September 25, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D B M

The Department of State made a determination on December 8, 1988 that D B M expatriated himself on February 14, 1972 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/ M entered a timely appeal from that determination.

I

Appellant, D B M , was born at London, England on [redacted] to parents who were British citizens and so acquired the nationality of the United Kingdom at birth. He lived in the United Kingdom until 1951 when his parents brought him to the United States. His parents were naturalized on July 13, 1960 before the Superior Court, Santa Ana, California. Since at the time of his parents' naturalization appellant was twelve years old, he automatically acquired United States citizenship under the provisions of section 321(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1432(a)(1).

According to statements appellant made to United States authorities in 1966, he was convicted of assault in December 1965 by the California Youth Authority. 2/ In lieu of

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1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), provides that:

> 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 --
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> > (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; or ...

2/ During the processing of appellant's case in 1988, the Consulate General at Vancouver, at the request of the Department, put the following question to appellant:

sentencing him to prison for juveniles, the Authority allegedly agreed to suspend the sentence, provided appellant left the United States and remained abroad for two years. He left the United States in early 1966 and went to Australia and New Zealand, travelling on a British passport which he obtained in the United States.

It appears that appellant was convicted in Auckland on drug charges but was freed by the New Zealand authorities on condition that he leave New Zealand. Appellant returned to the United States in the fall of 1966, travelling on a United States passport, valid only for return to the United States. In January 1967 appellant went to Canada, allegedly to complete the two-year period of living abroad upon which the California Youth Authority conditioned its suspension of its 1965 sentence.

In June 1967 he married a U.S. citizen. The marriage ended in divorce, and he remarried in July 1983; his second wife is also a U.S. citizen. He has one child, born in Canada in 1985.

2/ (cont'd.)

> Do you have any documentation to support your statement that the California Youth Authority indicated you had the option of leaving the United States for two years in lieu of incarceration or further prosecution? If so, please submit.

Appellant replied as follows:

> Attached is a copy of a letter to my attorney , from attorney who represented me in 1966. Mr. letter basically sets forth my recollection except that I did not desire to leave the U.S., but rather accepted that option as what appeared the best available to me at the time. Mv present attorney , has telephoned the California Youth Authority in both Santa Ana and Sacramento, California, and has been advised that there is no record relating to me.

Appellant applied to be naturalized in Canada on January 12, 1972, because, as he later stated when his case was processed by the Consulate General at Vancouver, "I required a travel document immediately and the most expeditious method appeared to be by obtaining Canadian citizenship."

On February 14, 1972 he was granted a certificate of Canadian citizenship and made the following oath of allegiance:

> I, ..., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.
>
> So help me God.

As the Canadian citizenship authorities considered appellant a British subject by virtue of his birth in England, he was not required to subscribe to the declaration of renunciation of all other allegiance then required of non-British and certain other Commonwealth nationals.

Fifteen years later, appellant visited the United States Consulate General at Vancouver to establish his United States citizenship and to inquire about the modalities of returning to the United States to live. At that time his naturalization in Canada came to the attention of the United States authorities. The Consulate General formally advised him on June 10, 1987 that he might have expatriated himself, and requested that he complete questionnaires to facilitate determintion of his citizenship status. After he had done so and presumably was interviewed by a consular officer, the latter executed a certificate of loss of nationality in appellant's name, as required by law. 3/ The officer

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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

certified that appellant acquired the nationality of the United States by virtue of being included in the naturalization of his parents on July 13, 1960; that he acquired the nationality of Canada upon his own application; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The consular officer forwarded the certificate to the Department under cover of a detailed memorandum in which he recommended that the Department approve the certificate.

In the fall of 1987 the Department instructed the Consulate General to put a number of questions to appellant concerning the circumstances surrounding his naturalization and his conduct before and after naturalization. Appellant promptly executed an affidavit in October 1987 replying to those questions. Half a year passed. In June 1988, the Department instructed the Consulate General to ask appellant to reply to a number of additional questions, which he promptly did by affidavit. At the Department's request, appellant also signed an authorization for the Internal Revenue Service to release to the Department copies of income tax returns he reportedly filed during the period 1979-1986.

