DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

Decided by the Board March 4, 1987

In 1971 appellant, a native-born United States citizen, left the United States and moved to Canada as a landed immigrant. Allegedly in order to obtain permanent employment with an agency of the Canadian government, appellant applied for Canadian citizenship. In 1977 she was granted a certificate of citizenship. A number of years later she obtained a Canadian passport.

In 1983 appellant's naturalization came to the attention of United States authorities when she made an inquiry about her citizenship status at the Consulate General in Toronto. After she submitted information to facilitate determination of her citizenship status (she was not interviewed by a consular officer, but simply completed a citizenship questionnaire that was sent to her), an official of the Consulate executed a certificate of loss of nationality under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate in July 1984. A timely appeal was entered. Two issues were presented: whether appellant voluntarily obtained Canadian citizenship, and whether she became naturalized with the intention of relinquishing United States nationality.

HELD: 1. Appellant did not rebut the statutory presumption that she voluntarily acquired Canadian citizenship. She did not establish that her ability to subsist would have been threatened had she not obtained Canadian citizenship and so gained permanent employment. Nor did she show she had tried to find alternative employment that would have met her economic requirements without placing her United States citizenship at risk. On all the evidence, she clearly had a choice to obtain naturalization or not. Her act thus was clearly voluntary.

2. With respect to the issue whether she intended to relinquish United States nationality, the Board held that the Department had not carried its burden of proof that such was appellant's intent. One member dissented.

The majority noted that when appellant became a Canadian citizen she did not renounce United States nationality. On the other hand, she undoubtedly knew that naturalization in a foreign state is expatriative; neglected to perform United States civic duties after her naturalization; obtained a Canadian passport; and identified herself at the U.S.-Canadian border as a Canadian citizen. Yet, on balance, the majority concluded that the evidence did not support a finding of intent to relinquish citizenship.

> Mrs. W. did not [the Board said] expressly relinquish her United States citizenship - either by word or act. Her words, standing alone, show no more than that she knew or had reason to believe that naturalization in a foreign state could be expatriating. And her conduct could by and large rationally be explained on grounds other than an intent to abandon her United States citizeship. Granted, reasonable people surveying the record in its totality might conclude that Mrs. W., who has hardly been fastidious about her United States citizenship obligations, acted in a way that suggests she purposed the loss of her citizenship. But, and this is the crucial consideration, people no less reasonable might find the pattern of her conduct insufficiently explicit to support a finding of intent to relinquish United States citizenship.

The dissenting member found in appellant's behavior a "consistent pattern which clearly indicated a strong motivation to become a Canadian citizen and a willingness to accept the consequences of her act even if that be loss of United States citizenship." In a case such as this "acceptance" of the possible consequences of foreign naturalization and "intention" to relinquish United States citizenship cannot be divorced, the dissenter asserted.

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

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This is an appeal from an administrative determination of the Department of State that appellant, S W , expatriated herself on January 24, 1977 under the provisions of section 349 (a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

For the reasons stated below, it is our conclusion that the Department's determination that Mrs. W expatriated herself should be reversed.

I

Mrs. W , nee P , became a United States citizen by virtue of her birth at [redacted]. She obtained a United States passport in 1969 in anticipation of a trip to Europe. In 1971 she moved to Canada as a landed immigrant. In 1974 she renewed her United States passport at Toronto, and in the same year she was hired by the Workers Compensation Board (presumably in Toronto). Since that Board was an agency of the Canadian Government, Canadian citizenship was a prerequisite to permanent employment. Mrs. W applied to be naturalized and on January 24, 1977 was granted a certificate of citizenship. Upon naturalization she 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.

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

The Immigration and Nationality Act Amendments of 1986, PL 99-653, approved Nov. 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".

Sometime in 1983 she obtained a Canadian passport.

