DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: B.A.M. -- Motion for Reconsideration - Loss of Nationality

Decided by the Board May 22, 1987

On April 1, 1987, the Board of Appellate Review granted the motion of the Department of State for reconsideration of the Board's decision of November 14, 1986.

In that decision, the Board concluded that appellant's renunciation was legally ineffective because it was made in prison, and, accordingly, reversed the Department's determination of loss of nationality.

In its motion, the Department argued that the Board misapprehended the law. It contended principally that section 349(a)(5) of the Immigration and Nationality Act speaks for itself as to where formal renunciation may take place, that is, before a diplomatic or consular officer "in a foreign state which would include a prison in a foreign state." It further contended that, assuming arguendo, there is need to go beyond the language of the statute, the Board erred by violating fundamental principles of statutory construction in not according any weight to the Department's interpretation of the statute which it administers. The Department's interpretation of section 349(a)(5) appears to be that by "refraining" from requiring that a renunciation occur "only" at consular premises the Department has acted reasonably, and, that, therefore, the Board's proper role is to determine whether the Department's position is a permissible construction of the statute.

HELD: While section 349(a)(5) is silent as to where the oath of renunciation should be administered, the legislative history of the statute squarely addresses the issue and sheds light on the intent of Congress that formal renunciation be made "only at a consulate of the United States before diplomatic or consular officers." Given the clear expression of Congressional intent in the legislative history, there is no question of the Board substituting its own construction of section 349(a)(5) for the Department's interpretation of the statute. As the Supreme Court stated in Chevron U.S.A. v. National Resources Defense Council, 467 U.S. 837, 842-43 (1984), if the intent of Congress is clear, "that is the end of the matter" for the court, as well as the agency must give effect to the unambiguous intent of Congress.

Upon review of the record and further reconsideration, the Board affirmed its decision of November 14, 1986.

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In a decision rendered on November 14, 1986, the Board of Appellate Review reversed the administrative determination made by the Department of State that appellant, B A M , expatriated himself on January 20, 1984, under the provisions of section 349(a)(5) of the Immigration and Nationality Act, by making a formal renunciation of his United States nationality before a consular officer of the United States in Mt. Crawford Prison in Wellington, New Zealand. 1/ In reversing the Department's determination of loss of nationality, the Board concluded that appellant's renunciation was legally ineffective because it was made in prison.

On April 1, 1987, we granted the Department's motion for reconsideration of the Board's decision. Under the governing regulations, if a motion for reconsideration is granted, the

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1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads:

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 --

. . .

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State;. . .

The Immigration and Nationality Act Amendments of 1986, PL 99-653, approved November 14, 1986, amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

Board shall review the record, and, upon such further reconsideration, shall affirm, modify, or reverse the decision. 2/ Upon review of the record, the Board will affirm its original decision.

I

The Department's motion for reconsideration is grounded on the belief that the Board misapprehended the law. First, the Department "objects to the Board's consideration of additional materials that were not part of the record." Second, it contends that the Board "erroneously maintains" that section 349(a)(5) of the Immigration and Nationality Act is silent on where the formal renunciation of citizenship may take place. Third, the Department argues that, assuming arguendo there is a need to go beyond the language of the statute, the Board "erred by violating fundamental principles of statutory construction." Fourth, it holds that the Board's proper role, in light of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. et al, 467 U.S. 837 (1984), is to determine whether the Department has acted reasonably "in not requiring a formal renunciation to take place only in a U.S. embassy or consulate."

2/ Section 7.9 of Title 22, Code of Federal Regulations, 22 CFR 7.9, provides as follows:

The Board may entertain a motion for reconsideration of a Board's decision, if filed by either party. The motion shall state with particularlity the grounds for the motion, including any facts or points of law which the filing party claims the Board has overlooked or misapprehended, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Board by the party filing the motion. Oral argument on the motion shall not be permitted. However, the party in opposition to the motion will be given opportunity to file a memorandum in opposition to the motion within 30 days of the date the Board forwards a copy of the motion to the party in opposition. If the motion to reconsider is granted, the Board shall review the record, and, upon such further reconsideration, shall affirm, modify, or reverse the original decision of the Board in the case.

