July 20, 1989

DEPARTMEMT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M L G

This is an appeal from an administrative determination of the Department of State that M L G expatriated himself on May 27, 1976, under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Canada upon his own application. 1/

The principal issue presented in this appeal is whether appellant's naturalization was accompanied by an intent to relinquish United States citizenship. For the reasons that follow, we conclude that the government has not satisfied its

---

1/ In 1976, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481, read in pertinent part as follows:

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

Section 349(a)(1) of the Act, 8 U.S.C. 1481, was amended by Pub. L. No. 99-653, 100 Stat. 3658 (Nov. 14, 1986), as amended by Pub. L. No. 100-525, 102 Stat. 2619, 2622 (Oct. 24, 1988). It now reads:

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality --
>
> (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; ...

burden of proof that the expatriating act was performed with such intent. Accordingly, we reverse the Department's determination of loss of United States nationality.

I

Appellant, M L G , acquired United States citizenship by virtue of his birth at [redacted].

In September 1968, appellant took up residence in Canada. He married a Canadian citizen in 1970. According to appellant, he entered law school at the University of Toronto in September 1975, at age 30, and applied for Canadian citizenship early in 1976. He said that he decided to pursue a career in law and understood that only Canadian citizens could practice law in Canada. Appellant also believed that being a Canadian citizen would improve his chances of summer employment by law firms while in law school. On May 27, 1976, appellant took an oath of allegiance, as prescribed by Canadian law, and was granted a certificate of Canadian citizenship. 2/

The oath of allegiance as then prescribed by the Canadian Citizenship Act read:

> 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.

The record shows that sometime in 1986, ten years after he became a Canadian citizen, appellant sought clarification of his citizenship status at the United States Consulate General at Halifax with a view to obtaining a passport to visit his sister in Hong Kong. At the Consulate General's request he completed a citizenship questionnaire to facilitate determination of his citizenship status and entitlement to consular services. Appellant also executed an application for registration as a United States citizen.

2/ The record provides meager information about appellant's activities in Canada from the time he entered that country in 1968 until he obtained Canadian citizenship in 1976.

Thereafter, a consular officer prepared, on June 30, 1986, a certificate of loss of United States nationality in appellant's name, in compliance with section 358 of the Immigration and Nationality Act. 3/ In a memorandum transmitting the certificate of loss of nationality and appellant's application for registration to the Department for consideration, the consular officer recommended that the Department approve the certificate of loss of nationality and disapprove appellant's application for registration.

In support of the adverse recommendation, the consular officer gave the following assessment of appellant's intent:

> Mr. G is a lawyer and became a Canadian citizen in order to be admitted to the Canadian Bar. Canadian citizenship is a requirement for such admission. He took an oath of allegiance to the Queen but did not take any oath of renunciation of former citizenships. He said that he did not intend to relinquish American citizenship by his naturalization in Canada. He votes and owns property in Canada. He does

---

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.

not vote in the U.S. He has carried his Canadian Citizenship Card for identification when crossing the American-Canadian border, but is not sure whether he displayed it. He votes in Canada, does not vote in the U.S. He describes in his application a certain indifference as to whether or not he was likely to lose U.S. citizenship.

The Department approved the certificate of loss of nationality on July 9, 1986, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to this Board. The Consulate General forwarded to appellant a copy of the approved certificate.

This appeal followed. Appellant contends that he did not intend to relinquish his United States citizenship when he sought and obtained naturalization in Canada.

The record on which the Department made its determination of loss of nationality in this case consisted of the following items: 1) a copy of an application of the Consulate General at Halifax in 1986 to Canadian authorities for a search of Canadian citizenship records regarding appellant's Canadian citizenship which he had acquired in 1976, 2) appellant's citizenship questionnaire of April 15, 1986, 3) appellant's application for registration as a United States citizen which he executed on June 27, 1986, 4) a memorandum of the Consulate General dated June 27, 1986, and 5) a certificate of loss of nationality in appellant's name that was prepared by the Consulate General on June 30, 1986.