In the fall of 1983 Mrs. W 's naturalization came to the attention of United States authorities when she inquired at the Consulate General (the Consulate) in Toronto about her citizenship status. The consular officer who handled her case later reported to the Department that Mrs. W "initiated the contact with the Consulate as she is contemplating to return to the United States in the near future." It does not appear that appellant was interviewed by a consular officer, but rather simply complied with the Consulate's request that she complete a form for determining United States citizenship. 2/ This she did on February 14, 1984. After the Canadian authorities confirmed that Mrs. W had obtained Canadian citizenship, an officer of the Consulate executed a certificate of loss of nationality in the name of S P on March 5, 1984. 3/ The official certified that appellant acquired United States nationality at birth; that she obtained naturalization in Canada upon her own application; and concluded that she thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

In recommending that the Department approve the certificate, the consular officer commented on her case in part as follows:

2/ In response to the Board's inquiry whether she had been interviewed by a consular officer, appellant's husband replied on her behalf as follows:

> I was the one who told S to go and inquire at the Consulate early 1984 [sic-late 1983?] the reason because I saw that she was confused about, whether she was an American, went about it correctly in 1977, to protect her native rights? She was never interviewed personally by a consular officer-ever-before or after.

Appellant subsequently informed the Board that she would stand on her husband's statement.

3/ 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.

> Ms. P states that she became a Canadian citizen in connection with her employment with the Workers Compensation Board. 'I was only accepted for the job at Workers Comp. with the understanding that I would become a citizen when eligible'. While we bear in mind that Ms. P became a Canadian citizen for 'job reasons' these reasons do not in themselves constitute sufficient countervailing evidence of intent to retain United States citizenship. Ms. P was not concerned enough to seek occupational alternatives to avoid performing the act.
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> In examining Ms. P 's entire course of conduct, it is noted that she failed to inquire prior to nor at the time of her naturalization what effect it would have on her American nationality with any United States Consulate/Embassy official. She failed to renew her United States passport Number Z1926070 issued January 31, 1974 at Toronto, Canada. She has maintained no formal ties to the United States. She states that she has not filed a United States tax return nor voted in any United States elections while residing in Canada. In addition, since her Canadian naturalization she has used her Canadian Citizenship Card as well as her Canadian passport for identification when crossing the U.S./Canada border.

In 1984 appellant married A W , a United States citizen working in Toronto.

The Department approved the certificate on July 20, 1984. Approval constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to this Board. In advising the Consulate General that it had approved the certificate, the Department observed that:

> 1. 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. The CLN under reference is approved and the approved copy will be forwarded separately.
>
> 2. FYI: In future cases of this type, CG is requested to avoid statements such as the final sentence of para. 4 and merely state the facts

as known to the conoff, e.g. Ms. P apparently did not check alternative offers. Department realizes that similar language often has been used in loss of nationality cases. However, Department has concluded that such unsupported conclusions are not appropriate for its consideration of the question of the individuals's intent with regard to relinquishing U.S. nationality.

The appeal was initiated on December 1, 1984. Appellant contends that she was forced by economic circumstances to obtain Canadian citizenship and that she never intended to relinquish United States citizenship.

II

There is no dispute that Mrs. W obtained naturalization in Canada upon her own application. She thus brought herself within the purview of section 349(a)(1) of the Immigration and Nationality Act.

Performance of a statutory expatriating act will not result in loss of citizenship, however, unless it was voluntary and the citizen intended to relinquish United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967). Although in law it is presumed that one who performs a statutory expatriating act does so voluntarily, the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntary. 4/

Mrs. W contends that economic exigencies forced her to become a Canadian citizen. As she put it in a statutory declaration executed May 7, 1985:

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

(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 claims 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.

The Immigration and Nationality Act Amendments of 1986, PL 99-653, approved Nov. 14, 1986, repealed section 349(b) but did not redesignate section 349(c).

> In 1974, I started working as a Branch Secretary with a local Government Agency. My job was very satisfactory to me and my employers were happy with my performance. Unfortunately, this being a Government position, my employers felt that it is of the utmost importance for me to become a Canadian Citizen if I wanted to obtain permanent status there. The economy at that time was very unstable and the unemployment rate very high. I was under extreme pressure at work due to the fact that I did not have Canadian Citizenship and therefore when I read about the new Canadian citizenship Act coming into effect which allowed Canadian Citizens dual citizenship, I decided to submit an application to become a Canadian citizen.

