DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: C R M S , known as M S

The Department of State determined on September 2, 1988 that C R M S , known as M S , expatriated himself on April 9, 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/ A timely appeal was entered from that determination.

The issue to be determined is whether the Department has met its statutory burden of proving that appellant intended to relinquish United States citizenship when he obtained naturalization in Canada. For the reasons given below, it is our conclusion that the Department has not carried its burden of proof. Accordingly, we reverse the Department's determination of appellant's expatriation.

I

Appellant acquired United States citizenship by birth at [redacted]. He was graduated from Harvard in 1952. Thereafter he served in the United States Navy on active and reserve duty and was honorably discharged as a lieutenant, USNR, in 1960. He is married to a United States citizen. They have four children, all United States citizens.

In 1964, appellant's company, a United States corporation, sent him to Canada to start a plant. He remained in Canada until 1967. In 1969 his company sent him back to

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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 ...

Canada, as he put it, "to turn around a failing subsidiary." He entered Canada as a landed immigrant. In 1975 he was issued a United States passport by the Consulate General at Vancouver.

By 1976, appellant states, he was chairman, president and CEO of the company he went to rescue, and served on national (Canadian) industrial committees. Believing that his company's interests would be best served if he were a Canadian citizen, appellant applied for naturalization. On April 9, 1976 he was granted a certificate of Canadian citizenship and made the prescribed 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.

Appellant obtained Canadian passports in 1977 and 1986.

In the spring of 1988, appellant made inquiries of the United States Consulate General at Vancouver about his citizenship status. He had an interview, completed two forms to facilitate determination of his citizenship status, and made an application for a United States passport.

In July 1988 the Consulate General referred appellant's case to the Department under cover of a memorandum which reads in pertinent part as follows:

> It is the Consul's opinion that C. S. acquired Canadian citizenship in order to enhance his business career. While he has displayed a marked indifference to the responsibilities of citizenship while living abroad, there does not appear to be sufficient evidence of a clear intent to relinquish his U.S. citizenship to sustain a recommendation of loss. In light of the above a Certificate of Loss of U.S. Nationality has not been prepared in this case.
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> It is therefore recommended that the application for registration and a U.S. passport be approved.

The Department instructed the Consulate General to elicit further information from appellant and after it had done so, to

prepare and submit a certificate of loss of nationality for the Department's consideration. Appellant made an affidavit in which he responded to the Department's questions. The Consulate General executed a certificate of loss of nationality in appellant's name on August 12, 1988, as instructed by the Department and in accordance with the provisions of the statute. 2/ The certificate recited that appellant acquired United States citizenship by birth at Albany, New York; and that he obtained naturalization in Canada upon his own application, thereby expatriating himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Consulate General forwarded the certificate and appellant's supplementary affidavit to the Department with the comment that: "The ConOffs [sic] recommendation as of July 14, 1988 remains unchanged." The Department, nonetheless, approved the certificate on September 2, 1988, approval being an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review. The appeal was entered on November 10, 1988.

II

The statute 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 his nationality. 3/

2/ 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.

3/ Note 1 supra.

It is undisputable that appellant duly obtained naturalization in Canada upon his own application. His case thus comes within the purview of the statute. The first issue posed is whether he acted voluntarily.

Under section 349(c) of the Immigration and Nationality Act, there is a presumption that one 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. 4/ In order to prevail on the issue of voluntariness, appellant must come forward with evidence sufficient to show that he probably acted against his will.

Appellant has not addressed the issue whether he obtained Canadian citizenship voluntarily. In any event, it is evident on the facts that appellant's naturalization was not coerced. The presumption that appellant became a Canadian citizen of his own free will stands unrebutted.

III

It remains to be determined whether appellant had the requisite intent to relinquish his United States nationality when he obtained that of Canada.

Under the Supreme Court's holding in Vance v. Terrazas, 444 U.S. 252, 263 (1980), the government bears the burden of proving that appellant performed the statutory expatriating act with the intent of relinquishing his United States citizenship.

4/ 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.

The government must prove intent by a preponderance of the evidence. Id. at 267. Under the "preponderance of the evidence" rule, the Department must prove that appellant probably intended, to surrender his United States citizenship. Intent may be expressed in words or found as a fair inference from the party's proven conduct. Id. at 260. It is the individual's intent at the time the expatriating act was performed that the government must prove. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

In this case, the only contemporary evidence bearing on appellant's intent is the fact that he obtained naturalization in Canada and made an oath of allegiance to a foreign sovereign. In themselves these facts will not support a finding of intent to relinquish citizenship, although they may constitute some evidence of such intent. Vance v. Terrazas, supra, at 261; King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972). It should also be noted that making a non-renunciatory oath of allegiance to a foreign sovereign leaves ambiguious the intent of the utterer with respect to his United States citizenship. Richards v. Secretary of State, CV 80-4150, memorandum opinion, (C.D. Cal 1982); aff'd., 752 F.2d 1413 (9th Cir. 1985).

