November 17, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: W E H

W E H appeals from a determination of the Department of State, dated July 31, 1988, that he expatriated himself on June 22, 1951 under the provisions of section 401(a) of the Nationality Act of 1940 by obtaining naturalization in Canada upon his own application. 1/ A timely appeal was entered from the Department's determination.

The single issue presented is whether appellant intended to relinquish his United States citizenship when he obtained naturalization in Canada. For the reasons given below, we conclude that the Department has not carried its burden of proving that appellant intended to relinquish his United States citizenship. Accordingly, we reverse the Department's holding of loss of his citizenship.

I

Appellant, W E H , acquired the nationality of the United States by virtue of his birth at [redacted] As his parents were British subjects, he also derived British nationality at birth through them. Between 1916 and 1923, appellant lived with his parents in England and Canada. In 1923 the family returned to the United States. Appellant was educated in California and between 1933-1938 saw service in the California National Guard. In May 1940 he went to Canada where he enlisted in the Canadian Army. During the Second World War, he served in the Canadian Army in Europe. He married a Canadian citizen in England in 1945. They have six children, all born in Canada, four prior to his naturalization, two thereafter. From 1954 to 1955, appellant served in the Canadian military contingent in Korea.

1/ Section 401(a) of the Nationality Act of 1940, 54 Stat. 1168, read in pertinent part as follows:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or....

In 1951 appellant, who was then a captain in the Canadian Army, applied to be naturalized as a Canadian citizen. It appears that officers in the Canadian armed forces who were not Canadian citizens were required to acquire Canadian citizenship in order to retain their commissions. Appellant was granted a certificate of Canadian citizenship on June 22, 1951 at which time he subscribed to the following oath of allegiance.

> I, ..., swear that I will be faithful and bear true allegiance to His Majesty King George the Sixth, his 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. 2/

Appellant served in the Canadian forces until he retired in 1965. From 1965 to 1981 he held various administrative positions at the University of British Columbia.

Thirty-six years after the event, appellant's naturalization in Canada came to the attention of the United States Consulate General in Vancouver when in the summer of 1987 one of appellant's sons, born in Canada three months after appellant's naturalization, applied for registration as a United States citizen and issuance of a passport. After reviewing the younger H 's case, a consular officer advised him that no action could be taken on his application until a determination had been made of his father's citizenship status. Accordingly, proceedings in appellant's case were instituted at the Consulate General. In November 1987 the Consulate General, which had obtained confirmation of appellant's naturalization from the Canadian authorities, informed appellant that he might have expatriated himself. As requested, he completed a form titled "Information for Determining U.S. Citizenship," and a personal data form. On February 2, 1988, in compliance with the statute, a consular

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2/ Since the Canadian authorities considered that appellant derived British subject status from his parents, he did not have to make the declaration then required of most applicants for naturalization renouncing all allegiance and fidelity to any other sovereign or state.

officer executed a certificate of loss of nationality in appellant's name. 3/ The officer certified that appellant acquired the nationality of the United States by virtue of his birth therein; that he obtained naturalization in Canada upon his own application on June 22, 1951; and that he thereby expatriated himself under the provisions of section 401(a) of the Nationality Act of 1940. After appellant had furnished additional information about himself at the request of the Department, the Department on July 31, 1988 approved the certificate of loss of nationality, an action that constitutes a determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review, in accordance with the provisions of 22 CFR 7.5(a) and (b).

An appeal was entered through counsel on February 2, 1989.

II

Section 401(a) of the Nationality Act of 1940 provided that a national of the United States would lose his nationality by obtaining naturalization in a foreign state. Appellant duly obtained naturalization in Canada upon his own application in 1951. Accordingly he brought himself within the purview of the then-applicable expatriation statute.

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.

The courts have long held, and since 1986 the statute has expressly provided, that nationality shall not be lost as a result of a statutory expatriative act unless the citizen performed the act voluntarily with the intention of relinquishing United States nationality. 4/

In law, it is presumed that one who performs a statutory expatriative act does so voluntarily, but the presumption may be rebutted by a showing upon a preponderance of the evidence that the act was not voluntary. 5/ Appellant has not alleged that he was forced against his will to obtain naturalization in Canada. The presumption that he acted voluntarily therefore stands unrebutted. And so the dispositive issue in this case is whether he obtained naturalization in Canada with the intention of relinquishing his United States nationality.