It is settled that duress is a valid defense to performance of a statutory expatriating act (Doreau v. Marshall, 170 F.2d 721 (3rd Cir. 1948). To excuse performance of a statutory expatriating act, the citizen must demonstrate that the circumstances he faced were extraordinary.

> If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is no authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary. He cannot be truly said to be manifesting an intention of renouncing his country. On the other hand it is just as certain that the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress. Doreau v. Marshall, supra, at 724.

The cases in which economic duress was successfully pleaded hold that the citizen must have faced a situation where his or his family's ability to subsist would have been endangered had he not performed a proscribed 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). In those cases, petitioners alleged that their expatriative conduct was compelled literally by the instinct for self-preservation in the economic chaos of wartime and post-war Italy. In both cases, the courts found that the petitioners accepted proscribed employment in a foreign government in order to subsist, if not to

survive. Stipa and Insogna, although decided thirty years ago, remain valid, in our view, for the proposition that extreme economic hardship must be proved in order to excuse performance of an act that puts one's United States citizenship at risk. 5/

Mrs. W has not proved, as she must do, that she faced dire economic necessity. She may have faced a difficult situation, but nothing of record indicates that her economic position was desperate. She has not alleged that she had no alternative to becoming a Canadian citizen or even that she explored alternative employment that would have obviated jeopardizing her United States citizenship. In brief, she must be held to have had a choice and to have exercised that choice when she obtained Canadian naturalization. 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 short of grave necessity cannot be considered to be an involuntary act. Mrs. W has failed to show that naturalization was forced upon her by factors she could not control. Accordingly, we conclude that she became a Canadian citizen of her 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, supra, at 270. Under the

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5/ Cf. Richards v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985). There, appellant Richards contended that he became a Canadian citizen under economic duress - the need to find employment. The court agreed with appellant that an expatriating act performed under economic duress is not voluntary, citing Stipa and Insogna. The issue before the Ninth Circuit, however, was whether the district court had erred in holding that Richards was under no economic duress when he became naturalized. The Ninth Circuit distinguished Stipa and Insogna from Richard's case, noting that conditions of economic duress had been "found under circumstances far different from those prevailing here." The court found it unnecessary, however, to decide whether economic duress "exists only under such extreme circumstances." It simply ruled that some economic hardship must be proved to support a plea of involuntariness, and found that the district court had not erred in finding that Richards was under no economic duress. 752 F.2d at 1419.

statute, 6/ the Government bears the burden of proving a person's intent and must do so by a preponderance of the evidence, 444 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).

The only evidence of record of Mrs. W 's intent that is contemporaneous with her naturalization is the fact that she applied for and accepted Canadian naturalization and swore a concomitant oath of allegiance. Naturalization, like the other enumerated statutory expatriating acts, may be highly persuasive, but is not conclusive, evidence of an intent to relinquish United States citizenship. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 365 U.S. 129, 139 (1958) (Black, J. Concurring.) Similarly, making an oath of allegiance to a foreign sovereign or state while alone insufficient to prove intent to relinquish citizenship, also provides substantial evidence of intent. King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972). However, an oath of allegiance that contains only an express affirmation of loyalty to the country whose citizenship is being sought leaves "ambiguous the intent of the utterer regarding his present nationality." Richards v. Secretary of State, CV80-4150 memorandum opinion (D.D. Cal. 1980) at 5.

It is recognized that a party's specific intent to relinquish citizenship rarely will be established by direct evidence, but circumstantial evidence surrounding commission of a voluntary act of expatriation may establish the requisite intent. Terrazas v. Haig, supra, at 288.

Thus it is obvious that where there is no direct evidence of a party's intent that is legally sufficient to support a finding of a will and purpose to relinquish United States citizenship, the Department must adduce circumstantial evidence in an attempt to satisfy its burden of proof. As the Seventh Circuit suggested in Terrazas v. Haig, supra, a party's words and conduct at times other than the crucial moment may shed light on the party's state of mind when the expatriative act was done. Therefore, to ascertain whether the Department has carried its burden of proof we must scrutinize Mrs. Warner's words and acts after she obtained Canadian citizenship and determine whether, as the Department submits, they more likely than not evidence a renunciatory intent.

