DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D. J. H. - In Loss of Nationality Proceedings

Decided by the Board June 15, 1987

Appellant and his wife moved to Canada in 1972. Allegedly in order to improve employment prospects and to be able to vote in Canada, appellant applied to be naturalized as a Canadian citizen. In 1978 he was granted a certificate of Canadian citizenship and some time later obtained a Canadian passport.

Appellant's naturalization came to the attention of United States authorities in Canada in October 1985 when, following a trip abroad (he had travelled on his Canadian passport), he inquired at the Consulate General at Vancouver about documentation he would need to re-enter the United States. After the Consulate investigated and processed appellant's case, a consular officer executed a certificate of loss of nationality in appellant's name, concluding that he expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in a foreign state upon his own application. Appellant initiated the appeal within one month of the Department's approval of the certificate of loss of his nationality

Decision of the Board

Since appellant conceded that he obtained Canadian citizenship voluntarily, the sole issue for decision was whether he performed the proscribed act with the requisite intent to relinquish United States nationality.

The evidence contemporaneous with appellant's naturalization was inconclusive on the issue of his intent, consequently, the Board was required to examine the circumstantial evidence surrounding appellant's performance of the expatriating act to determine whether it supplied the necessary intent.

The Department contended that a number of factors evidenced appellant's intent to relinquish United States citizenship: obtaining Canadian citizenship; voting in Canadian

but not United States elections; paying taxes in Canada but not filing United States income tax returns after 1977; using a Canadian passport to travel abroad and identifying himself as a Canadian citizen to United States authorities while transiting the United States after that trip; and applying for an immigration visa at the Consulate in Vancouver.

The Board granted that appellant showed marked indifference toward the right and duties of United States citizenship after becoming a Canadian citizen. But the essential question was, whether such casualness was probative of an intent to relinquish citizenship. The Board was unable to agree with the Department that appellant's conduct manifested an intent to relinquish citizenship. The Board rested its conclusion on the following rationale:

> In the Department's opinion, the composite of appellant's acts shows such clear disregard for and neglect of the rights and duties of United States citizenship that the fair inference to be drawn therefrom is that he intended to relinquish United States nationality in 1978. Reasonable people of course might comfortably associate themselves with the Department's position. No less reasonable people, however, might, as do we, find the Department's position unpersuasive. This is so because we do not find in appellant's conduct a knowing and intelligent forfeiture of his United States nationality. See United States v. Matheson, 532 F.2d 809 (2nd Cir. 1976). To phrase it differently, appellant's proven conduct is fairly explainable on grounds alien to a will and purpose to relinquish citizenship.
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> We do not say that the case is not rather finely balanced, but precisely because it is, we judge it right to resolve the ambiguities and uncertainties in the evidence in favor of continuation of citizenship...

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

*The Board also reversed the Department's determination that appellant's wife, P. J. H., who became a Canadian citizen on the same day as her husband had expatriated herself. Since the material facts in both cases were virtually identical, the Board concluded that its rationale in the husband's case applied with equal vigor to the wife's.

* * * * * * * * * * *

D J H appeals an administrative determination of the Department of State that he expatriated himself on August 2, 1978 by obtaining naturalization in Canada upon his own application. 1/

The sole issue we must decide is whether the Department has carried its statutory burden of proving by a preponderance of the evidence that appellant intended to relinquish United States nationality when he became a Canadian citizen. For the reasons that follow, we conclude that the Department has not met its burden of proof. Accordingly, we reverse the Department's determination that appellant expatriated himself.

I

Appellant acquired United States citizenship by birth at [redacted]. He received a high school education and served overseas in the United States Army. In 1972 he moved to Canada with his wife, P J whose citizenship appeal we also decide today. Appellant and his wife entered Canada as landed immigrants (admitted for permanent residence). In 1977 the couple moved to the Vancouver area, British Columbia. Shortly thereafter appellant decided to apply for Canadian citizenship, for the purpose, he later stated to the Board, "of hoping to improve employment opportunities." He

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1/ Prior to November 14, 1986, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read in relevant part as follows:

> 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, . . .

Public Law 99-653, approved November 14, 1986, 100 Stat. 3655, 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".

also stated that he wanted to be a Canadian citizen so he could vote in Canada. On August 2, 1978, after making the following oath of allegiance, appellant was granted a certificate of Canadian citizenship:

> 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.