On December 8, 1988, the Department approved the certificate of loss of nationality that the Consulate General executed in appellant's name. Approval constitutes an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review, as prescribed by 22 CFR 7.5(a) and (b).

A timely appeal was filed through counsel.

II

Section 349(a)(1) of the Immigration and Nationality Act provides that a national of the United States shall lose

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3/ (cont'd.)

> 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.

his nationality by voluntarily obtaining naturalization in a foreign state after attaining the age of eighteen years with the intention of relinquishing United States nationality.

There is no dispute that appellant duly obtained naturalization in Canada when he was twenty-four years old, and thus brought himself within the purview of section 349(a)(1) of the Act. Since appellant has not contended that he acted involuntarily when he applied for and was granted Canadian citizenship, the sole issue to be determined is whether he intended to relinquish United States nationality when he obtained naturalization in Canada.

The government bears the burden of proving that one who performed a statutory expatriative act did so with an intent to relinquish United States nationality. Vance v. Terrazas, 444 U.S. 252, 262 (1980). Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The evidentiary standard is a preponderance of the evidence. Vance v. Terrazas, 444 U.S. at 267. Proof by a preponderance is proof which would lead the trier of fact to find that the existence of the contested fact is more probable than its non-existence. McCormick on Evidence, 3rd Ed., section 339. It is the citizen-claimant's intent at the time he performed the expatriative act that the government must prove. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

Any of the enumerated statutory expatriative acts may be highly persuasive evidence of an intent to relinquish United States nationality. Vance v. Terrazas, 444 U.S. at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), Black, J., concurring. But, the Supreme Court said, it would be inconsistent with Afroyim v. Rusk, 387 U.S. 252 (1967) to treat any of the statutory expatriative acts "as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen." Vance v. Terrazas, 444 U.S. at 261. Since a party's specific intent will rarely be established by direct evidence, circumstantial evidence surrounding performance of the expatriative act must be scrutinized to determine whether it will establish the requisite intent. Terrazas v. Haig, 653 F.2d at 288.

The Department submits that appellant's naturalization in Canada is the initial evidence of his intent to abandon his United States citizenship. It finds other evidence of his intent in his overall attitude and course of behavior. From an early age appellant has demonstrated a disinterest in his U.S. citizenship, asserts the Department. In 1966 he travelled abroad on a British passport, and did not register for Selective Service at eighteen, "at a time in U.S. history when being eligible for the draft was a constant worry of an eighteen year old." In 1972 when he needed a travel document, he felt it easier to apply for Canadian citizenship rather

than apply for a U.S. passport. In the Department's view, the record appears to rebut appellant's argument that his only motive was to obtain a travel document. It is puzzling to the Department how going through the formalities of naturalization is easier than making an application for a U.S. passport. Noting that appellant obtained a Canadian passport to travel abroad, the Department points out that he described himself in his travels, including visiting the United States, as a Canadian citizen. "His behavior exemplified a total disinterest and unconcern for his status as a U.S. citizen," asserts the Department, which urges the Board to affirm the Department's 1988 determination that he voluntarily obtained naturalization in Canada with the intention of relinquishing United States nationality.

Under the applicable case law, the evidence at the time appellant obtained naturalization in Canada is insufficient to support a finding that he intended to relinquish his United States nationality. The question to be answered therefore is whether circumstantial evidence, together with his performance of the expatriative act, will establish the requisite intent.

We are not of the Department's view that appellant's conduct before he became naturalized in Canada has any relevance to the issue of his intent in 1972. Traveling abroad in 1968 at age 18 on a United Kingdom passport proves nothing with respect to his state of mind four years later. As a citizen of the United Kingdom he was entitled to obtain and use a British passport for travel outside the United States. Furthermore, it is possible that it was not appellant's idea to use a British passport. In a statement executed many years later, appellant recalled that his father obtained the passport for him.