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

Relating back words and conduct to ascertain intent at a distant moment in the past is an accepted method of evidentiary inquiry. But, it seems to us, the technique must be used circumspectly. The great worth of citizenship demands that the words and conduct of the party emerge reasonably clearly with respect to content and meaning before they may be held to support a finding of prior intent to abandon United States nationality.

The first recorded words of appellant after her naturalization that are relevant to her intent are contained in a form she completed on February 17, 1984 to determine United States citizenship. In response to the following question, Mrs. W stated:

> 11. ...
>
> c) How did you find out you were a United States citizen? (For example, did you always know you were a United States citizen? If not, when did you learn about your citizenship? Did someone tell you that you were a citizen?)
>
> I was born in the U.S. & thought I had lost my citizenship by taking out Can. citizenship until a friend told me the law has changed.

To another question she replied:

> 14. ...
>
> b) What was your intent in performing the act/s? Did you know that by performing the act/s described in item 7 you might lose United States citizenship? EXPLAIN.
>
> I thought I might lose it but was not thinking of returning at that time. Shortly after obtaining citizenship my work situation deteiorated [sic] but being a Can. citizen I couldnt [sic[freely leave.

After entering the appeal, appellant executed a statutory declaration on May 7, 1985 in which she made several assertions with respect to the issue of whether she intended to relinquish United States citizenship. In the declaration she stated that when she became a Canadian citizen "I was absolutely sure of my intentions to retain my American citizenship...." She was, she stated , "completely unaware of the fact that my Canadian naturalization would mean relinquishing my United States citizenship." Finally, she asserted that "I have never had any intentions at any given time, no matter how much under pressure, to relinquish my United States citizenship."

The inconsistency between the statements appellant made in her May 1985 declaration and the 1984 questionnaire is troubling. Asked by the Board to explain it, appellant did not reply but evidently asked her husband to do so, for he wrote to the Board on December 29, 1985 as follows:

> ...The form was mailed to her, after she called them by phone. She at once mailed it back, without showing it to me or anyone else; she is of an old fashioned American mind, very individualistic and a careless communicator with any burocracy...[sic] but as we discussed these things many times, I can say with certainty, that her response to item #11(c) in your point 3, was definitely an error. She did not think, at that point, that she lost her citizenship; after all it was me, who told her that she might have gone about it the wrong way (I was not sure myself) in 1977 and that she should inquire at the Consulate. And only then she called the Consulate, on my urging alone, they never interviewed her, sent her those forms, she without any assisstance, [sic] carelessly mailed them back, including the statement, obviously quoting my thought or fear, and not hers, as she was totally ignorant on the subject. That is a fact that made me latter [sic] visit the Consul, bring it to his attention, and on his advise [sic] alone we filed the appeal.

As previously noted (supra, note 2), appellant informed the Board that her husband's statement expressed her own views on the matter. Which statements of appellant are entitled to greater credence? Perhaps, as appellant's husband has stated, appellant's statements in the 1984 questionnaire did reflect Mr. W - 's concerns rather than her own. Or perhaps she used infelicitous phraseology in answering the questions posed. We have not examined appellant and her husband, and are unable to make a comfortable or categoric judgment about the issue.

Assume, however, that appellant's statements in the 1984 questionnaire which were undoubtedly more spontaneous than those in her statutory declaration are entitled to greater weight than the statements she made a year later. The important question is whether the earlier statements are dispositive of the issue of her intent to relinquish her United States nationality.

Her earlier statements obviously indicate at least a layperson's understanding that obtaining naturalization in a foreign state is expatriative. Moreover, they express appellant's willingness to accept the consequences of her act, even though those consequences might be loss of U.S. citizenship. Can they be read, however, to evidence an intent to relinquish citizenship?