II

The so-called additional materials that the Department claimed were not part of the record and "upon which neither side had an opportunity to respond" consist of two items: a memorandum of J. Donald Blevins, Deputy Assistant Secretary for Passport Services, dated October 23, 1981, addressed to the Board, and a Department circular instruction sent to all diplomatic and consular posts on February 24,1984. The Passport Services memorandum explained the Department's position on the significance of procedural defects in loss of nationality cases involving formal renunciation. The Department instruction to all U.S. missions abroad dealt with the issue of renunciations of citizenship in foreign prisons.

The Passport Services memorandum was in response to a request of the Board, dated August 4, 1981, for a memorandum of law stating the Department's position on the legal significance of procedural defects arising from the failure of a consular officer "to comply with the letter" of the procedures set forth in 8 FAM 225.6 (Foreign Affairs Manual) on renunciation of nationality. The Board foresaw "the possibility that such a procedural defect may in a future appeal become a critical factor in our determinations". The Board's request and the Passport Services memorandum dealt with the issue in general terms without reference to any particular appeal before the Board.

The Department's circular instruction of February 24, 1984, to U.S. missions abroad on the subject of renunciations in foreign prisons was also in general terms. It was sent, as the instruction stated, in response to inquiries from "several posts" whether a United States citizen may execute a formal oath of renunciation in a foreign prison. The fact that the general instruction was sent subsequent to appellant's act of renunciation in prison on January 20, 1984, is without significance. In this connection, it should be noted that the Department approved the certificate of loss of nationality in appellant's case on June 25, 1984, four months after the issuance of its circular instruction.

Both the Passport Services memorandum and the circular instruction endeavored to state the Department's position on procedural matters involving renunciations of citizenship. The fact that the documents were not submitted by the parties to the Board for consideration or included in the Department's case

record on appellant, does not, in our view, preclude the Board from taking cognizance or administrative notice of them in reaching a decision on the appeal. It is beyond dispute that, in considering and determining an appeal, the Board is not restricted from taking into account the Department's stated views, instructions, practices, procedures, and regulations relating to loss of nationality or expatriation cases. To suggest that the Board is not authorized to consider such material, unless it were a part of the record, as the Department submits in its motion for reconsideration, is untenable. It would lead to the absurd conclusion of requiring, for example, that laws, federal regulations, and judicial and administrative decisions be made part of the record before the Board may consider them in reaching a decision.

As to the Department's contention that the Board "entirely" misconstrued the conclusion of the Passport Services memorandum, we perceive no reason, upon review, to modify our previously stated view on the matter in our decision. 3/ We adhere to the view that in the Passport Services memorandum the Department took the position that the 1950 statement of the Senate Committee on the Judiciary to the effect that formal renunciation may take place only at a consular establishment was a clear expression of the intent of Congress.

III

The Department contends that section 349(a)(5) of the Immigration and Nationality Act "speaks for itself" as to the place where formal renunciation may take place, and is not silent

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3/ The Passport Services legal memorandum of October 23, 1981, on procedural defects in loss of nationality cases stated:

> The conclusion that should be drawn, therefore, is that a procedural defect in the renunciation process, other than a failure to meet the statutory requirements, should not, in itself, invalidate the expatriating act. The Department realizes, however, that certain procedural defects in individual cases may have a bearing on the separate issue of the voluntariness of the renunciant's act or of his/her comprehension of the nature of the act.

on the matter, as the Board "erroneously maintains." It is argued that the language, "making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state," is "all" that Congress intended to say with respect to the location of a renunciation of United States citizenship, "having failed to specify any particular location for renunciation within a foreign state." The Department argues essentially that the term "in a foreign state" means the place where formal renunciation may take place, and, because the statute speaks for itself, there is no need to search for an undisclosed intent as to where oaths of renunciation should be administered. It cites Chevron U.S.A., 467 U.S. 842-43 (1984), wherein the Supreme Court stated: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguous intent of Congress."

