October 4, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E E I B

This is an appeal from an administrative determination of the Department of State that appellant, E E I B , expatriated himself on April 9, 1981 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application. 1/

The main issue to be determined is whether the Department has met its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States nationality when he obtained Australian citizenship. For the reasons given below, we conclude that the Department has carried that burden. Accordingly, we affirm the Department's determination that appellant expatriated himself.

I

Appellant was born at [redacted], Egypt on [redacted]. He immigrated to the United States in 1968 and married a Syrian citizen here in 1971. A daughter was born in New York in 1973. From 1971 to 1973 appellant attended junior college. Allegedly unable to find work

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1/ In 1981 section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read in pertinent part as follows:

> **Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --**
>
> > (1) obtaining naturalization in a foreign state upon his own application,...

Pub. L. 99-653 (1986), 100 Stat. 3655, amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

as a teacher in the United States, he decided to go to Australia where he heard there was a demand for teachers. In June 1974 he obtained an immigrant visa from the Australian Consulate General in New York which was stamped in the Egyptian passport he obtained the preceding month. In September 1974 he was naturalized before the United States District Court for the Eastern District of New York and obtained a United States passport.

Appellant, his wife, and child were admitted to Australia in October 1974 as "migrants." A second child was born in Australia. In 1978 appellant obtained permission to leave Australia and to return as a permanent resident. In December 1978 he went to the United States for a short visit, allegedly to look for work. He returned to Australia in February 1979.

In September 1979 appellant obtained a new United States passport from the Consulate General at Melbourne. At that time he was informed that his citizenship might be subject to revocation under section 340(d) of the Immigration and Nationality Act, 8 U.S.C. 1451(d). That section provided that if a naturalized U.S. citizen left the United States for a foreign country to take up permanent residence within five years (since 1986, within one year) of his naturalization, such action would be prima facie evidence of a lack of intention at the time of filing for naturalization to live permanently in the United States and, in the absence of countervailing evidence would be sufficient in a judicial proceeding to authorize the revocation of a person's citizenship. A consular officer executed an affidavit in September 1979, attesting to the fact that appellant had established a permanent residence in Australia within five years of his naturalization. The Department thereafter recommended to the Department of Justice that proceedings be instituted for the revocation of appellant's citizenship. The Department of Justice declined, however, to institute proceedings.

Appellant applied to be naturalized as an Australian citizen, allegedly at the insistence of his wife. On April 9, 1981, after making an affirmation of allegiance (in lieu of oath), appellant was granted a certificate of Australian citizenship. His daughter, who was born in New York was included in his grant of citizenship. It appears that appellant's wife was also naturalized at the same time. Two months later, appellant's wife left him and returned to the United States with the two children.

Appellant's Australian naturalization came to the attention of the Consulate General at Melbourne in early

1985 when appellant applied for a new U.S. passport, the passport issued in 1979 having expired on September 18, 1984. 2/ On that occasion, a consular officer advised appellant by letter that he might have expatriated himself by obtaining naturalization in a foreign state and informed him that he might submit evidence for the Department to consider in determining his citizenship status. Appellant was asked to complete a form titled "Information for Determining U.S. Citizenship." He completed and returned the form in March 1985. The Consulate General referred the case to the Department for its opinion.

The Department instructed the Consulate General to process appellant's case as one of loss of nationality, and to execute a certificate of loss of nationality in appellant's name. This a consular officer did on July 26, 1985. 3/ The certificate attested that appellant

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2/ Australian authorities customarily inform the Embassy of the country concerned when one of its citizens obtains Australian naturalization, and forward that person's passport to the issuing authority. In appellant's case, however, United States authorities where not so notified because, it appears, appellant surrendered his Egyptian passport at the time of his naturalization not the United States passport issued to him in 1979.