II

Section 349(a)(1) of 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 with the intention of relinquishing United States nationality. There is no dispute that appellant sought and obtained Canadian citizenship, nor is there any dispute that he voluntarily became a Canadian citizen. Appellant admitted in his citizenship questionnaire and submissions to the Board that the act was voluntary.

Although appellant voluntarily obtained naturalization in Canada, there remains the issue whether he performed that expatriating act with the intention of relinquishing United States nationality. It is settled that, even though a citizen voluntarily performs a statutory expatriating act, loss of citizenship will not ensue unless it is proved that the

citizen intended to relinquish his United States nationality. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967). It is the government's burden to prove a party's intent by a preponderance of the evidence. Vance v. Terrazas, supra, at 267. Intent may be expressed in words or found as a fair inference from proven conduct. Id., at 260.

The citizen's intent to relinquish citizenship is to be determined as of the time of the performance of the statutory act of expatriation. The person's own words or conduct at the time the expatriating act occurred are to be looked at in determining his or her intent. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). It is recognized, however, that a party's specific intent to relinquish citizenship "rarely will be established by direct evidence", but that circumstantial evidence surrounding the performance of a voluntary act of expatriation may establish the requisite intent, Terrazas v. Haig, supra, at 288. In the case before the Board, the intent that the government must prove by a prepondèrance of the evidence is appellant's intent at the time he voluntarily obtained naturalization in Canada in May 1976.

The only contemporaneous evidence bearing on appellant's intent in 1976 is the fact that he voluntarily obtained naturalization in Canada, took the prescribed oath of allegiance to Queen Elizabeth the Second, and swore to faithfully observe the laws of Canada. Although the act of obtaining naturalization may be considered highly persuasive evidence of an intent to relinquish citizenship, it is not conclusive evidence of the assent of the citizen. The Supreme Court stated in Vance v. Terrazas, supra, at 261:

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

The first expression of appellant's intent in the record appears some ten years later in his citizenship

questionnaire of April 15, 1986. He gave the following explanation of his intention when he obtained naturalization:

> In the normal sense of 'intend', I did not intend to give up my US citizenship. I was told by some of my friends (Canadian) that I would lose it automatically when I became a Canadian. Since the US and Canada are more like siblings than enemies, I could not see why this was necessary, and it seemed contrary to the spirit of the Constitution. Nevertheless, I became a Canadian without pursuing the matter further. In short, I was willing to take the risk of losing my American status, but I was firmly convinced that it would have to be taken from me. I remember wondering what was going to happen if and when the American Embassy in Canada learned of my naturalization. Since apparently nothing ever happened, I just let it go. Except for purposes of finding a job in Canada, my citizenship made no difference. I was content to reside and vote in the jurisdiction where I studied and would find a job.

In his later submissions to the Board, appellant reiterated his statements of lack of intent to relinquish his United States citizenship.

The Department acknowledges that the primary evidence of appellant's intent to relinquish his citizenship is his act of obtaining naturalization in Canada in 1976 and taking an oath of allegiance. While conceding that such conduct is persuasive but not conclusive evidence of a person's intent, the Department asserts that appellant's "admissions augment that evidence by reflecting on his intent with regard to his citizenship prior to and at the time of his naturalization." The "admissions" referred to are statements appearing in appellant's 1986 citizenship questionnaire concerning his belief that he could lose his citizenship if his naturalization were discovered and his willingness to take that risk and proceed with his naturalization without pursuing the matter further.

