DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

Decided by the Board March 17, 1987

Appellant, a native-born French citizen, married a United States naval officer and moved with him to the United States where she was naturalized, thereby automatically losing her French nationality. In 1979 she was divorced and, with her children, returned to France where she contemplated marrying a French citizen. The contemplated marriage fell through, however, and appellant, to whom a residence permit had been promised on condition that she provide the authorities with a marriage date, became seriously concerned that she might be expelled from France as an illegal alien. Allegedly, to protect herself against that eventuality, she obtained French nationality in 1980 by a procedure open to former French citizens like herself; she simply made a declaration in court that she wished to be reintegrated into French nationality. She also obtained French nationality for her American-citizen children. Her naturalization came to the attention of United States authorities when she visited the Consulate General at Bordeaux in late 1981 to renew her children's passports. A consular officer who processed her case executed a certificate of loss of nationality in appellant's name stating that she expatriated herself under section 349(a)(1) of the Immigration and Nationality Act by obtaining nationality in a foreign state. The Department approved the certificate in July 1982. An appeal was entered nearly four years later.

HELD:

1. Although entered well after the prescribed limitation of one year after approval of the certificate of loss of nationality, the appeal was deemed timely. Appellant was misinformed about the limitation on appeal; information on the certificate of loss of nationality and in a communication from the Consulate indicated she might appeal "within a reasonable time" after she received notice of the Department's holding of loss of her nationality. That limitation was the one in effect from 1967 to 1979. It therefore was not unreasonable for her to delay nearly four years in taking an appeal, especially since she was led to believe by the consular officer involved that she might only appeal to the Board through an attorney. In fact she spent nearly 3 years in trying to find an attorney whose fees she could afford, learning only much later that she might appeal pro se. In the circumstances, the Board found she was justified in not appealing sooner.

2. Appellant's acquisition of French nationality was voluntary. She did not rebut the statutory presumption that she acted of her own free will. Indeed, it seemed clear that she had

an alternative to acquiring French nationality that might just as effectively have permitted her to obtain a residence permit to live in France.

3. Finally, the Department failed to carry its burden of proving that appellant intended to relinquish United States nationality. Although appellant had been naturalized in the United States and knew that such naturalization had resulted in loss of her French nationality, it was not clear that she knew obtaining foreign naturalization would necessarily endanger her United States nationality. The simple procedure of obtaining naturalization by declaration (no oath or renunciatory declaration was required) was such that she might well have believed, as she alleged, she was not taking a step that could place her United States nationality in jeopardy. Naturalization aside, the record revealed no express words or acts of appellant that manifested knowing and intelligent forfeiture of United States nationality.

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

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This is an appeal from an administrative determination of the Department of State holding that appellant, M S F , expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining restoration of her French nationality of origin upon her own application. 1/

Three issues are presented by the appeal: whether the appeal is timely; whether Ms. F performed the expatriative act voluntarily; and whether the Department has met its burden of proving by a preponderance of the evidence that she intended to relinquish her United States nationality. For the reasons set forth below, we deem the appeal timely; we find that appellant acted voluntarily when she performed the proscribed act; but we conclude that the Department has not sustained its burden of proof that Ms. F intended to relinquish United States nationality. Accordingly, we will reverse the Department's decision that Ms. F expatriated herself.

I

Ms. F was born on [redacted], of French citizen parents and so acquired French citizenship. In 1964 she married R W , a United States citizen, and left France to live in the United States. Here, three children were born to appellant. She obtained United States citizenship by virtue of naturalization on July 13, 1971 at San Francisco before the United States District Court for the Northern District of California. As a consequence of her naturalization in the United States, she lost her French nationality by operation of law. Ms. F 's marriage was terminated by divorce in June 1979, at which time she returned to France with her three children. "I wanted to live closer to my

