August 25, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M C P - On Motion for Reconsideration

In a decision rendered May 25, 1989, the Board of Appellate Review concluded that the Department of State did not carry its burden of proving that M C P intended to relinquish his United States nationality when he obtained naturalization in Panama upon his own application. 1/ Accordingly, the Board reversed the Department's determination of appellant's expatriation.

The Department filed a motion for reconsideration of the Board's decision on June 29, 1989. 2/ Appellant filed a memorandum in opposition to the Department's motion on June 30, 1989. For the reasons given below, the Board denies the Department's motion for reconsideration.

I

The Department submits that the Board erred in not giving significant evidential weight to the oath appellant made upon being granted naturalization in Panama in which he swore that he renounced his United States nationality. In the Department's opinion, the Board discounted the evidential significance ordinarily accorded to such an oath, treating it as just one piece of evidence, entitled to roughly equal

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1/ An officer of the United States Embassy at Panama executed a certificate of loss of nationality in appellant's name on August 12, 1986, certifying that appellant expatriated himself on October 17, 1984 under the provisions of section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), by obtaining naturalization in Panama upon his own application. The Department approved the certificate on November 13, 1986. Pierce took a timely appeal from the Department's adverse decision regarding his citizenship.

2/ Section 7.10 of Title 22, Code of Federal Regulations, 22 CFR 7.10 (1989), provides that the Board may entertain a motion for reconsideration of a decision of the Board filed by either party within 30 days of receipt of a copy of the Board's decision. The motion shall state with particularity the grounds of the motion, including any facts or points of law that the moving party contends the Board overlooked or misapprehended in reaching its decision.

weight with other facts and circumstances. The Department asserted that the Board held that evidence of unsubstantial weight was sufficient to outweigh the evidence of intent to relinquish United States citizenship that is normally associated with a renunciatory oath.

With respect to the latter point, the Department cited evidence to which the Board, erroneously in the Department's opinion, gave significant weight - evidence that was neither relevant to nor probative of appellant's intent at the time he performed the expatriative act. The first of the Board's major evidentiary findings which the Department faulted was the Board's deeming appellant's 1982 letter to the Department to be part of a pattern of conduct showing a will to retain citizenship. The Department considered that letter to be merely an expression of hope he would not lose his citizenship, not a clear statement of intent to retain citizenship. Its remoteness in time from the expatriative act also robbed it of evidential significance. The second finding to which the Board gave undue weight, in the Department's opinion, was appellant's extensive involvement and participation in the affairs of the United States civilian and military community in Panama. Such activities are not, in the Department's view, per se reflective of an intent to retain United States citizenship. Third, the Department believed that the Board erred in giving preponderant evidentiary weight to the testimonial affidavits executed by American citizens prominent in public life in Panama. This evidence is of insubstantial weight, the Department argues, because it consists almost entirely of self-serving statements of appellant and his witnesses about his general state of mind over an extended period; the affidavits do not focus on the issue of his intent at the critical moment.

The Department also takes issue with the Board's use of what it describes as "two new and somewhat inconsistent criteria" for determining that appellant must not have meant the categorical and unequivocal oath of renunciation that he took before Panamanian officials. First, the Department asserts that "the Board erred in concluding that although appellant obtained naturalization voluntarily, he did not have the requisite intent to relinquish citizenship because he perceived he was acting under duress sufficient to render the expatriating act involuntary." In the Department's view, appellant simply faced a difficult situation about his professional career, not a life or death situation; he was aware that he had alternatives to obtaining naturalization in Panama.

Second, the Department contends that even if a fleeting moment of intent were a legally insufficient basis upon which to base a holding of loss, there is no factual basis for the conclusion that appellant intended only for one fleeting

moment to relinquish his U.S. citizenship, for the record shows that although he did not wish to lose his citizenship, he knowingly and intelligently chose to become a Panamanian citizen and to renounce his American citizenship in order to reap the benefits of Panamanian citizenship. Having made his choice, he cannot now avoid the consequences of his act because of a convenient after-the-fact change of mind, asserts the Department, citing the holding of the court in Richards v. Secretary of State, 752 F.2d 1413, 1421-1422 (9th Cir. 1985):

> Whenever a citizen has freely and knowingly chosen to renounce his United States citizenship, his desire to retain his citizenship has been outweighed by his reasons for performing an act inconsistent with that citizenship. If a citizen makes that choice and carries it out, the choice must be given effect.