It is settled that knowledge and intent are entirely different concepts. 7/ Knowledge is acquaintance with a fact or facts. Intent

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7/ The Department it seems agreed with this assertion in 1980. See Circular Airgram no. 1767, August 27, 1980 which the Department sent

is the intending of an act, the purpose formed in one's mind. Proof of knowledge is thus a problem distinct from that of proving intent. As Wigmore puts it: ..."since intent may be conceived of apart from knowledge, the mode of proving Intent is a problem distinct from that of proving Knowledge, even where the latter is also concurrently available." II Wigmore on Evidence, section 301, p. 193, 3rd ed.

The court in Richards v. Secretary of State, 753 F.2d 1413 (9th Cir. 1985) explained why knowledge that an act is expatriative alone is insufficient to warrant a finding of loss of citizenship.

> As we read Afroyim and Terrazas, a United States citizen effectively renounces his citizenship by performing an act that Congress has designated an expatriating act only if he means the act to

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7/ Cont'd.

to the field after the Supreme Court decided Vance v. Terrazas, supra. In the Circular Airgram the Department gave examples of potential loss of nationality cases to illustrate application of the general principles to determine a person's intent in light of Terrazas. In example IV, the party apparently believed she had lost her United States citizenship by naturalization in a state that did not require one to renounce previous nationality. She had lived abroad for a number of years, did not renew her passport after it expired, travelled on a foreign passport; did not pay U.S. income taxes. In commenting on this type of case the Department stated that: "...The problem here is than an awareness of having lost citizenship, under the law as it stood at the time of her expatriating act, is not necessarily the same thing as an intention to give up citizenship." The Department added, however, that:

> But in view of her prolonged absence from the U.S. and the absence of any ties with this country, or any apparent effort to maintain her links with the U.S., it seems more probable than not that by obtaining naturalization in D she intended to sever her ties to the U.S. On these facts, a finding of loss would be made.

> constitute a renunciation of his United States citizenship. 6/ In the absence of such an intent, he does not lose his citizenship simply by performing an expatriating act even if he knows that Congress has designated the act as an expatriating act. By the same token, we do not think that knowledge of expatriation law on the part of the alleged expatriate is necessary for loss of citizenship to result. Thus, a person who performs an expatriating act with an intent to renounce his United States citizenship loses his United States citizenship whether or not he knew that the act was an expatriating act, and, indeed, whether or not he knew that expatriation was possible under United States law.
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> 6/ [Footnote omitted].

753 F.2d at 1420, 1421.

If one argues that statements appellant made in the 1984 questionnaire are highly probative of an intent to relinquish citizenship, one should be no less meticulous in drawing inferences from what she did not write in the same questionnaire. Item 9 of the questionnaire read as follows:

> 9. You should be aware that under United States law a citizen who has performed any of the acts specified in item 7 with the intention of relinquishing United States citizenship may have thereby lost United States citizenship. If you voluntarily performed an act specified in item 7 with the intention of relinquishing United States citizenship, you may sign the statement below and return this form to us. We will then prepare the necessary forms to document your loss of United States citizenship.
>
> STATEMENT OF VOLUNTARY RELINQUISHMENT OF UNITED STATES NATIONALITY
>
> "I, _____ performed the act of expatriation indicated in item 7____ voluntarily and with the intention of relinquishing my United States nationality."
>
> _____ _____
> (Signature) (Date)
>
> If you believe that expatriation has not occurred, either because the act you performed was not voluntary or because you did not intend to relinquish United States citizenship you should complete the remainder of this form.

Is it unreasonable to assume that Mrs. W deliberately skipped item number 9, and since she had not intended to relinquish citizenship, responded to all the subsequent questions.

Here intent must be proved by evidence other than evidence of knowledge. Accordingly, we must evaluate Mrs. W 's conduct which consists of a number of acts of omission and several of commission. These, the Department suggests, constitute a clear pattern unexplainable on grounds other than an intent to divest herself of United States citizenship.