The Department's argument, we believe, is specious. It assumes that section 349(a)(5) speaks for itself and clearly states the intent of Congress. We are unable to agree. Section 349(a)(5) is silent as to where the oath of renunciation shall be administered; it merely states that a formal renunciation be made before a diplomatic or consular officer in a foreign state. It does not disclose on its face the intent of Congress on the location or site of executing a formal renunciation of nationality.

The legislative history of the Immigration and Nationality Act of 1952, however, is illuminating on the question of the place where the oath of renunciation should be executed. That Act was the result of an intensive investigation and study of immigration, naturalization, and nationality laws made by a special subcommittee of the Senate Committee on the Judiciary. 4/ In describing the scope and method of that

4/ Senate Resolution 137, 80th Congress, First Session (1947) authorized the Senate Committee on the Judiciary, or any duly authorized subcommittee thereof, to make a full and complete investigation of the entire immigration and naturalization systems of the United States, and to make a report of its findings to the Senate, together with recommendations for changes in the immigration and naturalization laws as it may deem advisable. Pursuant to Senate Resolution 137, a special subcommittee of the Senate Committee was appointed and a staff was organized. Under subsequent resolutions of the Senate, the authority of the Committee on the Judiciary to conduct the investigation and to make a report was extended until March 1, 1950. The report of the Committee on the Judiciary pursuant to Senate Resolution 137 was submitted in 1950. S. Rep. No. 1515, 81st Cong., 2d Sess. (1950).

study, Senator Pat McCarran, the Chairman of the subcommittee stated:

> ...We studied each of the thousands of provisions of our immigration and naturalization laws with end in view of appraising their adequacy, force, and effect. May I say in passing that not only were these thousands of provisions of the law themselves studied carefully but in conjunction therewith we studied the judicial and administrative interpretations of those provisions of the law and the rules and regulations implementing them.
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> In the course of our work the subcommittee obtained and considered appraisals and suggestions from several hundred officers and employees of the Immigration and Naturalization Service and the Visa and Passport Divisions of the Department of State. In addition, we received and considered appraisals and suggestions from numerous individuals and representatives of various interested nongovernmental organizations. 5/

With respect to various proposed bills, ensuing from that comprehensive study, which sought to remove inequities and discriminations from immigration and naturalization laws, Chairman McCarran observed:

> If the bills now before us did nothing more than eliminate the deadwood from our present immigration and naturalization laws and integrate into one legislative enactment all of the remaining provisions, they would be worth the time and effort which has gone into them. But they do much more than that. The bills do not, however, undertake to change any of the provisions of existing law just for the sake of change. It has been my policy not to change those provisions of the present law which have proven to be sound, especially since throughout the years there has been built up a body of judicial and administrative interpretations of those provisions upon which we can rely. 6/.

5/ Revision of Immigration, Naturalization, and Nationality Laws, Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess. 2 (1951).

6/ Id. at 3.

Section 401(f) of the Nationality Act of 1940 provided for loss of nationality by making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State. 7/ In its investigation and study of formal renunciations under section 401(f), the special subcommittee of the Senate Committee on the Judiciary found:

> Formal renunciation by a native-born or a naturalized citizen abroad may be made only at a consulate of the United States before diplomatic or consular officers. The form for making such renunciation is prescribed by the Secretary of State, and is to be in affidavit form and includes pertinent data relating to the person's place and date of birth, his residence, the manner in which he acquired United States citizenship, that he desires to renounce such citizenship and that he does so renounce, absolutely and entirely. In 1945, 344 United States citizens lost citizenship by this method, and in 1948 there were 552 such renunciations of citizenship. 8/

7/ Section 401(f) of Chapter IV of the Nationality Act of 1940 read:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization shall lose his nationality by:
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> . . .
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> (f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State (54 Stat. 1169; 8 U.S.C. 801); . . .