Appellant concedes that he did not register for Selective Service in 1966 at age 18, but the Department has not shown that he deliberately avoided doing so. Even if he willfully failed to register, that fact standing alone has no bearing on his probable intent in 1972, particularly given the multitude of young men who were in the same boat.

The conduct that is relevant is appellant's conduct after his naturalization. The Department rests its case that appellant intended to relinquish his United States nationality mainly on the fact that after naturalization he used only Canadian travel documentation and identified himself to Canadian, American and other national authorities as a Canadian citizen. For the reasons that follow we do not agree that an intent to relinquish citizenship is a more reasonable inference than others that might fairly be drawn from such conduct.

Appellant contends that because he was not required to renounce and did not renounce previous nationality when he swore the oath of allegiance to Queen Elizabeth the Second, he had no cause to think that he had jeopardized his United States citizenship. In fact, it was his belief that he had become a dual national of the United States and Canada by obtaining naturalization.

Since appellant became a citizen of Canada in conformity with its laws, he was entitled to hold himself out as a Canadian citizen and to travel in foreign countries on a Canadian passport. He placed his United States citizenship in jeopardy by performing an expatriative act. Nonetheless, his perception that he had not endangered his United States citizenship was not an unreasonable one for a lay person in these circumstances. He should have taken counsel before obtaining naturalization, as he admitted during the initial processing of his case at the Consulate General in Vancouver, but his failure to do so is as explainable by ignorance or lack of caution as it is by an intent to relinquish his United States citizenship. So perceiving his status, appellant availed himself of his right to carry a Canadian passport. It also appears that he identified himself on occasion to United States authorities at the border as a Canadian citizen. Do those actions suggest preponderantly that appellant intended in 1972 to relinquish United States citizenship?

If we accept appellant's contention that he believed himself to be a dual national of the United States and Canada (the Department has not demonstrated that such a belief was untenable), then it follows that he behaved in a manner consistent with his professed perception of his situation by using a Canadian passport and identifying himself as a Canadian citizen. To put the matter slightly differently, it would seem as reasonable to infer that appellant exercised his rights as a Canadian as a matter of convenience as it would to infer that he formed an intent in 1972 to relinquish United States citizenship and therefore felt constrained to act henceforth solely as a Canadian citizen.

Even if one were to draw unfavorable inferences from appellant's use of Canadian documentation, the record shows no other acts by him that are expressly derogatory of United States citizenship. On the contrary, there is uncontradicted evidence that appellant has with fair consistency done a number of the kinds of things that the Department usually considers indicate an intent to retain citizenship on the part of one who has performed an expatriative act.

He has family ties to the United States; owns a house in the State of Washington occupied by his mother whom he supports; and has filed tax returns with apparent regularity from 1976 to the present.

In short, the evidence we are asked to consider does not show preponderantly that appellant intended to divest himself of his United States nationality when he became a citizen of Canada. Appellant could be faulted for failure to obtain official advice before obtaining naturalization in Canada and for not ascertaining precisely what his status under law became after naturalization. But the Department has not established a connection on the one hand between non-actions which could be explained by any number of human shortcomings and on the other appellant's state of mind in 1972.

In our view, the record leaves the issue of his intent in 1972 to relinquish United States citizenship in doubt. In such circumstances, we are compelled to resolve any and all doubts in favor of the retention of citizenship. The Supreme Court has said that, in actions instituted for the purpose of depriving one of the precious right of citizenship previously conferred, the facts and the law should be construed as far as 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 thus come to the conclusion that the Department has not carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States nationality when he obtained naturalization in Canada upon his own application.

III

Upon consideration of the foregoing, we hereby reverse the Department's determination that appellant expatriated himself.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member