DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

Decided by the Board December 17, 1987

Appellant, who was born in the United States, married a Canadian citizen in 1953 and moved with him to Canada. After living in Canada for over twenty years, appellant applied for and obtained naturalization in 1975. In 1986 her naturalization came to the attention of the Consulate General at Toronto, which, after processing her case, executed a certificate of loss of nationality under section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate shortly afterwards, and appellant entered a timely appeal. The sole issue for decision by the Board was whether the Department of State had proved by a preponderance of the evidence that appellant intended to relinquish her United States nationality when she obtained naturalization in Canada.

HELD: The Department did not carry its burden of proving that appellant intended to relinquish her United States citizenship.

The evidence relevant to appellant's intent contemporaneous with her naturalization, which consisted solely of the statutory expatriating act and non-renunciatory oath of allegiance, was insufficient to support a finding of intent to relinquish citizenship.

The Board found the circumstantial evidence - appellant's post-naturalization conduct - also insufficient to enable the Department to meet its burden of proof. Appellant alleged but could not submit evidence to support her contention that she had inquired at a consular office about the effect of naturalization on her United States citizenship prior to obtaining Canadian citizenship and gained the impression that she could become a Canadian without jeopardizing her citizenship; in brief, that she would become a dual national. The Board found it not implausible in the particular circumstances of the case that appellant might actually have perceived that she acquired dual nationality without losing United States citizenship. Her later behavior as a Canadian citizen was thus consistent with that perception and not necessarily expressive of an intent to relinquish United States citizenship.

As to the Department's contention that appellant's non-performance of a number of the rights and duties of United States citizenship, the Board was of the view that appellant's explanations why she did not do the things the Department said she should have done if she really wished to retain United States citizenship, although perhaps self-serving,

suggested that there was more than one sensible explanation of her non-actions. "We gain the impression," the Board's opinion stated, "that appellant

> simply did not think of doing that which, objectively perceived, she should have done to ensure that her United States citizenship would be safeguarded after she performed the expatriative act. As we have pointed out in a number of cases alike to this one, appellant's non-discharge of civic duties could spring from considerations wholly alien to a will to forfeit United States citizenship. It is human nature to procrastinate, to forget to do important things, to be preoccupied with one's daily problems and not to make an effort to get official information or assistance. So how can one be reasonably sure - comfortably sure - that this appellant's ostensible indifference to obligations and rights of United States citizenship sprang from a will and purpose formed in 1975 to divest herself of United States citizenship?

Having concluded that the evidence presented by the Department was "too flimsy" to support a holding that appellant intended to relinquish her United States nationality, the Board reversed the Department's determination of loss of her nationality.

****

This is an appeal from an administrative determination of the Department of State, dated March 5, 1987, that appellant, J J S , expatriated herself on May 6, 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/

The central issue to be decided is whether the Department has carried its burden of proving that appellant intended to relinquish her United States citizenship when she became a citizen of Canada. For the reasons stated below, it is our conclusion that the Department has not met that burden. Accordingly, we reverse the Department's determination that appellant expatriated herself.

I

Appellant was born at [redacted] and so acquired United States citizenship. In August 1953 she married a Canadian citizen and in November of that year moved to Canada. There four children were born to appellant and her husband.

On a date not given in the record, appellant applied to be naturalized as a Canadian citizen. She was granted a certificate of Canadian citizenship on May 6, 1975 after making the following oath of allegiance as prescribed by the Canadian Citizenship Act:

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

Pub. L. 99-653, 100 Stat. 3655 (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".

> 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.

Appellant states that in the autumn of 1986 she "started inquiries" (at the Consulate General in Toronto) about her son's citizenship status. Apparently he had been offered a position in California that required him to verify his citizenship status. As a consular officer put it in a report subsequently sent to the Department on appellant's case: "Mrs. S 's case was brought to our attention when her son A applied for an adjudication of his possible derivative claim to United States citizenship through her." In this way, her naturalization came to the attention of the Consulate General. As part of the processing of her case, appellant was asked to complete a form titled "Information for Determining U.S. Citizenship." This she did in early January 1987. Shortly thereafter on January 15, 1987, 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. 2/ Therein the officer certified that appellant acquired United States nationality by virtue of her birth in the United States; acquired naturalization in Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Consulate forwarded the certificate to the

---

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

Department under cover of a memorandum that recommended approval on the following grounds:

> In examining Mrs. S 's course of conduct during her prolonged residence in Canada, it is noted that she failed to seek documentation with any United States Consulate/Embassy office. She failed to register her Canadian born children as American citizens. Mrs. S has not filed a United States tax return nor has she voted in any United States elections while residing in Canada. Furthermore, after her Canadian naturalization, she used her Canadian certificate of citizenship as identification when crossing the U.S./Canadian border. The preponderance of the evidence indicates that she intended to relinquish her United States citizenship upon acquisition of Canadian citizenship.