He obtained a Canadian passport in August 1984.

The fact that appellant had obtained naturalization in Canada did not come to the attention of the United States authorities in Canada until October 1985. According to the records of the United States Consulate General at Vancouver: "It first came to our attention that Mr. H and his wife had taken out Can. Cit. when we [the Citizenship Section] received the Preliminary Questionnaire from the Visa Section...." A consular officer later reported to the Department that appellant initiated the contact when he made inquiries of the Visa Section "about immigrating to the United States." The "Questionnaire" referred to in the Consulate's records is titled "Preliminary Questionnaire to Determine Immigrant Status." Appellant completed the questionnaire around October 17, 1985. In it he acknowledged that he and his wife had become Canadian citizens. After obtaining confirmation of appellant's naturalization from the Canadian citizenship authorities, the Consulate wrote to him on December 27, 1985 to state that by obtaining foreign naturalization he might have expatriated himself. He was asked to complete a form titled "Information for Determining U.S. Citizenship," and informed he might make an appointment with a consular officer to discuss his case. Appellant completed the questionnaire and returned it on January 5, 1986; he also completed another form giving additional background information about himself. He did not request an interview with a consular officer. Thereafter, as required by law, a consular officer executed a certificate of loss of nationality in appellant's name on January 28,

1986. 2/ The official certified that H acquired United States nationality by birth therein; 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 Immmigration and Nationality Act. The consular officer dispatched the certificate to the Department and recommended approval.

> We have noted [the consular officer wrote in his report] that Mr. H ceased filing U.S. Income Tax returns after 1977, when he had become a Canadian citizen. We have further noted that Mr. H applied for and received a Canadian passport in August 1984 and subsequently traveled through 16 different countries returning to North America through Los Angeles where he presented his Canadian passport for entry thereby holding himself to be a Canadian citizen to U.S. Immigration and Customs officers. D H says he has not voted in any U.S. elections since his arrival in Canada, but has voted in Canadian elections in 1979, 1981, 1983 and 1984. Further he states his act of obtaining Canadian naturalization was wholly voluntary.

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

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.

> It is the consul's opinion that since 1978, D H 's actions have hardly been those of a person who considered himself to be a U.S. citizen. If, as he states in his reply to question 13 of the standard questionaire [sic], he believed he could not lose his U.S. citizenship through Canadian naturalization, then why didn't he apply for a U.S. Passport rather than to open proceedings for obtaining a U.S. visa, or at least make inquiries to the citizenship section as to his status.
>
> We believe that D H clearly intended to relinquish his U.S. citizenship when he was naturalized in Canada and has held himself to be only a Canadian citizen as evidenced by his use of a Canadian passport when entering the U.S. from overseas.

The Department agreed with the consular officer's opinion and approved the certificate on February 18, 1986, 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 March 13, 1986. Appellant gives the following reasons for alleging that the Department erred in determining that he expatriated himself.

> We [appellant and his wife] became Canadian citizens for the sole purpose of hoping to improve our living and working conditions in Vancouver. At no time did we intend to give up our United States citizenship. Our families are residing in the United States and it was always our intention to return there in the future.
>
> It is my belief that the United States Supreme Court ruled that a person must show intention of giving up his/her citizenship before expatriation can take place. Since this was never our intention, I cannot understand the issuance of these nationality loss certificates.

- II -

The statute prescribes that a national of the United States shall lose his nationality by obtaining naturalization in

a foreign state voluntarily with the intention of relinquishing United States nationality. 3/ Appellant concedes that he obtained Canadian citizenship upon his own application and did so voluntarily. Thus, the sole issue to be determined is whether the Department has sustained its burden of proof that appellant intended to relinquish United States nationality when he became a citizen of Canada.

Even though 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. 252, 270 (1980). Under the statute, 4/ the government bears the burden of proving intent and must do so by a preponderance of the evidence. 444 U.S. 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 party's intent at the time the expatriating act was done. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). Evidence contemporary with the prescribed act is, of course, the most probative of the issue of a party's intent.

3/ Section 349(a)(1) of the Immigration and Nationality Act. Text supra, note 1.