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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 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 November 14, 1986, amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

parents...., who were very lonely," she wrote to the Board. "I also [had] plans to marry a French citizen." It seems that permission for Ms. F to reside in France had been conditioned upon her going through with the marriage she contemplated with a French citizen. A few months after she arrived in France, Ms. F was informed by the Prefecture of Police where she was living that she would have to give them a date for the marriage; only after she had done so would her residence permit be approved. It seems that her fiance's wife, who originally had consented to a divorce, changed her mind and there was no prospect that Ms. F 's wedding to a French citizen would take place. Since she could not give the authorities a date for her marriage, "I started living in constant fear of being deported." She therefore petitioned for restoration of her French nationality before a judge of the Tribunal d' Instance of Antibes on May 5, 1980. Her petition was approved on Decæmber 5, 1980, and she became a French citizen again from that date. She also petitioned for the naturalization of her three minor United States citizen children to whom French citizenship was granted.

In December 1981 Ms. F visited the Consulate General (the Consulate) at Bordeaux, near which city she was then living, to renew her children's passports. She returned to the Consulate in January 1982 and a third time in February 1982. Ms. F 's citizenship status came under discussion during either her December 1981 or January 1982 visit. She has described the circumstances as follows:

> ...The children had been invited by their father to spend the summer vacation, and their passports had expired, so that's why I went there.
>
> And then, when I applied for the children's passport, the secretary told me 'why don't you apply for your own passport', [her own passport, issued in 1976, had just expired] even though she knew that I had been reintegrated at that time in the French nationality. I was really puzzled. I thought maybe she was making a mistake. And yet I started to think, 'Well, maybe I could.' So, to make sure -- because I knew it was not a very -- that it was not a light subject -- to make sure, I made an appointment with Mr. L , the Consul. 2/

2/ Transcript of Hearing in the Matter of M S F, Board of Appellate Review, November 24, 1986 (hereafter referred to as "TR"), pp. 34, 35.

She was interviewed by L on February 8, 1982; completed a form titled "Information for Determining U.S. Citizenship," to which she attached amplifying statements; and, for information purposes, filled out an application for a passport/registration. On May 5, 1982 L submitted Ms. F 's case to the Department "for decision." In his report, L noted as relevant factors in Ms. F 's case: her reintegration into French nationality; her successful petition for the naturalization of her American-born children; her receipt of a French identity card; her application for family assistance; lack of property in the United States; failure to file U.S. income tax returns; and the statement she made to him that when she returned to France she initially had no intention of returning to the United States.

> Her comments to the Consular Officer [L concluded] plainly reveal that at the time she petitioned for reintegration she intended not to return to the U.S. and was consciously turning away from any obligations toward the U.S.
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> Post finds this act sufficient to lead to the conclusion Ms. F did in fact lose her United States citizenship and recommends a similar finding by the Department.

The Department instructed the consular officer to execute a certificate of loss of nationality in Ms. F 's name. This he did on July 19, 1982. 3/ He certified that she acquired United States nationality by virtue of naturalization; that she reacquired her French nationality of origin upon her own application; and concluded that she had expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on August 12, 1982, and the next day so advised the Consulate, transmitting a copy of the approved certificate to be forwarded to Ms. F . Approval of the certificate constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal

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3/ 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.

may be taken to the Board of Appellate Review. Ms. F returned to the United States from France in May 1985. She entered the appeal pro se on May 19, 1986 and requested oral argument which was heard on November 24, 1986,

II

Before proceeding, we must determine whether the Board has jurisdiction to consider this appeal. Since timely filing is a jurisdictional issue, U.S. v. Robinson, 361 U.S. 220 (1960), the Board's authority to hear and decide the case depends on our finding that the appeal was filed within the limitation prescribed by the applicable regulations.

The limitation on appeal is within one year after approval of the certificate of loss of nationality. Section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1). An appeal not filed within the prescribed limitation shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed limitation. 22 CFR 7.5(a). The regulations further provide that when the certificate of loss of nationality is forwarded to the person concerned, he or she must be informed of the right of appeal to this Board within one year after approval of the certificate. 22 CFR 50.52. Notice of the right of appeal is conveyed by information printed on the reverse of the certificate; the obverse bears the notation in bold type at the bottom: "See Reverse for Appeal Procedures."