Intent to relinquish citizenship is an issue that the government bears the burden to prove. Vance v. Terrazas, 444 U.S. 252, 262 (1980). Intent may be proved by a person's words or found as a fair inference from proven conduct. Id. at 260. The standard of proof is a preponderance of the evidence. Id. at 267. Proof by a preponderance means that the government must show that it was more probable than not that appellant intended to forfeit his United States nationality when he acquired Canadian citizenship. 6/ The

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4/ Section 349(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1481(a)(1). Afroyim v. Rusk, 387 U.S. 253 (1967) and Vance v. Terrazas, 444 U.S. 252 (1980).

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

(b) 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. 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.

6/ "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to

intent the government must prove is the party's intent at the time the expatriative act was performed. Terrazas v. Haig, 653 F.2d 285, 288 (7th Cir. 1981).

The contemporary evidence of appellant's state of mind in 1951 is meager. It consists solely of the fact that he made an oath of allegiance to King George the Sixth and was granted a certificate of Canadian citizenship. Obtaining naturalization in a foreign state, like the other enumerated statutory expatriating acts, may be persuasive evidence of an intent to relinquish citizenship, but it is no more than that; it is not conclusive on the issue of intent. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J. concurring.) The direct evidence in this case thus is plainly insufficient to support a finding that appellant intended to relinquish his United States citizenship when he became a Canadian citizen.

As is customary in such cases, we must therefore examine the circumstantial evidence to determine whether, added to the contemporary evidence, it may establish the requisite intent. Terrazas v. Haig, supra at 288. The circumstantial evidence we must evaluate is appellant's proven conduct before and after he obtained naturalization in Canada.

The Department asserts that although obtaining naturalization in a foreign state and making a non-renunciatory oath of allegiance alone are insufficient to prove intent to relinquish United States nationality, "the taking of the oath -- motivated by and coupled with Mr. H 's decision to make a career of and become a commissioned officer in the Canadian Army -- manifests, in the Department's view, a transfer of allegiance from the United States to Canada."

6/ (cont'd.)

> find that the existence of the contested fact is more probable than its non-existence. 12/ Thus the preponderance of evidence becomes the trier's belief in the preponderance of probability." McCormick on Evidence (3rd ed.), Section 339.

12/ [footnote omitted]

Appellant made the Canadian Army his career for twenty-five years, the Department's brief continues, fourteen of which were served in a capacity requiring undivided loyalty to Canada. The Department pointed out that commissioned officers in Canada who were not Canadian citizens or British subjects were required to swear an oath renouncing previous nationality, adding that:

> ...But for the happenstance that W H was considered a British subject, he would have been required to take an oath. In the Department's view, this indicates that undivided loyalty was considered a requirement for a commissioned officer, whether assumed, as in Mr. H 's case, because of British nationality or confirmed by a renunciatory oath for individuals who were not British subjects.

The Department cites as additional indicia of appellant's intent to relinquish United States nationality the fact that he lived in Canada for thirty-six years during which time, aside from visiting family in the United States, he "exhibited no ties" to the United States. His conduct in the Department's opinion, "was fully consistent with and is susceptible to no other conclusion than that he decided to transfer his allegiance to Canada." Finally, since appellant did not try to establish his American citizenship for his own purposes but rather merely to aid his son in establishing a derivative claim to United States citizenship, the Department believes that appellant's "coming forward has not been motivated by an expression of continued allegiance to the United States.

In our judgment, the only two factors of those the Department cites that go to the merits of the Department's case that appellant intended to relinquish his United States nationality in 1951 when he obtained Canadian citizenship are: (1) his living long years in Canada, thirty-seven after naturalization; and (2) his service in the Canadian Army, fourteen after naturalization. We regard the other factors cited by the Department in support of its position as immaterial to the issue of appellant's probable intent in 1951.