4/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c) provides 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. 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.

Here, the only evidence of appellant's intent dating from the time he became a Canadian citizen is the fact that he obtained naturalization in a foreign state and made a concomitant oath of allegiance. Such evidence is insufficient, however, to support a finding of intent to relinquish citizenship. Obtaining naturalization in a foreign state is not conclusive evidence of an intent to relinquish citizenship. Vance v. Terrazas, supra, at 261. "... would be inconsistent with Afroyim to treat the expatriating acts specified in sec. 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)." And an oath of allegiance merely expressing affirmation of loyalty to the country where citizenship is sought but which does not include renunciation of other allegiance leaves "ambiguous the intent of the utterer regarding his present nationality." Richards v. Secretary of State, CV80-4150, memorandum opinion (C.D. Cal. 1982) at 5. Since the evidence contemporary with appellant's naturalization will not support a finding that appellant intended to relinquish United States nationality, we must examine his words and conduct after naturalization to determine whether they corroborate the evidence of intent inherent in his obtaining naturalization. Terrazas v. Haig, supra, at 288:

> ...Of course, a party's specific intent to relinquish his citizenship rarely wil be established by direct evidence. But, circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship. 4/

4/ In King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972), the Ninth Circuit states that:

> The Secretary [of State] may prove this subjective intent [to renounce citizenship] by evidence of an explicit renunciation,...acts inconsistent with United States citizenship,...or by "affirmative voluntary act[s] clearly manifesting a decision to accept [foreign] nationality...."

(citations and footnote omitted; first and second brackets supplied). See also Vance v. Terrazas, 444 U.S. at 261-62, 100 S.Ct. at 545-46.

A person may behave in such a way after doing a particular act that the trier of fact may fairly infer from such conduct that he did the act in question with a specific will and purpose. This technique of evidentiary inquiry is, of course, well-established. Given the vital right at issue, however, the technique must, in our opinion, be employed with circumspection. For one thing, the courts have not defined comprehensively what conduct will support an inference of intent to relinquish United States nationality. Certain conduct obviously would leave little room for uncertainty, as the court made clear in King v. Rogers, 463 F.2d 1188 (9th Cir. 1972). There the plaintiff swore an oath of allegiance to Queen Elizabeth the Second upon obtaining naturalization in the United Kingdom, but did not make a renunciatory declaration. After naturalization he informed his draft board that he was no longer a United States citizen, and told a consular officer that if there were doubt he had lost his United States nationality, he would formally renounce it.

In many cases appealed to the Board where an appellant has obtained naturalization in a foreign state but not renounced previous nationality, the actor's post-naturalization conduct has been far less explicit than that of plaintiff in King. In this respect H 's case follows a well - established general pattern. In many cases, the Board has approached the issue of intent by considering whether an intent to relinquish United States nationality is the only fair and reasonable inference that one might draw from the appellant's post-naturalization conduct. Put differently, the pertinent inquiry is whether the appellant's conduct admits of more than one reasonable explanation, that is, could it fairly be construed as arising from a will and purpose different from an intent to relinquish citizenship, or, perhaps, from no specific purpose at all?

The Department submits that a number of factors evidence H 's intent to relinquish United States citizenship. Chief among these are: obtaining Canadian citizenship; voting in Canadian but not United States elections; paying taxes in Canada but not filing United States income tax returns after 1977; using a Canadian passport to travel abroad and identifying himself as a Canadian citizen to United States authorities while transiting the United States after that trip; and applying for an immigration visa at the Consulate in Vancouver.

We begin by noting that appellant showed at best marked indifference toward the rights, privileges and duties of United States citizenship after becoming a citizen of Canada. But the essential question is whether such casualness is probative of an intent to relinquish United States citizenship. Given the high abstension rate of citizens living in the United States, his not voting in United States general elections proves nothing about appellant's intent with respect to his United States citizenship. Voting in foreign elections is not expatriative, Afroyim v. Rusk, supra, so the fact appellant voted in Canadian elections sheds no light on his intent with respect to his United States citizenship.