The form of certificate of loss of nationality used by the Consulate, however, was obsolete. It carried information about making appeals prescribed by regulations that were in force prior to November 30, 1979, the date on which the Board's present regulations were promulgated. The form sent to Ms. F carried, inter alia, the following information about making an appeal:

> Any holding of loss of United States nationality may be appealed to the Board of Appellate Review in the Department of State. The regulations governing appeals are set forth at Title 22, Code of Federal Regulations, Sections 50.60 - 50.72. The appeal may be presented through an American Embassy or Consulate or through an authorized attorney or agent in the United States.

The appeals information set forth in the obsolete form did not expressly state that there was a limitation on appeal, but, as indicated above, referred the party to 22 CFR 50.60-50.72. 22 CFR 50.60, the limitation on appeal in effect from 1967 to 1979, provided that a person who wished to contest the Department's determination of his or her expatriation might, within a reasonable time after receipt of notice of that determination, take an

an appeal to the Board of Appellate Review. In its letter of September 20, 1982 transmitting the approved certificate to Ms. F , the Consulate wrote that an appeal to the Board of Appellate Review "must be made in writing within a reasonable time after receiving notice of the Department's administrative holding of loss of nationality." (Emphasis added.)

We begin by noting that the Department and its agent, the Consulate at Bordeaux, failed to advise Ms. F that her right of appeal would have to be exercised within one year of August 12, 1982. Instead, they led her to believe that she had a more flexible period within which to act. Plainly, she was entitled to rely on the information given her, despite the fact that the applicable limitation was in fact one year after approval of the certificate. The issue for us to decide thus becomes whether in the circumstances of the case Ms. F 's delay of three years and eight months (from September 20, 1982 the date on which she received notice of the holding of loss of her nationality to May 19, 1986) was or was not reasonable.

The rule on reasonable time has been exhaustively defined by the courts. It is generally considered to depend on the facts and circumstances of the particular case, taking into consideration the interest in finality, the reason for the delay, and prejudice to the other party. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). The rationale for the rule in loss of nationality proceedings is to allow the aggrieved party sufficient time to prepare a case showing wherein the Department erred in determining that a citizen expatriated him or herself. But the rule presumes that the moving party will act with all reasonable dispatch while the recollection of the events surrounding performance of the expatriative act remains fresh in the minds of all concerned.

Ms. F has explained that she did not appeal sooner because she understood from Consul L that the appeal should be filed through an attorney if it were to have any chance of success; that she tried repeatedly but unavailingly to find an attorney within her means; and that she had only learned in the spring of 1986 from an official of the Immigration and Naturalization Service that she might take the appeal herself. 4/

In its letter to Ms. F of September 20, 1982 enclosing a copy of the approved certificate of loss of nationality, the Consulate (L signed the letter) stated that:

4/ Appellant's letter to the Board, June 16, 1986; her reply to the Department's brief, November 31, 1986; TR 10-12, 18.

> ...If you have new or additional evidence to submit or if you contend that the holding of loss of nationality in your case is contrary to law or fact, you may present an appeal through an American Foreign Service office or a duly authorized attorney or agent in the United States. It should be emphasized that unless your appeal is based on these grounds, it will not be accepted.

From the wording of the Consulate's letter and her subsequent conversations with L , Ms. F alleges she drew the conclusion that she might only appeal through an attorney. She expressed her understanding of the way she had to proceed as follows:

> Mr. L told me that without the help of a lawyer, I had no chance of ever getting my American citizenship back. He said he could not help me anymore and he gave me a list of American attorneys in Europe. The reason I delayed more than two years beyond the allowable time is simple. I never questioned Mr. L 's words and honesty and I did not know I could make the appeal myself. 5/

L executed an affidavit on September 11, 1986 in which he stated in part as follows:

> Based on the Department's findings as well as the other developments I counseled her to make an appeal. While suggesting that she contact an attorney, I also told her an attorney was not mandatory. Rather it would be more likely to give her the best advice possible. In addition to the appeals mechanism, the importance of a timely appeal was pointed out.