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, provides that:

> 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.

acquired United States nationality by virtue of naturalization before the United States District Court for the Eastern District of New York; that he obtained naturalization in Australia upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. More than a year later, the Department reached a decision in appellant's case, on October 14, 1986 approving the certificate that the Consulate General had executed. Approval of the certificate constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

In notifying the Consulate General of its decision, the Department noted that appellant had been required to take an oath of allegiance to Australia (actually, he made an affirmation, according to his certificate of citizenship), and that the oath included specific renunciatory language with respect to other nationalities. 4/ The Department's opinion concluded:

> In light of the Richards and Meretsky cases, [Richards v. Secretary of State, 752 F.2d 1413, 9th Cir. 1985) and Meretsky v. Department of State, et al., memorandum opinion, (Civil Action 85-1985 D.D.C., 1985), aff'd., memorandum opinion (NO. 86-5184, D.C. Cir, 1987)] Dept concludes that the facts presented in this case reflect that Mr. B obtained Australian nationality and took an oath of allegiance to Australia containing renunciatory language with respect to other nationalities voluntarily, albeit reluctantly,

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4/ The affirmation of allegiance prescribed by Schedule 2 of the Australian Citizenship Act of 1948-1969, as amended, reads as follows:

> I, ..., renouncing all other allegiance, solemly and sincerely promise and declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfill my duties as an Australian citizen.

with the intent to relinquish U.S. nationality. Although Mr. B claims to have acquired Australian nationality and taken the oath of allegiance at the behest of his wife in the interests of family unity, the subsequent breakdown of the marriage and thus the elimination of his stated reason for committing the acts has no bearing on his intent at the time the acts occurred. The fact that Mr. B departed the United States shortly after naturalization as a U.S. citizen, thus causing himself to fall under the presumption of section 349(d) INA and Post's 1983 development of that case is also noted.

An appeal was entered on September 17, 1987.

II

The Immigration and Nationality Act provides that a national of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state upon his own application with the intention of relinquishing United States nationality. 5/

The parties here agree that appellant duly obtained naturalization in Australia and thus brought himself within the purview of the statute. The first question to be determined therefore is whether appellant's act of applying for and obtaining Australian citizenship was voluntary.

In law, it is presumed that a person who performs a statutory expatriating act does so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntary. 6/ Appellant thus bears the burden of

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5/ Text note 1 supra.

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

(c) Whenever the loss of United States nationality is put in issue in any action or proceeding

rebutting the presumption that he obtained Australian citizenship voluntarily.

Appellant contends that his naturalization was involuntary because his wife forced him to become an Australian citizen. He stated his case as follows:

> In 1981, my wife kept insisting on becoming an Australian Citizen. I refused because I wanted to keep my American Citizenship, which I was very proud of. As I was a resident of Australia, I did not need an Australian Citizenship. My wife insisted because she wanted an Australian Passport for the whole family. She had a Syrian Passport, my youngest daughter had an Australian Passport as she was born here, my eldest daughter had an American Passport. I had an American Passport. I kept refusing, which deeply distressed my wife. This caused me to be concerned about our relationship, and the unity of our family. I wanted to try to make my wife happy. So I discussed the matter with her again, she promised that if in the future we wanted to go to

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> 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.

Pub. L. 99-653 (1986), 100 Stat. 3655, repealed section 349(b) but did not redesignate section 349(c), or amend it to reflect repeal of section 349(b).

> America again, we'd apply through her family who are naturalized Americans and live in Brooklyn, New York. It was only by this promise, after a great deal of pressure by her, which convinced me that we could become American Citizens again. Thus the four of us became Australian Citizens on the 9th of April, 1981.
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> I did not become aware of the reasons for the pressure put on me by my wife until June 1981, when she abducted the children and took them to New York where she still resides safe in the knowledge that I could not pursue her as I could not permanently stay in America.

He supported the foregoing allegations with evidence from three friends who state that they have known him for many years and attest to the pressure exerted on him by his wife.

We will accept that appellant might not have obtained Australian citizenship had his wife not insisted that he and the family do so. The question is, however, whether, as a matter of law, such pressure constitutes duress, thus rendering appellant's acquisition of Australian citizenship involuntary.