The Department submits:

> Although Mr. G. believed that he ran a substantial risk of losing

> his citizenship -- indeed, that he would lose it if discovered -- he decided to pursue his naturalization without making the most basic of inquiries. [footnote omitted] In the Department's view, this degree of deliberate, knowing and voluntary risk taking, given Mr. G 's belief that he could lose his citizenship if his naturalization were discovered, is tantamount to intent to relinquish. A well educated man, he knew and understood the risk he was incurring and he freely and voluntarily chose to incur that risk. In the Department's view, intent to relinquish his U.S. citizenship can fairly be inferred from appellant's deliberate and knowing assumption of risk.

We find the Department's view untenable. The intent that the government must prove is appellant's intent when he was naturalized in 1976, and not when subsequent discussions of the expatriative act occurred. Apart from his performance of that expatriative act, admittedly persuasive but not conclusive evidence of intent, there is no other contemporaneous evidence of appellant's intentions about his United States citizenship. It was not until appellant sought clarification of his citizenship status at the Consulate General at Halifax some ten years later (1986), and completed, as requested, a citizenship questionnaire that he gave his recollection of what he believed his views and intentions were at the time he became a Canadian citizen. Although he was aware that he might lose his citizenship as a consequence of his naturalization in Canada and was willing to take that risk, appellant stated that he did not intend to give up his United States citizenship. In our opinion, appellant's admissions in his citizenship questionnaire that he was willing to take the risk of losing his citizenship and to proceed with his naturalization without inquiring about its legal consequences are inconclusive as to his intent. Knowing or believing that an act might result in loss of citizenship is not the same thing as intending to give up that citizenship.

As to the fact that appellant proceeded with his naturalization "without making the most basic of inquiries," it may have been imprudent for him to proceed without first seeking competent advice from a consular officer regarding the consequences of his naturalization for his United States citizenship. In his submissions, appellant explained that he mistakenly believed that he could lose his citizenship only by expressly renouncing it or having the government take it away,

and that, by informing a consular officer, he would increase the risk that his citizenshp would be taken away from him. He said that he "did not want to tip the government off that I was going to become a Canadian citizen", and that he believed that his failure to talk with consular officers "seemed like a way of protecting my citizenship." We are unable to attribute to appellant's conduct in the circumstances or infer from such conduct a renunciatory intent. Appellant's failure to seek advice prior to his naturalization does not provide a basis for a finding of an intent to surrender United States citizenship.

The Department also recites in its brief that appellant owned property in Canada, voted in Canadian elections, has not voted in any United States election, carried his Canadian citizenship card among other forms of identification when crossing the United States-Canadian border, and acquired a Canadian passport after the Consulate General issued a certificate of loss of United States nationality in his name. Although the Department is not contending that such acts manifest appellant's intent to relinquish his United States citizenship, we fail to see how these acts could reasonably support a finding that his naturalization was accompanied by an intent to terminate United States citizenship. The acts may be explainable on grounds having little, if any bearing, on the intent to abandon citizenship.

In our view, the evidence that the Department presented in this case is insufficient to support a finding that appellant intended to relinquish his United States citizenship when he became a Canadian citizen. As noted, the only concrete and direct evidence on the matter of appellant's intent at the time he obtained naturalization is the fact that he performed the statutory act of expatriation and swore an oath of allegiance to Queen Elizabeth the Second. The oath did not include a renunciation of United States citizenship. While naturalization may be highly persuasive of an intent to relinquish United States citizenship, it is not, while alone, conclusive evidence of such an intent. With respect to circumstantial evidence surrounding his naturalization, derived entirely from appellant's admissions in his citizenship questionnaire and other submissions to the Board, made ten years or more after he was naturalized, we find no clear expression of a design to sever his allegiance to the United States.

It is the government's burden to establish by a preponderance of the evidence that the expatriating act was performed with the intent to relinquish citizenship. In our judgment, the Department has not satisfied its burden of proof.

III

Upon consideration of the foregoing, we are unable to conclude that appellant expatriated himself by obtaining naturalization in Canada and, hereby, reverse the Department's determination that he expatriated himself.

Alan G. James, Chairman

Edward G. Misey, Member

Howard Meyers, Member