Ms. F contests L 's assertion; "he never told me I could make the appeal myself."

> It is evident [she stated in her reply to the Department's brief] that Mr. L contradicted himself. Had he told me four years ago that I did not need a lawyer I would have presented the appeal immediately. Again, I never questioned what Mr. L had told me. I took what he said for granted. I could not afford a lawyer at the time, neither could I later on....

5/ Appellant's letter to the Board, June 16, 1986.

In support of her position Ms. F introduced an unfinished memorandum drafted by L in the autumn of 1982 (apparently at her request with a view to discussing it with an attorney she contemplated retaining) setting forth his views on her case. The Department confirmed that L prepared the memorandum, and amplified it by providing a second page which appellant did not submit.

The memorandum reads as follows:

DRAFT

> Mrs. F considers it significant that her return to France compelled her to live Illegally. She asserts it was for that reason that she resumed French citizenship. In our conversations before preparing the Consular Officer's Opinion this issue was not raised. It did appear as an item in her written statements but I took no notice of it. However, as now explained and more fully documented the issue might well have played an important role in my opinion. This is particularly bothersome since I have not been able at any point - up to and including this moment - to convince her that obtaining legal counsel or the assistance of some other objective party might assist her.
>
> It is fair to characterize my view of the situation as follows:
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> 1. A statutory expatriating act took place.
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> 2. The original decision was valid but the additional evidence might be properly considered.
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> 3. It is possible - although admittedly difficult - that Mrs. F could have obtained a French residence permit as an American citizen. The difficulty is that because she was born in France and thus received French citizenship under the principle of JUS SOLI the French authorities might well have frustrated the effort despite the subsequent acquisition of U.S. nationality.
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> 4. Had proper counsel been sought at virtually every step along the line she might not have been thrust into this situation.

> 5. Because the additional assertion has been presented at a late date it is impossible for me to objectively analyze what might have been had the 'new' factor been presented in a timely and complete manner.
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> Frankly, I do not feel Mrs. F has presented her case as effectively as possible. She continues to prejudice her situation by failing to obtain adequate counsel. Her undue reliance on my view makes it impossible for me to objectively analyse the merits of the case. It is for that reason - coupled with the fact she has in essence raised a new issue - that I feel this is a case which could be properly reviewed by the Board of Appellate Review.
>
> The subject's loss of U.S. citizenship was reviewed and approved by CA/OCS/EUR on August 21, 1982. September 20, 1982, I discussed the situation with Mrs. F . At that time she was informed of the appeals procedures, including both initial appeal to the Board of Appellate Review and also through the judicial process. Her right to legal counsel was reiterated.

Ms. F has also submitted a copy of a letter, dated September 27, 1982, which she drafted to send to the Board of Appellate Review but which she never mailed. In it she laid out much of the argumentation she subsequently presented to the Board. "I started this letter for the Board of Appellate Review," she said at the hearing, "because I was determined to fight for my rights and to get my American citizenship back." TR 52. She did not mail the letter because after reflecting upon what L had written to her (September 20, 1982 letter) and told her about legal representation, she decided to turn her appeal over to a lawyer in Paris. TR 44-45.

In addition, Ms. F has submitted copies of correspondence she conducted with a number of attorneys between 1982 and 1986, showing that she did seek counsel to represent her but found that she could not afford their fees.

Ms. F believed, with justification, it seems to us, that she had been advised by a responsible official that she should retain legal counsel. The emphasis L placed on her retaining counsel in the above-quoted draft memorandum might well have led a lay person to conclude that her only recourse would be through an

attorney. It also seems to us that L 's draft memorandum of September 1982, being contemporaneous, is more reliable evidence of what he told her in 1982 than what he stated in his affidavit executed some four years later.