Duress connotes absence of opportunity to make a choice. Conversely, opportunity to make a decision based upon personal choice is the essence of volunariness. Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971); cert. denied, 404 U.S. 946 (1971). Under certain circumstances family obligations may be so compelling as to negate freedom of choice. See Prieto v. United States, 289 F.2d 12 (5th Cir. 1961); Jubran v. Dulles, 255 F.2d 81 (5th Cir. 1958); Mendelsohn v. Dulles, 207 F.2d 37 (1953); Takehara v. Dulles, 205 F.2d 560 (9th Cir. 1961); Ryckman v. Acheson, 106 F.Supp. 739 (S.D. Tex. 1952).

Generally, the circumstances which led one to perform an act in derogation of United States citizenship must be unusual and exigent before the courts will consider that the actor was deprived of freedom of choice. In Mendelsohn v. Dulles, supra, the petitioner performed an expatriative act under the duress of marital devotion; his wife was gravely ill and he remained abroad in excess of the time allowed him as a naturalized citizen to care for her. Plaintiff in Ryckman v. Acheson, supra,

also remained abroad longer than permitted by statute in order to care for her aged, infirm mother. The upbringing of petitioner in Takehara v. Dulles, supra, required him to follow the dictates of his parents and thus led him to perform an expatriative act.

Performing an act to gratify a spouse or parent, however, clearly is insufficient to persuade a court that a person had acted involuntarily. In Prieto v. United States, supra, the petitioner, an alien, obtained an exemption from military service "against my better judgment, because my mother wanted me to sign it [a form for relief from military service]." (She associated the illness and death of appellant's older brother with the army and wished her younger son to have nothing to do with the military.) Some years later he applied for naturalization as a United States citizen but his petition was denied on the grounds that he was barred under law from becoming a United States citizen by virtue of having obtained an exemption from military service. He contended that his mother's pressure to sign the request for exemption amounted to legal duress. The court held that he acted voluntarily. "It seems probable," the court stated, "that the appellant's primary motive in signing the form was to satisfy his mother." The court continued:"

> Though we may sympathize with the plight in which the appellant found himself, yet the filial duty of the son does not afford any escape from the effect of the statute. The appellant was not misled in any respect. He was fully aware of the consequence of taking the exemption. He made an election and the making of it was deliberate and after seeking advice. He made his voluntary election against his better judgment but having made it and having had the benefit of it he must be held to the result that Congress has imposed. Jubran v. United States, 5 Cir., 1958, 255 F.2d 81; Kahook v. Johnson, 5 Cir., 1960, 273 F.2d 413.

It is reasonable to assume that appellant was aware of the consequences of obtaining Australian citizenship. His submissions to the Board indicate that he knew he could jeopardize his United States nationality by becoming an Australian. Furthermore, according to notes of the consular officer who interviewed appellant in March 1985, appellant claimed that he visited the Consulate General shortly before or just after obtaining Australian

citizenship and was advised at that time that he might lose his citizenship. It might therefore be said that he made a decision to obtain Australian citizenship against his better judgment.

It is understandable that appellant wanted to preserve his marriage, but he may not escape the effect of the expatriating provisions of the statute by asserting that he had no choice but to acquiesce in his wife's demands. Of course, he owed his wife a duty to protect, support and care for her. His marital obligation did not extend, however, to acquiescing in an action that he did not really want to take. Absent a showing of a legal duty to agree with her when she pressed him to do so, marital devotion does not constitute evidence of duress sufficient to eliminate appellant's freedom of choice.

Appellant did have a choice: to make a strong stand vis-a-vis his wife against jeopardizing his United States citizenship which he professes to prize highly, or to give in to her. He chose the latter.

We conclude therefore that appellant has not rebutted the presumption that he obtained Australian naturalization voluntarily.

III

The remaining question is whether appellant intended to relinquish his United States nationality when he obtained naturalization in Australia. Under the holding of the Supreme Court in Vance v. Terrazas, 444 U.S. 252, 263 (1980), the government bears the burden of proving that a citizen who performed a statutory expatriating act did so with the intention of relinquishing his United States citizenship. Intent is to be proved by a preponderance of the evidence. Id. at 267. It may be expressed in words or found as a fair inference from the party's proven conduct. Id. at 260. It is the individuals's intent at the time the expatriating act was performed that the government is required to prove. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The Department submits that the following considerations support a finding that appellant intended to relinquish his United States nationality.