We are unable to assign decisive weight to her acts of omission. Not consulting United States authorities before proceeding with foreign naturalization surely is explainable on grounds other than a will to relinquish United States citizenship. People often act rashly or thoughtlessly without any particular design behind their action. Similarly, her not seeking to establish a claim to United States citizenship over a period of several years after naturalization could have been the product of inertia or even indifference, as much as an express intent to relinquish her United States citizenship. On the other hand, that she voluntarily consulted the Consulate in 1983 to clarify her status, albeit belatedly, suggests that although she may have believed she forfeited her citizenship, it was not her design to do so.

We do not lightly brush aside Mrs. W 's failure to carry out the responsibilities of citizenship owed to the United States by its citizens whether they live abroad or at home. But once again not voting in the United States or filing income tax returns assuredly is explainable in terms other than an intent to sever her allegiance with the United States. Many citizens living in the United States as well as abroad are negligent about these responsibilities.

Mrs. W obtained a Canadian passport and identified herself (how consistently we are not told) at the United States-Canadian border as a Canadian citizen. These acts on their face are not consistent with United States citizenship. But, in the general pattern of this case, should they be given sufficient weight as to tip the scales against restoration of Mrs. W 's citizenship? Using a Canadian passport and telling border officials that one is a Canadian citizen are arguably consistent with her belief that she had automatically lost her United States nationality when she obtained Canadian citizenship. Then too one cannot rule out that Mrs. W may simply have found it more convenient to obtain a Canadian passport than renew her United States passport and that she could avoid delays at the border by saying she was a Canadian. With respect to her acts of commission, she at least must be credited with candor; she volunteered information in 1983 which consular officials might or might not have been able to glean had she remained silent.

The foregoing discussion makes it clear that Mrs. W did not expressly relinquish her United States citizenship - either by word or act. Her words, standing alone, show no more than that she knew or had reason to believe that naturalization in a foreign state could be expatriating. And her conduct could by and large rationally be explained on grounds other than an intent to abandon her United States citizenship. Granted, reasonable people surveying the record in its totality might conclude that Mrs. W , who has hardly been fastidious about her United States citizenship obligations, acted in a way that suggests she purposed the loss of her citizenship. But, and this is the crucial consideration, people no less reasonable might find the pattern of her conduct insufficiently explicit to support a finding of intent to relinquish United States citizenship.

Cases like Mrs. W 's fall into a juridical gray area. With one exception, King v. Rogers, 463 F.2d 1188 (9th Cir. 1972), the courts have not since Afroyim decided a case where the petitioner made a simple oath of allegiance, leaving the trier of fact to determine his or her intent from subsequent words and/or conduct. Appellant in King 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, however, 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 such actions the court found ample evidence that King intended to relinquish his United States citizenship at the time he obtained British nationality.

We do not say that only conduct as egregious as that of appellant in King will support a finding of an intent to relinquish United States citizenship. We do, however, maintain that intent to relinquish citizenship should be reflected in more patent evidence of a will and purpose to abandon citizenship than the evidance in the case before us. Where the field of law is barren of more precise judicial definitions of conduct that may be deemed to manifest a renunciatory intent, the Board, as trier of fact, is in the end left to make its own judgment based on all the evidence whether the party has in fact relinquished his citizenship. 8/ That judgment must, of course, attempt to balance the dignity and priceless right of citizenship with the citizen's right to retain citizenship unless he knowingly and intelligently relinquishes that citizenship. Here the dictum of the 2nd Circuit Court of Appeals seems apposite:

8/ Opinion of the Attorney General, 420 Op. Atty. Gen. 397 (1969) noted with approbation by the Supreme Court in Vance v. Terrazas, 444 U.S. at 261.

> ...Afroyim's requirement of a subjective [sic] intent reflects the growing trend in our constitutional jurisprudence toward the principle that conduct will be construed as a waiver or forfeiture of a constitutional right only if it is knowingly and intelligently intended as such. Surely the Fourteenth Amendment right of citizenship cannot be characterized as a trivial matter justifying departure from the rule. Accordingly, there must be proof of a specific intent to relinquish United States citizenship before an act of foreign naturalization or oath of loyalty to another sovereign can result in the expatriation of an American citizen. See, e.g., King v. Rogers, 463 F.2d 1188, 1189-90 (9th Cir. 1972); Jolley v. INS, 441 F.2d 1245, 1249 (5th Cir.), cert. denied, 404 U.S. 946, 92 S.Ct. 302, 30 L.Ed.2d 262 (1971).