8/ S. Rep. No. 1515, 81st Cong., 2d Sess. 750-51 (1950).

Although the subcommittee made several recommendations for change in the Nationality Act of 1940 relating to loss of nationality, it made no recommendation for change or suggested any amendment with respect to section 401(f). The House and Senate reports on proposed legislation, which was enacted as the Immigration and Nationality Act, pointed out that the legislation would continue in effect, with certain modifications (not relevant here), the provisions of the Nationality Act of 1940 relating to acts which cause loss of nationality. 9/ The provisions of section 401(f) were not changed; the provisions appear in identical language in section 349(a)(5), formerly section 349(a)(6), of the Immigration and Nationality Act of 1952. 10/ Section 349(a)(5) did not disturb the legislative history of section 401(f) of the Nationality Act of 1940.

In light of the foregoing, we do not accept the Department's characterization of the 1950 report of the Senate Committee on the Judiciary as one of "dubious standing" and "questionable" legislative history. The legislative history squarely addresses the issue of the place where the formal renunciation should be administered and sheds light on the intent of Congress.

IV

As we have seen, the legislative history indicates the intent of Congress that a formal renunciation "be made only at a consulate of the United States before diplomatic or consular officers." This was the Senate Judiciary special subcommittee's finding and understanding on the application of section 401(f) of the Nationality Law of 1940, the provisions of which remained unchanged in section 349(a)(5) of the Immigration and Nationality Act of 1952.

9/ See H.R. Rep. No. 1365, 82nd Cong., 2d Sess. (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. (1952).

10/ Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, renumbered section 349(a)(6) of the Immigration and Nationality Act as section 349(a)(5).

The Department believes that the Board, by adopting the above indicia of Congressional intent, erred by violating fundamental principles of statutory construction. Citing Chevron U.S.A., the Department maintains that the Board did not accord any weight to the Department's interpretation of the statute. The Supreme Court said in Chevron U.S.A. that with regard to judicial review of any agency's construction of a statute which it administers, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

While section 349(a)(5) may be silent on where the renunciation should take place, we do not find that the legislative history is ambiguous on the intent of Congress on the issue. In the circumstances, there is no question of the Board substituting its own construction of a statutory provision for a reasonable interpretation made by the Department. In the absence of a clear Congressional intent, expressed in the statute or the legislative history, we would agree that the Department's interpretation or construction of the statute is entitled to deference.

In this connection, it would, indeed, be difficult to understand the Department's "construction of the statute." The Department apears to maintain that, by "refraining" from categorically requiring that a renunciation occur only at consular premises, the Department has acted reasonably, and that, therefore, the Board's proper role in light of Chevron U.S.A. is to determine whether the Department's position is a permissible construction of the statute. Congress, however, as we have noted, has spoken to the question at issue and, as the Supreme Court stated in Chevron U.S.A., 467 U.S. 837, 842 (1984) "that is the end of the matter."

V

Upon review of the record and further reconsideration of the matter, we hereby affirm the Board's decision of November 14, 1986. 11/

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member

11/ The Department in its motion for reconsideration expressed concern of the need to preserve administrative flexibility with respect to consular premises in order to cope with "frequently unpredictable operational realities" in the administration of the Immigration and Nationality Act.

In concluding that appellant's renunciation was legally ineffective, the Board was not called upon to address the illustrative instances of "operational realities" recited in the motion. The issue before the Board was whether this appellant's formal renunciation in prison in the presence of two prison officials as witnesses, in the circumstances of the case, was valid, taking into account the intent of section 349(a)(5) of the Immigration and Nationality Act with respect to the place where the oath of renunciation may be taken, the Department's regulations on renunciation of nationality (22 CFR 50.50), the procedural guidelines in the Foreign Affairs Manual, and the Department's memoranda and instructions relating to formal renunciations.