-- naturalization in a foreign state is in itself indicative of an intent to abandon citizenship

-- in the affirmation of allegiance made by appellant he expressly renounced "all other allegiance"

-- his brief sojourn in the United States after he became a naturalized American citizen calls into question the credibility of his assertion that he has, or indeed ever had, a strong attachment to the United States

-- nothing in the record mitigates, let alone contradicts, appellant's express renunciation of his allegiance to the United States.

Declaring allegiance to a foreign state may be highly persuasive evidence of an American citizen's intent to relinquish United States nationality. But, as the Supreme Court said in Vance v. Terrazas, supra, at 261, it is not conclusive evidence of such a purpose. In cases where, as here, a citizen expressly renounces United States nationality in the course of making a declaration of allegiance to a foreign state, the courts have held that such words constitute compelling evidence of an intent to relinquish United States citizenship. Indeed, such statements have been the main (but not sole) factor supporting a finding of loss of nationality in a number of cases decided after Vance v. Terrazas, supra. The same cases make it clear that in order to conclude that a person intended to relinquish United States citizenship, the trier of fact must also conclude that the individual acted knowingly, intelligently and voluntarily, and that there are no other factors that would justify a different result.

In Terrazas v. Haig, supra, the court found abundant evidence of the petitioner's intent to relinquish United States citizenship in the fact that he willingly, knowingly and voluntarily made a declaration of allegiance to Mexico that included renunciation of his United States citizenship, and in his subsequent conduct. 653 F.2d at 288. In Richards v. Secretary of State, 752 F.2d 1413, 1421 (9th Cir. 1985), the court held that "the voluntary taking of a formal oath of allegiance that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to renounce United States citizenship," provided that there are no factors that would justify a different result. 752 F.2d at 1421. Similarly, Meretsky, v. United States Department of Justice, et. al., CA No. 86-5184, memorandum opinion (D.C. Cir. 1987).

Under the criteria laid down by the leading cases, the direct evidence of appellant's intent to relinquish his United States citizenship is very compelling. But we must address a further question: whether appellant

knowingly and intelligently obtained naturalization in Australia and made an affirmation of allegiance to the Queen of Australia. Appellant evidently is an educated man. When he became an Australian citizen appellant was 40 years old. As we have seen, he indicated to the Board that he knew naturalization in a foreign state might adversely affect his United States citizenship. It is therefore evident that appellant did not perform the expatriative act inadvertently or under any misapprehension about what he was doing.

Finally, we must inquire whether there are any factors in the case of sufficient probative weight to countervail the highly persuasive evidence of an intent to relinquish American nationality that appellant manifested when he pledged allegiance to the Queen of Australia and affirmed that he renounced all other allegiance.

Appellant submits that a number of considerations warrant a finding that he did not intend to relinquish his United States nationality. He professes a strong attachment to the United States and is anxious to be able to return to the United States as a citizen to be reunited with his children. He told a consular officer in March 1985 (after he obtained naturalization) that he had resisted obtaining an Australian passport and continued to hold himself out as an American citizen precisely because he had no intention of relinquishing his United States citizenship.

We do not consider that the foregoing factors are sufficiently probative of an intent to retain citizenship to counterbalance the highly persuasive evidence of a renunciatory intent by appellant's express renunciation of all other allegiance. We sympathize with appellant's natural wish to be with his children but paternal devotion does not in itself indicate that he lacked the requisite intent in 1981. Nothing of record substantiates appellant's contention that he conducted himself as a United States citizen after his naturalization as an Australian. In brief, there is no reason to doubt that in 1981 appellant intended to transfer his allegiance from the United States to Australia, as he formally affirmed in 1981.

After reviewing the entire record, we are of the opinion that the Department has carried its burden of proving that appellant intended to relinquish his United States nationality when he obtained naturalization in Australia upon his own application.

IV

Upon consideration of the foregoing, the determination of the Department that appellant expatriated himself is affirmed.

Alan G. James, Chairman

Mary Elizabeth Hoinkes, Member

Howard Meyers, Member