Not filing United States income tax returns after 1977 shows not only indifference to United States citizenship in general but also disregard for the law. It is especially troubling in view of his contention that he paid U.S. taxes, or at least filed returns, for several years after he arrived in Canada. Nevertheless, we are left in some doubt whether appellant' failure to file U.S. tax returns may only be construed as evidence that he proposed in 1978 to sever his allegiance to the United States. Furthermore, "[c]itizenship", observed Chief Justice Warren, "is not a license that expires upon misbehavior." Trop v. Dulles, 356 U.S. 86 (1958). Continuing he said:

> The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war the citizen's duties include not only the military defense of the Nation but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked....

356 U.S. at 92.

More detrimental to appellant's contention that he did not intend in 1978 to relinquish United States citizenship is

his use of a Canadian passport for foreign travel and to identify himself in 1985 when he transited the United States at the end of the trip abroad. For a United States citizen to travel on a foreign passport is, on its face, inconsistent with United States citizenship. It is also unlawful for a United States citizen to enter the United States from outside the western hemisphere without a valid passport. Section 215(b) of the Immigration and Nationality Act, 8 U.S.C. 1185 (b).

Appellant suggests that he used a Canadian passport simply because he found it convenient to do so. "Since we were in Canada," he explained to the Board, "it seemed logical to travel on Canadian passports. These passports were not obtained for travel to the United States." He has not explained why it seemed to him more convenient or logical to obtain a Canadian rather than a United States passport; after all he held a United States passport when he entered Canada in 1969. Still, there is no evidence that he intended to use the Canadian passport expressly to enter the United States. Indeed, aside from that one time in Los Angeles, there is no evidence that he held himself out to United States officials as a Canadian citizen. On balance, it is at least as possible appellant used a Canadian passport because it was relatively easy to obtain one as it is because he no longer considered himself to be a United States citizen and wished to make clear that he had transferred his allegiance to Canada.

We are unable to ascribe much probative weight to appellant's alleged application for an immigrant visa to return to the United States. It is by no means clear that he actually inquired how he could "immigrate" to the United States. He and his wife applied to the Consulate in the fall of 1985, he informed the Board, not as aliens but as U.S. citizens who had been naturalized in Canada and who wanted to take the proper steps for re-entry. They did not want to return to the United States, "without some official documentation that said what we were doing was correct."

It is not unreasonable to assume that appellant and his wife made a general inquiry about entering the United States and that a consular clerk assumed they wished to immigrate and sent them the applicable forms. Appellant's account of how he and his wife were directed to the immigrant visa section strikes us as credible.

> ...we telephoned the Consulate and were told to submit a self-addressed stamped envelope and the information would be returned by mail. We did as instructed and were sent a form entitled "Preliminary Questionnaire to Determine Immigrant

> Status." This form is what we referred to as an application....We filed the form because that is what the Consulate General supplied us with.

To support his contention that he did not intend to relinquish his United States nationality appellant has proffered scant evidence, only assertions that he never intended to forfeit citizenship, has close family ties to the United States and visits this country regularly. The burden, however, lies on the Department to prove by a preponderance of the evidence that appellant intended to relinquish citizenship, not on him to prove lack of intent.

In the Department's opinion, the composite of appellant's acts shows such clear disregard for and neglect of the rights and duties of United States citizenship that the fair inference to be drawn therefrom is that he intended to relinquish United States nationality in 1978. Reasonable people of course might comfortably associate themselves with the Department's position. No less reasonable people, however, might, as do we, find the Department's position unpersuasive. This is so because we do not find in appellant's conduct a knowing and intelligent forfeiture of his United States nationality. See United States v. Matheson. 532 F.2d 809 (2nd Cir. 1976). To phrase it differently, appellant's proven conduct is fairly explainable on grounds alien to a will and purpose to relinquish citizenship.

We do not say that the case is not rather finely balanced, but precisely because it is, we judge it right to resolve the ambiguities and uncertainties in the evidence in favor of continuation of citizenship. 5/

Accordingly, we conclude that the Department has not carried its burden of proving that appellant intended to relinquish United States nationality when he obtained naturalization in Canada upon his own application.

5/ See Nishikawa v. Dulles, 356 U.S. 129, 134 (1958), citing Schneiderman v. United States, 320 U.S. 118, 122 (1943).

- 11 -

- III -

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

Alan G. James, Chairman

Gerald A. Rosen, Member

George Taft, Member