Asked by counsel for the Department whether it did not seem to her unfair that, having a "proper claim," she would be barred from appealing except through counsel, Ms. F replied: "very unfair. In fact, the whole thing, the whole process, seemed unfair to me." TR 45. She had not been prompted to complain to the Consulate or to the Department because the consul was a person "way up high." "I could not really go against his wishes or sayings. I was immature, I know. I know, it's a case where you really can't believe what you hear." Id.

Given what we consider a well-founded belief that she would have to retain counsel in order to pursue an appeal, Ms. F made several genuine attempts beginning in 1982 to do so, but her efforts foundered on her lack of funds. Her conduct after she was notified that the Department decided she expatriated herself thus is wholly consistent with what she has alleged. She has established that between 1982 and 1986 her resources were exiguous. In France, she had no employment; had to take care of three young children by her ex-husband, who allegedly had never paid court-mandated support; then had another infant to care for. Returning to the United States in May 1985, on the pleas of her American children, and enabled to do so by the gift of airplane tickets, she obtained work as a full-time housekeeper, as the only possible employment because of her visa status. In her own words, "I was coming home exhausted. I still had to take care of the children. I still had to cook and do all the things a mother should do." TR 73. Surely she would not have persisted in trying to obtain counsel she could scarcely afford had she perceived that she could save herself expense and delay by representing herself. People do not, generally, act against their pecuniary interests to attain a particular goal unless they are firmly convinced that they have no alternative to doing so.

Perhaps others might have gone around the consular officer and attempted to challenge the advice he allegedly gave her, but in the circumstances of this case we do not consider that Ms. F 's conduct should be judged rigidly by the standard of the ordinary prudent person. We conclude therefore that her delay in coming before this Board has been adequately justified.

To allow the appeal will not, in our opinion, prejudice the Department. The record is ample. Both appellant and the Department's agent, Consul L , seem to recall the events of 1982 clearly; indeed, L has stated that his recollection of the case is "quite vivid." (Affidavit of September 11, 1986, further confirmed by his memorandum of January 12, 1987.) Appellant has appeared before the Board where she was examined extensively by the Department's counsel.

Nor, do we believe, should the interest in finality and stability of administrative decisions be accorded precedence in this case, where the merits plainly call out for consideration.

In sum, we do not consider that there exist in this case those paramount considerations which would bar the appeal as stale or untimely. On balance, we find that the appeal was taken within a reasonable time after Ms. F was informed that the Department had determined she expatriated herself. Appellant is therefore entitled to be heard on the merits, and we now proceed to consider them.

III

There is no dispute that by reintegrating herself into French nationality Ms. F brought herself within the purview of section 349(a)(1) of the Immigration and Nationality Act. Under the statute and court decisions, nationality shall not be lost by performance of a statutory expatriating act, however, unless the act was done voluntarily with the intention of relinquishing United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967). The first issue we address therefore is whether Ms. F acquired French nationality voluntarily.

The statute provides that a person who performs a statutory expatriating act shall be presumed to have done so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntary. 6/

6/ 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.

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

Ms. F does not expressly contend that she reacquired French nationality under duress, but she avers that she would never have sought French nationality had she not been told by the French authorities that she would be deported if she did not comply with the conditions attached to approval of a residence permit for her. Without any funds of her own, responsible for her three American citizen children, who were in France with her, having received no support payments from her former husband, she was pressed by fear of deportation and separation from her fiance and her parents to petition for reintegration as a French citizen. 7/

"[I]t is settled that no conduct results in expatriation unless the conduct is engaged in voluntarily." Nishikawa v. Dulles, 356 U.S. 129, 133 (1958) (Emphasis is the Court's), citing Mandoli v. Acheson, 344 U.S. 133 (1952). To establish that one acted under duress, the citizen must show that circumstances neither of his creation nor subject to his control forced him into performing the expatriative act. The rule was stated explicitly in Doreau v. Marshall, 170 F.2d 721 (3rd Cir. 1948).