The only evidence of appellant's intent in 1951 is the fact that he obtained naturalization in a foreign state and made an oath of allegiance to a foreign sovereign; as noted above, he was not required to, nor did he, declare that he renounced United States nationality, a fact of which it is fair to assume he appreciated the significance, as he now claims was the case. "I considered myself to be a dual national, not having taken the oath of renunciation when I

naturalized in Canada," appellant asserted in a questionnaire he completed in December 1987. Obviously, appellant performed an expatriative act in 1951, as he would have learned had he consulted competent authority before acting. However, it is not difficult to credit his contention that he did not perceive that he placed his United States citizenship at risk by obtaining Canadian citizenship. To carry the latter thought a step further, one might from the available contemporary evidence entertain reasonable doubt whether appellant formed an intent in 1951 to relinquish his United States citizenship.

But, it is pertinent to ask, is it credible that one who did not intend to relinquish United States citizenship would conduct himself after obtaining naturalization as appellant did? Is appellant's conduct as reasonably explained on grounds other than intent to relinquish citizenship as it is on grounds that he had formed such an intent? If his actions are as plausibly explainable on grounds other than an intent to transfer his allegiance to Canada, a substantial question would arise whether appellant intended in 1951 to relinquish United States citizenship.

Like thousands of young American citizens, appellant enlisted in the armed forces of Canada before the United States entered World War II. At war's end, appellant married a Canadian citizen and decided to make his life in Canada and his career in the Canadian Army. Comes 1951. Commissioned officers in the Canadian Army who are not Canadian citizens are required to become citizens in order to retain their commissions. Appellant, then 36 years old and a captain in the Canadian Army, had lived in Canada and served in its forces for eleven years. Note that by 1951 appellant had already made a number of vital decisions about his style of life, which prior to his naturalization, at least, had no perceptible relationship to the issue of whether he intended to relinquish or retain United States citizenship. A citizen may live abroad indefinitely without suffering loss of citizenship, for doing so in no way evidences renunciation of nationality and allegiance. Schneider v. Rusk, 377 U.S. 163, 168, 169 (1964). And serving in the army of a state allied to the United States is not demonstrably an act inimical to United States interests.

From the record it seems clear that appellant would not have obtained naturalization had Canadian law not required him to do so to hold his commission. His motive in obtaining naturalization thus assumes relevance to the issue of his intent in obtaining naturalization. We recognize, of course, that "a person's free choice to renounce United States citizenship is effective whatever the motivation." Richards v. Secretary of State, 752 F.2d 1413, 1421 (9th Cir.) But in the case before the Board, appellant made no declaration

renouncing his United States citizenship. Thus, his allegation that he obtained naturalization solely to be able to continue his career and not to sever his allegiance to the United States is entitled to fair evidential weight, not being contradicted by any evidence of record.

Appellant's situation post-naturalization differed in only one respect from his situation before that event - he was a Canadian citizen. However, he made no evident choice to renounce his U.S. citizenship, a choice to which, under the rule in Richards, supra at 1421, 1422, we would have to give effect.

We acknowledge that if a United States citizen lives long years in a foreign state, even though that state be a close and sturdy ally, having obtained naturalization there and served in its army, it might be reasonable to infer that such a person intended to transfer his allegiance to the foreign state. That said, we submit that the foregoing inference is not necessarily the fairest and most reasonable one to draw from the conduct of appellant in this case. Absent direct, contemporary evidence that he intended in 1951 to relinquish United States citizenship, it would be no less fair and reasonable to entertain doubts whether appellant intended to change his loyalties. It might be argued, rather, (and so to argue assuredly does not fly in the face of the evidence of record) that appellant lacked any particular will and purpose except to seek to be able to continue the pattern of life that he had shaped many years before he contemplated performing the expatriative act.

The facts in the case being susceptible of two contradictory inferences, we do not believe that the Department has proved by a preponderance of the evidence that appellant probably intended to relinquish his United States nationality when he acquired that of Canada.