The Department approved the certificate on March 5, 1987. In informing the Consulate of its action, the Department stated simply that: "The Department concurs in the consular officer's opinion that the evidence of record is sufficient to support a holding that the subject intended to relinquish her claim to U.S. citizenship by becoming naturalized in Canada." Approval of the certificate 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. Appellant entered the appeal pro se on June 26, 1987.

II

The statute provides that a national of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state with the intention of relinquishing United States nationality. There is no dispute that appellant sought and obtained Canadian citizenship. Nor is there any dispute that she became a Canadian citizen of her own free will. The dispositive issue in the case is therefore whether she obtained foreign naturalization with the requisite intention of relinquishing United States nationality.

2/ Cont'd.

> 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 settled that the government (in this case, the Department of State) bears the burden of proving a party's intent, and is to do so by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 252, 267 (1980). Intent may be proved by the person's words or found as a fair inference from his or her proven conduct. Id. at 260. The intent the government must prove is the party's intent at the time the expatriative act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

We may synopsize the Department's case as follows: obtaining naturalization in a foreign state may be highly persuasive evidence of an intent to relinquish United States citizenship. Appellant's naturalization in Canada "is the initial evidence of her intent to abandon her United States citizenship." Other evidence of her renunciatory intent "can be clearly inferred from he attitude and behavior." She never acted as an American citizen after naturalization; did not keep in touch with any U.S. consular office; never registered her children as U.S. citizens; never voted in U.S. elections or paid U.S. income taxes; never identified herself as a U.S. citizen at the border between the United States and Canada. Rather, after becoming a Canadian citizen, she acted exclusively as a Canadian citizen. Her argument that she lacked the requisite intent to relinquish her citizenship (because her only motivation for obtaining naturalization was to be able to vote in Canada) is without legal merit. Specific intent does not turn on the party's motivation. Richards v. Secretary of State, 752 F.2d 1413, 1422 (9th Cir. 1985).

We begin by noting that the only evidence contemporary with appellant's naturalization is the act itself, which involved a concomitant, non-renunciatory oath of allegiance. Making a declaration of allegiance to a foreign state may be highly persuasive evidence of an intent to relinquish United States citizenship; it is not, however, the equivalent of, or conclusive, evidence "of the voluntary assent of the citizen." The Supreme Court expressed the principle in Vance v. Terrazas, supra, thus:

> ..., we are confident that it would be inconsistent with Afroyim to treat the expatriating acts specified in section 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. 'Of course', any of the specified acts 'may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.' Nishikawa v. Dulles, 356 U.S. 129, 139 (1959) (Black, J., concurring). But the trier of fact must in the end conclude that the citizen not only voluntarily committed the

> expatriating act prescribed in the statute, but also intended to relinquish his citizenship.

444 U.S. at 261.

Plainly, there is insufficient contemporary evidence in this case before us to support the Department's finding that appellant intended to relinquish her United States nationality. We must therefore scrutinize the circumstantial evidence - appellant's words and conduct after naturalization - to determine whether it, combined with appellant's performance of a statutory expatriating act, establishes an intent in 1975 to reqlinquish United States nationality.

To construe a person's words and conduct after performance of a particular act in order to determine the intent with which the act was done is, of course, a legitimate method of evidential inquiry. Still, as we have asserted in a number of cases similar to the one before us, the technique of applying later conduct to gauge earlier intent should be used with considerable circumspection. Absent words or conduct explicitly derogatory of United States citizenship, one should draw inferences with a great deal of care. Why should this be so? Primarily, because "when we deal with citizenship we tread on sensitive ground," 3/ and because in such proceedings "the facts and the law should be construed as far as is reasonably possible in favor of the citizen." 4/ Furthermore, except where a party's words or conduct do not patently manifest a renunciatory design, the margin for erroneous interpretation can be rather wide. Wigmore, commenting on criminal conduct as evidence of intent states: "But in the process of inferring the existence of that inner consciousness from the outward conduct, there is ample room for erroneous inference; and it is in this respect chiefly that caution becomes desirable and that judicial rulings upon specific kinds of conduct become necessary." II Wigmore on Evidence, sec. 273(1), 3rd ed.

Appellant in this case we are considering maintains that she had no intention of relinquishing her United States nationality. From a telephone call she allegedly made to a U.S. consular office in 1975 she got the impression that "I could [become a Canadian citizen] without losing my birthright as an

---

3/ United States v. Minker, 350 U.S. 179, 197 (1956).

4/ Nishikawa v. Dulles, 356 U.S. 129, 134 (1958).

