canadian passport evidences his own assumption that he had lost his United States citizenship and his agreement with that loss.

Finally, in 1983 when M. called at the Embassy, it was, according to the contemporary report of the consular officer, to inquire about immigration to the United States. The Board notes that M. has taken no exception to this characterization of his visit (see Department's brief at p. 3 to which M. filed no reply) and that an inquiry of this nature is not the way in which a person considering himself to be a U.S. citizen would couch his inquiry to enter his country.

In Vance v. Terrazas, the Supreme Court pointed out that Afroyim emphasized that loss of citizenship requires the individual's "assent" in addition to his voluntary commission of the expatriating act. 444 U.S. at 260. The Court stated "it is difficult to understand that 'assent' to loss of citizenship would mean anything less than an intent to relinquish citizenship whether the intent is expressed in words or is found as a fair inference from proven conduct." Id. Here the Board has been presented with concrete

evidence of conduct indicating that M. considered himself to be solely Canadian; at no point has he indicated that he did not assent to the transfer of his allegiance from the United States to Canada and thus the relinquishment of his United States citizenship.

It is therefore our conclusion that the Department has carried its burden of proving that appellant intended to relinquish United States citizenship when he obtained naturalization in Canada.

IV

Upon consideration of the foregoing, we hereby affirm the Department of State's determination that appellant expatriated himself.

Alan G. James, Chairman

G. Jonathan Greenwald, Member

Mary Elizabeth Hoinkes, Member