On the record presented to us we are not satisfied that Mrs. W knowingly and intelligently intended to waive her right to remain a United States citizen. Since a doubt lingers about whether she intended to relinquish her citizenship, we believe we must resolve that doubt in favor of continuation of citizenship. 9/

9/ Nishikawa v. Dulles, 356 U.S. 129, 134, 135 (1958): "This Court has said that in a denaturalization case, 'instituted...for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen.' Schneiderman v. United States, 320 U.S. 118, 122 (1943). The same principle applies to expatriation cases..." 6/

> 6/ See also United States v. Minker, 350 U.S. 179, 197 (concurring opinion): "When we deal with citizenship we tread on sensitive ground."

On balance, we do not think the Department has carried its burden of proving that Mrs. W intended to relinquish her United States nationality when she obtained naturalization in Canada upon her own application.

IV

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

Alan G. James, Chairman

James G. Sampas, Member

DISSENTING OPINION

Reaching a definitive conclusion as to a person's intent, years after the fact, is a very difficult matter. In putting itself in Ms. W 's shoes, and trying to understand what her intentions were in 1977 when she took out Canadian citizenship, it is incumbent upon the Board to look at each aspect of appellant's behavior which has been presented to the Board to see if any pattern emerges that sheds light on her precise intention vis a vis her U.S. citizenship at that time. In contrast to my colleagues in the majority, I find in Ms. W 's behavior a consistent pattern which clearly indicates a strong motivation to become a Canadian citizen and a willingness to accept the consequences of her act even if that be loss of U.S. citizenship. I also find evidence of an assumption on her part that in fact she had lost her U.S. citizenship, from her responses to the Questionnaire "Information for Determining Citizenship" which she completed on February 14, 1984.

It is regretable that the information available to the Board regarding Ms. W 's actions and state of mind in 1977 is so sparse. It cannot be overlooked that Ms. W has relied in great measure upon statements made by her husband, rather than present her case to the Board herself, thereby affording the Board an opportunity to evaluate her own words, which would of course constitute important evidence of her intentions. I am unable to give the same weight to Mr. W 's comments about his wife's behavior and intentions as I would to her own. On the other hand, while the evidence in this case is sparse, it is unusually clear cut.

Ms. W acquired U.S. citizenship by birth, in 1935. There is no question that she considered herself a U.S. citizen prior to her taking out Canadian citizenship in 1977. However, in 1984, when she visited the U.S. Embassy, she responded to the question "When did you first become aware that you might be a United States citizen?" by stating "February, 1983." (See Citizenship Questionnaire, question 11(a)). The explanation for this seemingly strange response is evident from her response to a subsequent question "How did you find out you were a U.S. citizen?" to which she answered "I... thought I had lost my citizenship by taking out Canadian citizenship until a friend told me the law had changed." (Id., question 11(c), emphasis added).

Ms. W thought she would lose her U.S. citizenship as a result of becoming a Canadian. Whether her understanding of the

law was correct or not is not important. What is important is the state of mind of the individual concerned. In Vance v. Terrazas, 444 U.S. 252(1980) the Supreme Court announced the rule that to sustain a finding of loss of nationality the government must show that the expatriating act was performed with the intention of relinquishing U.S. citizenship. That intention may be expressed in words or, as the Court said "found as a fair inference from proven conduct." Id. at 260. If the Supreme Court had meant that an express renunciation was a prerequisite to a finding of loss of U.S. citizenship it would have said so. It did not. But the majority appears to believe that this is the test to be applied. Having gone to considerable lengths to explain away Ms. W 's behavior (her acts are admitted by the majority to be "plainly inconsistent with United States citizenship") the majority states that "[t]he foregoing discussion makes it clear that Ms. W never expressly relinquished her United States citizenship -- either by word or act." I believe the majority has missed the point of Terrazas. What matters is what a person was thinking, what a person intended, not what he expressed. The Supreme Court appreciated that this might not be readily apparent, and suggested that intent might be found "as a fair inference from proven conduct."