> If, by reason of extraordinary circumstances, an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is not authentic abandonment of his own nationality.

107 F.2d at 724.

Duress connotes absence of choice, lack of alternatives. On the other hand, the opportunity to make a decision based on personal choice is the essence of voluntariness. Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971.)

The circumstances in which Ms. F found herself in 1980 were manifestly not "extraordinary." She made what we must assume was a free choice to live in France, and so placed herself in a position where, in order to remain in France as a resident alien, she would be required to comply with the applicable French laws and regulations. In this sense, she generated her own dilemma: whether to obtain naturalization and so be sure to be able to stay in France but at the risk of losing her United States nationality, or to try, through appropriate representations to the competent authorities, to obtain a residence permit on grounds other than marriage to a French citizen. She chose the former course of action. Having exercised a personal choice, it is clear that she obtained naturalization of her own free will.

7/ TR 7-10; letter of appeal of May 16, 1986; reply to Department's brief, November 13, 1986; responses to citizenship questionnaire, February 8, 1982.

Upon consideration of the foregoing, we conclude that Ms. F has not rebutted the statutory presumption that her acquisition of French nationality was voluntary.

IV

Although we have concluded that appellant voluntarily obtained naturalization in France, the question remains whether on all the evidence the Department "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 statute, 8/ the government must prove a person's intent by a preponderance of the evidence. Id. at 267. Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The intent that the government must prove is the party's intent when the expatriating act was done. Terrazas v. Haig, 653 F.2d 285, 297 (7th Cir. 1981).

The only evidence of record relevant to Ms. F 's intent that is contemporaneous with her performance of the expatriative act is the act itself. Performing an expatriating act may evidence an intent to relinquish citizenship, but it is not conclusive evidence of such an intent. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), (Black, J. concurring.) Since Ms. F 's intent in 1980 cannot be proved by such meager evidence, we must determine whether, as the Department argues, circumstantial evidence establishes an intent to relinquish citizenship.

The Department's case that Ms. F intended to relinquish her United States nationality rests on two major arguments. First, as a naturalized United States citizen, Ms. F understood better than most Americans the legal consequences of acquiring another nationality; she proceeded nonetheless to obtain French nationality. Second, after regaining French

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

nationality Ms. F resumed her life as a French citizen. "There is no indication and no assertion," the Department's brief states, "that she ever acted as a United States citizen or that she considered herself an American either residually or as a dual national." "Sometime after she obtained naturalization," the Department's brief continues, "she found that her expectations about life in France were disappointed and by 1982...she had already changed her mind." The Department thus sees her appeal as "a general plea to be excused from the consequences of her act of naturalizing."

Ms. F maintained at the hearing that she saw no similarity between reintegrating into French nationality and obtaining naturalization in the United States.

> No, for me, reintegration was just the fact that I was born French, and since I was living at the time in France, in order to be living legally, for me it was just a matter of paperwork. Excuse me. It was just like France saying to me, 'You can stay. You're French.' I mean, 'You are French on paper.'

TR 32, 33.

It seems to us perfectly plausible that, as a lay person, Ms. F might not have appreciated that reintegration into French nationality could result in loss of her United States nationality. We note that obtaining French nationality by declaration seems to be a pro forma procedure, devoid of the solemnity that marks naturalization in the United States. Furthermore, Ms. F 's perception that reintegration was not strictly akin to naturalization is buttressed by the fact that she was not required to make oath or renounce United States nationality. But even if Ms. F might properly be charged with knowledge that obtaining French nationality by declaration constitutes an expatriative act under United States law, we do not accept that knowledge is equatable with an intent to relinquish citizenship.