III

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

Alan G. James, Chairman

Warren E. Hewitt, Member

DISSENTING OPINION

In its opinion in Vance v. Terrazas, 444 U.S. 252 (1980), the Supreme Court quoted with approval the statement in Nishikawa v. Dulles, 356 U.S. 129, that performance of any of the statutory expatriating acts "may be highly persuasive evidence in the particular case of a purpose to abandon citizenship" but is not conclusive (at 139). (In its opinion, the majority of the Board reiterates this rule, although it omits the word "highly.") In Vance, the Court also stated that an individual's intent may be "expressed in words or may be found as a fair inference from proven conduct." The majority concludes that the direct evidence in this case is "plainly insufficient" to support a finding of loss of citizenship, and states that the circumstantial evidence that must be evaluated is "appellant's proven conduct before and after he obtained naturalization in Canada." In my view, in the light of appellant's proven conduct both before and after he obtained naturalization in Canada, the evidence that he intended to transfer allegiance to Canada and relinquish U.S. citizenship is not only preponderant, it is overwhelming.

Appellant was born in California in 1915 and taken to the United Kingdom in 1916, to Canada in 1919, and back to the United States in 1923 where he remained until going to Canada in 1940 and enlisting in the Canadian Army. He remained in the Canadian Army for 25 years, serving in Canadian contingents in Europe in World War II and in Korea in the mid-1950's. He married a Canadian citizen in 1945 and they had six children, four of whom were born before his Canadian naturalization in 1951. He retired from the Canadian Army in 1965, and from then until 1981 held positions at the University of British Columbia. Now, at age 72 and after living in Canada for 47 years, appellant claims, coincident with the 1987 application of one of his son's for registration as a U.S. citizen, that he never intended to relinquish his U.S. citizenship when he became a Canadian citizen 36 years ago.

In weighing the evidence of appellant's proven conduct, it is pertinent to note that, on the one hand, in addition to naturalization as a Canadian citizen, appellant has:

1) served in the Canadian army for 25 years;

2) lived in Canada for 47 years;

3) held 3 Canadian passports that he used for travel to a number of foreign countries over the years;

4) used only Canadian documentation in traveling to the U.S.;

5) voted in every Canadian federal election since 1953;

6) never registered his six Canadian-born children as U.S. citizens, including the four born before his Canadian naturalization;

7) never held a U.S. passport;

8) never, since moving to Canada in 1940, voted in U.S. elections;

9) never, since moving to Canada in 1940, paid U.S. income taxes;

10) never, prior to his son's application in 1987 for registration as a U.S. citizen, inquired about his U.S. citizenship status.

On the other hand, appellant states, in his responses to a 1987 questionnaire, that he never intended to relinquish his U.S. citizenship, and his brief makes the point that he did not make a renunciatory oath and obtained Canadian naturalization only to continue his career in the Canadian army.

The majority opinion states that of the factors cited above only appellant's years of residence in Canada and his years of service in the Canadian army are material to the issue of his probable intent in 1951. Why only these two factors are material to the issue of intent is not further explained. Certainly, other factors cited come within any reasonable definition of "proven conduct." But, even if one confines evidential evaluation to the factors of appellant's 47 years of residence in Canada and 25 years of service in the Canadian army, it is difficult to come to any conclusion other than that, as the majority states, appellant "decided to make his life in Canada and his career in the Canadian army." In fact, the evidence suggests that that decision was made well before appellant's Canadian naturalization.

Confining itself to the two factors it considers material to the issue of appellant's probable intent in 1951, the majority raises the question as to the "fairest and most reasonable" inference to be drawn from long residence in a foreign country and long service in its army. It then states that "absent direct, contemporary evidence that he intended in 1951 to relinquish United States citizenship," it would be fair and reasonable to doubt that appellant intended to transfer allegiance. This analysis seems to me to ignore: 1) that there indeed is such direct, contemporary, "highly persuasive," evidence of his intention (i.e., obtaining naturalization in a foreign state) and, 2) that the evidence of proven conduct ineluctably leads to the conclusion that his intention was to transfer allegiance.

Appellant's conduct for years before and for years after his naturalization as a Canadian citizen has been constant, consistent, and unambiguous. It admits of no other conclusion than that he intended to transfer allegiance to Canada at least by the time he became a Canadian citizen 36 years ago, if not before. Indeed, it is difficult to construct a course of conduct more persuasive of such intent. In my view, there is more than ample evidence to sustain the Department's burden of proof.

Frederick Smith, Jr., Member