The minimal evidence available shows an individual, who for primarily job related reasons, took out Canadian citizenship realizing that she might lose U.S. citizenship. In response to the question "Did you know ... that you might lose United States citizenship"? she responded "I thought I would lose it, but was not thinking of returning at that time (Citizenship Questionnaire, question 14(b)).

Every action Ms. W took, or did not take, after having become a Canadian citizen in 1977 was completely consistent with her own (mistaken or not) view that she was no longer a U.S. citizen. Why should she even think about renewing a U.S. passport, filing tax returns, voting in a U.S. election? She did not think she was a U.S. citizen. Whether or not her understanding of applicable law was correct or not is beside the point, for the point here is not whether loss of U.S. citizenship flows automatically from commission of an expatriating act, but what she thought to be, and accepted, as the consequence of her action. She did not become a Canadian unintentionally. She intended to become a Canadian, and she thought that meant that she would no longer be a U.S. citizen as a result.

I am aware that on May 23, 1985 Ms. W solemnly declared under oath that she "was completely unaware of the fact that

my Canadian naturalization would mean relinquishing my United States citizenship." (Statutory Declaration of S. W , May 7, 1985.) I find this disturbing, in light of her previous signed statement (the Citizenship Questionnaire referred to above) that she thought she had lost her U.S. citizenship until a friend told her the law had changed. The effort to ascertain Ms. W 's true intentions in 1977 has not been facilitated by such contradictory statements, each formally subscribed to by Ms. W herself. I am compelled to conclude that Ms. W has been less than precise, and has on occasion misrepresented her true attitude. Faced with the need to determine which of these two contradictory statements more accurately reflects the truth, I have come to the conclusion that Ms. W had less reason in 1983, when answering the questionnaire, to distort her mental state at the time she became a Canadian citizen than she might have had in 1985. As a consequence, I accept validity of Ms. W 's 1983 indication that from 1977 to 1983 she was under the impression that she had lost her U.S. citizenship.

Then, apparently in early 1983, Ms. W was told by a friend that "the law has changed" and, as she stated on the Questionnaire, she became aware that she might be a U.S. citizen after all. She did not, however, take any action vis a vis her status for another year. We do not know precisely when Ms. W met her husband, who is a U.S. citizen, or precisely when she began to think of returning to the U.S. But by February 14, 1984 Ms. W was sufficiently interested in the prospect of returning to the U.S. to approach the Embassy to clarify her citizenship status. (See Citizenship Questionnaire, question 11(b)). I am sympathetic with this totally understandable latter-day change of heart and priorities, and increased appreciation of the value of that which was lost. At the same time, I discern in the very effort to undo, evidence of knowing acceptance in 1977 of the consequences of the act of naturalization. Ms. W did not, in my view, take a chance, or gamble with her U.S. citizenship. Rather, she acquired Canadian citizenship with full expectation that she would lose her U.S. citizenship and for six years thereafter she thought, without any question, that she had. She did not make inquiries, she did not seek to clarify either Canadian or U.S. views regarding her status as a U.S. citizen, she assumed it had been lost. In all respects she acted as if her sole nationality was Canadian, until she met Mr. W .

In a case such as this "acceptance" and "intention" cannot be divorced. They are two sides of the same coin. As discussed in the majority opinion, Ms. W was not under duress and acted voluntarily in taking out Canadian citizenship. Her

intent in that regard was clear; to become a Canadian was clearly to her benefit as she perceived her situation at the time. As she stated with respect to her state of mind in the mid-1970s "at that time I was not in Canada long enough to know that I might want to return to the U.S." Circumstances and appreciation of alternatives change with the years. But in 1977 it seems clear to me that Ms. W had the intention of paying the price of U.S. citizenship for Canadian.

I therefore conclude that Ms. W expatriated herself when she voluntarily took out Canadian citizenship with the intention of relinquishing her U.S. citizenship, and I would affirm the Department of State's finding of loss of nationality.

Mary Elizabeth Hoinkes, Member