II

The Department makes important points in its motion which merit careful discussion.

The Board does not agree that it discounted the significance ordinarily accorded an oath of allegiance made to a foreign state that includes renunciation of United States nationality. In considering appellant's probable intent at the time he obtained naturalization in Panama, the Board premised its analysis on the applicable case law which, the Board carefully pointed out, makes it clear that renouncing United States nationality while performing a statutory expatriative act is ordinarily sufficient to establish a specific intent to divest oneself of American nationality. The Board quoted the holding of the Supreme Court in Vance v. Terrazas, 444 U.S. 252, 261 (1980), to the effect that performance of any of the statutory expatriative acts may be highly persuasive evidence of an intent to relinquish United States citizenship. The Board continued that the evidence of an intent to relinquish citizenship "becomes even more compelling" if an American citizen also renounces United States citizenship, citing Richards v. Secretary of state, 752 F.2d 1413 (9th Cir. 1985), and Meretsky v. U.S. Department of Justice, et al., No. 86-5184, memorandum op. (D.C. Cir. 1987). At the same time, the Board took note that the Supreme Court stated categorically in Terrazas that performance of a statutory expatriative act cannot be considered conclusive evidence of a person's intent to relinquish citizenship.

The Department appears to have misconstrued the Board's analytical approach to determine whether there were any factors in the case that might warrant the Board's concluding

that, despite naturalization and making a renunciatory declaration, appellant probably did not intend to forfeit his United States citizenship.

As indicated above, the Board assigned high probative value to appellant's obtaining foreign naturalization and making a renunciatory oath. At the same time, the Board took the position that despite the great probative value of those acts, it was conceivable and consistent with the principles of the applicable case law that other facts and circumstances might, in their totality, outweigh even highly persuasive evidence dating from the critical time. The Board believed and believes that the case law amply bears it out on the latter proposition; specifically, that it would be inconsistent with the Supreme Court's holding in Vance v. Terrazas, 444 U.S. 261, 270, to maintain that a renunciatory oath may never be outweighed by other factors. If the Court's mandate that the trier of fact shall weigh all the evidence to determine whether the government has met its burden of proof means anything, it means that no single act shall be dispositive on the issue of the person's intent. The Seventh Circuit made it clear in Terrazas v. Haig, 653 F.2d 285 (1981) that the entire sweep of a person's acts and words must be scrutinized to determine the issue of intent, not just his statements and actions at the time the expatriative act was done, even if, as did the plaintiff in Terrazas, the person expressly renounced U.S. citizenship while making an oath of allegiance to a foreign state. The Ninth Circuit too made it clear in Richards, v. Secretary of State, 752 F.2d 1421 that the trier of fact must scrutinize all the facts and circumstances to determine whether there are any factors that might warrant concluding that the citizen did not intend to relinquish citizenship.

Thus, it seems to the Board, the pertinent inquiry is whether the evidential findings that the Board made in the instant case are entitled to weight sufficient to diminish the probative value of the evidence of an intent to relinquish citizenship manifested by the renunciatory oath of allegiance appellant made in 1984. The weight to be given to the other factors in the case is a question of fact, not of law. As finder of fact, the Board has the responsibility to make this determination. The Board determined that a number of elements which the Department considers insubstantial raised material doubt whether appellant intended in 1984 to relinquish United States nationality, and accordingly, that such doubt had to be resolved in favor of continuation of appellant's citizenship.

The letter appellant wrote to the State Department in 1982 was treated by the official who replied to it as evidence that appellant intended to retain his United States nationality, should he consider that he had no alternative to obtaining Panamanian citizenship. Appellant thus was entitled

to rely, and the evidence shows did rely on the official's response. Granted, appellant's letter was written two years before he performed the expatriative act. Nonetheless, it is concrete evidence of a concern about his United States citizenship that is not isolated, but rather is part and parcel of a consistent course of pro-citizenship conduct.