American citizen, thereby becoming a dual national...." (Reply to the Department's brief.) 5/

She concedes however, that she can produce no evidence except her own word to substantiate her claim that she consulted a U.S. official source before she obtained naturalization and received no express warning against proceeding. Nonetheless, we do not regard her contention that she thought she acquired dual nationality to be irrational. She had been married to a Canadian citizen and lived in Canada as a permanent resident for twenty-two years; she took a non-renunciatory oath of allegiance; and although it was not until enactment of the Canadian Citizenship Act of 1977 that dual nationality was officially sanctioned in Canada, appellant might well have been aware of Canadian de facto toleration of dual nationality at the time she became naturalized.

Since we believe it not unreasonable to accept appellant's claim that she really believed she became a dual national in 1975, it is reasonable to regard her actions after

---

5/ In her opening submission, appellant stated that she had telephoned the Consulate General at Toronto in 1975.

> ...it was my understanding from information obtained from a phone call to the Consulate sometime in 1975 that a person's birth right [sic] to American Citizenship would always be valid. I did not document dates or names because it did not occur to me at that time that I could possibly need them for future reference. I relied on this information to be correct and did not make further inquiries. For the past 12 years I believed that I held Dual Citizenship.

Asked by the Board whether she could recall the substance of that conversation, appellant replied:

> The call was made to the American Consulate in Toronto. I do not know who I was speaking to at the time and cannot recall exact details of the conversation, it took place so long ago. My interpretation of that conversation, however, led me to understand that applying for Canadian Citizenship would not affect my American Citizenship status because I was born in the United States and would always be entitled to my birth right.

naturalization (conducting herself in a number of specific respects as a Canadian citizen) as consistent with that perception and in no wise illustrative of a prior intent to divest herself of United States nationality. In any event, She had, for quite legitimate reasons, long ago made Canada her home. It does not necessarily follow that doing many things that a Canadian citizen would do bespeaks a will to forfeit United States citizenship, particularly when there is no evidence (her naturalization aside) that appellant did or said anything at any time expressly or tacitly derogatory of her allegiance to the United States.

We now turn to the other side of the coin - appellant's non-feasance of things that an exemplary (and probably quite unique) United States citizen who had obtained foreign naturalizatation would do to show to the world that he or she had not intended to transfer allegiance to the foreign state. Appellant admits she did not vote in United States elections; file U.S. income tax returns; identify herself as a United States citizen when crossing the border; register her children as United States citizens; keep in touch with any United States consular establishment. Does her non-feasance of such things compel one to conclude that appellant was so blase about American citizenship that the only fair and reasonable inference to draw is that her purpose when she became a Canadian citizen was to sever her allegiance to the United States? The answer must, of course, be: "certainly not."

Appellant would have been foresighted (and shown commendable civic responsibility) to do the things she left undone. In reply to the Department's brief, she took the position, which we find persuasive, that her non-feasance should not be construed as intent to relinquish her United States citizenship.

> "Since the time of her naturalization [appellant is quoting from the Department's brief]:
>
> (1) - "She never bothered to keep in contact with any U.S. Consulate or register her children as U.S. Citizens."
>
> - I did not know I should have. Is this compulsory.
>
> (2) - "She never voted in U.S. Elections."
>
> - How could I vote in U.S. Elections when I did not reside there and I was not of voting age when I moved.
>
> (3) - "Nor did she pay U.S. Taxes."

- I DID pay U.S. taxes on my U.S. investments at the time I had them. Other than that how could I pay U.S. taxes if I was not working or living there.

(4) - "She never identified herself at the U.S. Border as a U.S. Citizen."

- Should I have said I was a dual national or just neglected to say I held Canadian Citizenship.

(5) - "Whereas after naturalizing, she participated in Canada by voting and paying taxes."

- The purpose of taking out Canadian Citizenship was to exercise the privilege of voting and how could I NOT pay taxes if I was working and living here.

(6) - "The purpose of naturalization was to allow her to actively participate as a Canadian, neglecting her obligations and responsibilities as a U.S. Citizen."

- I did not take out Canadian Citizenship with the purpose of neglecting my obligations as a U.S. Citizen.

One may consider appellant's explanations as self-serving, but we find it hard to deny that they suggest there is more than one sensible and acceptable explanation of her actions or non-actions. We gain the impression from appellant's submissions that she simply did not think of doing that which, objectively perceived, she should have done to ensure that her United States citizenship would be safeguarded after she performed the expatriative act. As we have pointed out in a number of cases alike to this one, appellant's non-discharge of civic duties could spring from considerations wholly alien to a will to forfeit United States citizenship. It is human nature to procrastinate, to forget to do important things, to be preoccupied with one's daily problems and not to make an effort to get official information or assistance. So how can one be reasonably sure - comfortably sure - that this appellant's ostensible indifference to obligations and rights of United States citizenship sprang from a will and purpose formed in 1975 to divest herself of United States citizenship?

In sum, we consider the evidence in this case too flimsy to support the holding that appellant more likely than not intended to relinquish United States citizenship when she obtained naturalization in Canada upon her own application. In

our judgment, the Department has not carried its burden of proving that appellant assented to loss of her citizenship.

III

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member