The Department argues that statements Ms. F made in a questionnaire she completed at the Consulate in February 1982 indicate an intent to relinquish United States nationality. The Department cites in particular her statement that she was ashamed she had given up her native French nationality when she became a United States citizen. Ms. F 's actual language was: "My parents have been sort of traumatized by the fact that we (appellant and her twin sister) both left. They also never understood why I renounced my French citizenship. They could not accept it and I came to feel rather ashamed of it when I realized it."

It seems fairly clear that Ms. F was expressing concern for the effect of her American naturalization on her aged parents

rather than expressing second thoughts about having chosen American citizenship. Furthermore, the foregoing statement should be read against the following statement which Ms. F made in the same questionnaire and which hardly indicates an intent to renounce United States citizenship:

> ...when I returned to France, I started a procedure to be reintegrated in the French nationality. I did not want to give up my American citizenship. I just wanted to be recognized by the French as one of theirs.

In support of its second argument that Ms. F 's intent to relinquish United States nationality is shown by her acting solely as a Frenchwoman, the Department notes that after reintegration she obtained a French identity card; secured French citizenship for her children; applied for family assistance and in no respect showed that she considered herself to be an American citizen. The Department also cites Ms. F 's remarks to Consul L in 1982 (these are reported in his memorandum of May 5, 1982 to the Department recommending approval of the certificate of loss of nationality), namely, that: she acknowledged she had returned to France intending to rebuild her life there, never to return to the United States; after living in France she enountered many difficulties and changed her mind about having given up United States citizenship.

We do not agree that the afore-cited factors manifest an intent on Ms. F 's part to relinquish United States nationality. Her return to France to live permanently does not in itself evidence an intent to transfer allegiance to France, for her decision to leave the United States was certainly occasioned by legitimate family considerations. 9/ Applying for family assistance after reacquiring French nationality does not necessarily show an earlier intent to relinquish United States citizenship; she had three children to support and very limited resources with which to do so. Carrying a French identity card was simply a consequence of having reacquired French nationality. There is no evidence that she obtained a French passport after naturalization and before the Department determined she expatriated herself. Although obtaining French nationality for her American citizen children might cast some doubt on Ms. F 's intent to retain United States citizenship, it should be recalled that it was she who secured renewal of her childrens' United States passports. And we do not see the relevance to the issue of Ms. F 's intent in 1980 of the Department's argument that after she encountered certain personal

9/ See Schneider v. Rusk, 377 U.S. 163, 169 (1964): "Living abroad...in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business or other legitimate reasons."

setbacks she underwent a change of heart and tried to be excused from the consequences of her naturalization.

To admit that she might have made a mistake in deciding to live permanently in France and to express a wish to return to the United States are not facts that perforce support a finding that Ms. F acknowledged she intended in 1980 to relinquish her United States nationality. Surely her decision to return to the United States is not explainable only as a change of heart, that is, an admission that she intended to relinquish citizenship. It could just as rationally be explained as a change of plans occasioned by practical considerations.

In undertaking to carry its burden of proof, the Department did not address a very relevant point Consul L made in the memorandum he drafted in September 1982 (text supra, Part II), namely, that Ms. F 's fear of being deported because she was an illegal alien was the impetus for her naturalization. L acknowledged that he had taken no notice of that factor when he submitted his opinion to the Department in May 1982. "However, as now explained and more fully documented," L wrote, "the issue might well have played an important role in my opinion." In the memorandum he stated that it was possible Ms. F could have obtained a residence permit, but conceded that she might have had considerable difficulty in doing so. 10/

10/ One can only speculate whether if L had adequately addressed Ms. F 's fear of deportation he would have recommended that the certificate of loss of nationality not be approved. Likewise, one can only speculate whether if he had recommended that the certificate not be approved, the Department would have accepted his recommendation. It is, however, just conceivable that the Department might not have approved the certificate, for it clearly heavily relied on L 's opinion in deciding to approve the certificate.