We find it anomalous that the Department is dismissive of the evidential significance of appellant's leading involvement and participation in the activities of the American community in Panama. There is abundant, credible evidence from appellant and many friends that from his arrival in Panama to date appellant did all the things that the Department normally considers show a will to retain United States citizenship. Not only was appellant a leader in the life of the American community, but he also discharged all the obligations of United States citizenship (e.g., paid taxes, took part in political affairs) while holding himself out consistently as a United States citizen.

We do not agree with the Department that the declarations of the affiants who support the appeal are entitled to little weight. Of course, there is a self-serving element in submissions of this kind. The affiants here, however, have known appellant for many years and presumably are competent to testify to his attitudes toward the United States and his citizenship. Moreover, these affiants are United States citizens whose careers and positions lend weight to the veracity of their declarations. Their evidence is relevant and material, for it tends to shed light on appellant's probable state of mind before, at and after his performance of the expatriative act.

In sum, the Board's three major findings of fact that the Department finds unpersuasive assume evidential significance not in isolation but when looked at as part of a composite.

We turn briefly to the other points the Department made in its motion for reconsideration.

The Board did not state that appellant lacked the requisite intent to relinquish citizenship because he perceived that he was acting under duress sufficient to render the act involuntary. What the Board said in its opinion was that:

> Although we hold that appellant's naturalization in Panama was voluntary as a matter of law, his perception that he was acting under duress, a perception which has been amply documented by many affiants, lends substance to his claim

> that he did not mean what he swore to in October 1984.

We cannot therefore accept the Department's contention that:

> Although no provision is made in the Board's regulations for administrative stare decisis, the Department considers this case harmful to the principle of consistent and equitable administration of the law. This case departs from the Board's long line of decisions where renunciatory oaths, some taken under situations of actual duress far more severe than that perceived by Mr. P , were the basis for loss of citizenship.

Standing alone, appellant's perception that he was forced into naturalization would not be relevant to the issue of his probable intent. However, since his allegation that he considered he was forced to become a Panamanian citizen was supported by credible testimony, we regarded it one element among others that raised doubts about whether he intended to relinquish U.S. citizenship.

The Board does not agree with the Department's contention that its decision is at odds with the decision of the Ninth Circuit in Richards v. Secretary of state, 752 F.2d 1413. While the Richards court said that a citizen's choice to relinquish his citizenship, if voluntarily and knowingly made, must be given effect, the court also made it quite clear at the beginning of its discussion of the issue of intent that other factors might warrant a finding of lack of intent to relinquish citizenship. In the case before the Board, the evidence does not show that appellant more probably than not chose to relinquish his U.S. citizenship. He pronounced a renunciatory oath but also did a range of things from which, in the Board's judgment, one might infer a will to retain citizenship. The Richards court did not spell out what factors might warrant a finding of lack of intent to relinquish citizenship; it was not required to do so. For the conduct of plaintiff Richards -- making a renunciatory oath and conducting himself in all things as a Canadian citizen after his naturalization -- manifested an unmistakable intention to relinquish citizenship. Making a determination whether other factors, such as the consistent conduct of appellant in the case now before the Board, warrant a finding of lack of intent lies within the province of the trier of fact and does not contravene the judicial guidelines by which the work of the Board is and must be governed.

III

Upon consideration of the Department's motion for reconsideration of the Board's decision on the appeal of M C P , the Board is of the view that the motion states no facts or points of law that the Board has overlooked or misapprehended. Accordingly, the Department's motion is hereby denied.

Alan G. James, Chairman

Howard Meyers, Member

Dissenting Opinion

I favor granting the Department's motion for reconsideration. This position flows naturally from my views of this case as stated in my dissent to the Board's decision of May 25, 1989. I remain firmly convinced that the Board's decision in this case constitutes an aberration in the Board's jurisprudence which is likely to have regrettable consequences in the future. The Board's decision denying the Department's motion for reconsideration repeats and aggravates the original errors, especially the Board's self-styled "analytical approach" in weighing the evidential factors bearing on the issue of P 's intent to relinquish his United States citizenship. The Board's analysis reaches the wrong conclusion because all of the "evidence" upon which the Board relies to outweigh P 's express renunciation of United States citizenship has no direct bearing upon the issue of P 's intent at the time the expatriative act was done. My reasons for this point on view are fully spelled out in my original dissent; they have not been affected by the additional writing which has been done since then by appellant P and by two members of the Board.

Warren E. Hewitt, Member