In a case closely resembling Ms. F 's, the Department approved a certificate of loss of nationality despite the consular officer's recommendation that it not do so. In Matter of J.E.P., decided by the Board October 23, 1986, appellant also obtained naturalization in France by declaration. She made clear she had returned to France from the United States, where she had been naturalized, with no intention of returning to the United States. She had no ties to the United States and the record showed that

After Ms. F appealed, L explained why he had prepared the memorandum and why he believed his original opinion on Ms. F 's intent was correct. In an affidavit executed in September 1986 he stated that:

> her "illegal" status in France, while not a part of my decision, would have played no material part in the outcome. Indeed, based on my understanding of French law she could have been eligible for French entitlements and could have been permitted to remain in France irregardless [sic] of her nationality. If her decision was predicated on illegality it might have been based on faulty information.
>
> [S]he clearly stated that at the time she resumed French citizenship she had no intention of being a U.S. citizen; indeed, she sought French citizenship for her minor children and clearly stated at the time of reintegration it was her intention to cease U.S. affiliation. 11/

10/ Cont'd.

she had attended to none of the duties or rights of United States citizenship. In submitting the case to the Department, the consular officer recommended that the certificate of loss of nationality not be approved since he considered the evidence insufficient to support a finding that appellant intended to relinquish United States nationality. The Department disagreed with the consular officer, using essentially the same argumentation it has presented in this case: that it was reasonable to assume Ms. P., who realized she lost her French nationality when she became naturalized in the United States, had some awareness that she might in turn lose her United States nationality when she reacquired French nationality; and furthermore, she had performed no contemporaneous acts demonstrating that she intended to retain United States citizenship.

Upon appeal to the Board, the Department decided upon further review that it was unable to carry its burden of proof on the issue of Ms. P.'s intent. Accordingly, it requested that the Board remand the case for the purpose of vacating the certificate of loss of nationality. The Board granted the Department's request.

11/ We find no basis in the record for this assertion. Ms. F made no such admission in the written information she submitted to the Consulate in 1982. Nor did L report such a statement in his memorandum to the Department of May 5, 1982.

And in a statement he made in January 1987, he observed that:

> Ms. F 's fears regarding her status were part of a series of concerns which were mentioned as individual items in her written statements. After due consideration, the only finding I could reach based on law, regulation, and Ms. F 's statements was that an expatriating act had occurred.
>
> I would have welcomed some overlooked element which might have benefitted Ms. F . It was in this spirit that the draft memorandum was composed. However, I did not then and do not now believe there was any material aspect which was overlooked in preparing the certificate of loss.

Without disputing L 's interpretation of the draft memorandum and the significance he believes it merits, we think it germane to note that the memorandum properly addressed the reason why Ms. F sought French naturalization. Motive, of course, is not to be confused with intent. But motive is not without relevance, for it may shed light on the actor's state of mind at the decisive moment, thus helping guide the trier of fact to a fair determination on the issue of intent. Ms. F made a wholly credible case, both in her written submissions and during oral argument, that her paramount preoccupation in 1980 was how she could avoid being expelled from France. With this concern uppermost in her mind, it is not unreasonable to doubt that she coolly balanced the pros and cons of obtaining French nationality or gave serious thought to the possibility that she might jeopardize her United States citizenship. Her act thus could be described as impulsive. Under such circumstances the probability that Ms. F made a knowing and intelligent forfeiture of her United States nationality seems remote indeed.

The Supreme Court has held that where deprivation of citizenship is at issue, the "facts and the law should be construed so far as it is reasonably possible in favor of the citizen." Nishikawa v. Dulles, 356 U.S. 129, 134 (1958); Schneiderman v. United States, 320 U.S. 118, 122 (1943). We are, thus, required to examine the record in the light of this mandate.

Surveying the entire record we note no express acts or words of appellant's that manifest an intention in 1980 to forfeit United States nationality. We therefore conclude that the Department has not carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States nationality when she was reintegrated into French nationality upon her own application.

V

Upon consideration of the foregoing, we hereby reverse the Department's determination of August 12, 1982 that appellant expatriated herself.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Howard Meyers, Member