There being insufficient direct contemporary evidence to support a finding that appellant intended to relinquish United States nationality, we must inquire whether circumstantial evidence will establish the necessary intent. Terrazas v. Haig, supra, at 288.

While acknowledging that obtaining naturalization in a foreign state of itself is insufficient to support a finding of intent to relinquish citizeship, the Department finds confirmation of the renunciatory intent inherent in naturalization in appellant's post-naturalization words and conduct. These are the key points of the Department's argument.

> After Mr. S naturalized, he identified himself as a Canadian. When crossing the U.S./Canadian border, he identified himself as a Canadian. He traveled internationally on a Canadian passport; never inquiring as to the availability of a U.S. passport. When he first came to Canada in 1969, he filed U.S. income tax returns every year until he naturalized in 1976. From then on, he only filed Canadian taxes. He did not contact the U.S. consulate prior to his naturalization for advice and/or guidance in his decision to naturalize. His behavior is not that of an individual interested in

> retaining his U.S. citizenship or of acting without the intent to relinquish. Throughout the years, the appellant has demonstrated a total disinterest and lack of concern for his U.S. nationality. When viewed in its entirety, the appellant's course of conduct is susceptive only of one inference - behavior which is not that of a person desirous of maintaining his U.S. citizenship.
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> ...
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> ...Based on his statements it can be inferred that he thought he had lost his U.S. nationality. 'I did not find out that I was, but that I might still be one (U.S. citizen). (Information for Determining U.S. Citizenship, pg. 3, question 11.b., dated 5/20/88.) The Department contends that when a person believes that he will lose his citizenship and yet, proceeds with the naturalization process without making formal inquiries, that person has demonstrated an intent to relinquish his U.S. citizenship.

We do not think the Department has made its case.

First, we do not agree that merely because appellant believed he might have expatriated himself that he necessarily harbored an intention in 1975 to relinquish his United States citizenship. In many earlier appeals the Department has taken this position which we have considered unstainable. Intent and knowledge are different concepts. "Since intent may be conceived of apart from knowledge, the mode of proving intent is a problem distinct from that of proving knowledge." II Wigmore on Evidence, section 301, 3rd Ed. 5/

5/ I am aware of course the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue...But, when words are used exactly, a deed is not done with intent to produce a consequence unless

In Richards v. Secretary of State, 753 F.2d 1413, 1420, (9th Cir. 1985) the court made it clear that knowledge alone that an act is expatriative is insufficient to warrant a finding of loss of citizenship.

> As we read Afroyim and Terrazas, a United States citizen effectively renounces his citizenship by performing an expatriating act only if he means the act to constitute a renunciation of his United States citizenship. 6/ In the absence of such an intent, he does not lose his citizenship simply by performing an expatriating act even if he knows that Congress has designated the act as an expatriating act. By the same token, we do not think that knowledge of expatriation law on the part of the alleged expatriate is necessary for loss of citizenship to result. Thus, a person who performs an expatriaing-act with an intent to renounce his United States citizenship loses his United States citizenship whether or not he knew that the act was an expatriating act, and, indeed, whether or not he knew that expatriation was possible under United States Law.

[6/ footnote omitted].

5/ (Cont'd.)

> that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable to it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

Abrams v. United States, 250 U.S. 616, 626, 627 (1919) (Holmes, J., dissenting).

Intent, therefore, must be proved by evidence other than mere proof of knowledge. In Richards, for example, the petitioner made an oath of allegiance upon obtaining naturalization in Canada that included an express renunciation of all other allegiance. He also later stated to United States authorities that: "I didn't want to relinquish U.S. citizenship but as part of the Canadian citizenship requirements I did so." 753 F.2d at 1422. Plaintiff Richards' statements, including the oath, coupled with his use of a Canadian passport to enter the United States, and registration at an American university as a foreign student supplied abundant evidence, in the court's judgment, of a renunciatory intent.

Appellant here made no renunciatory declaration upon being granted Canadian citizenship. Nor is there a discernible pattern in his words and proven conduct that is more plausibly explained on grounds that he intended to relinquish his United States citizenship than it is on wholly different grounds. Indeed, it could be argued with fair cogency that appellant's lack of intent to relinquish citizenship is demonstrated by the fact that in the spring of 1988 he pursued the status of his U.S. citizenship "as soon as I heard there was a possibility that I could still be a citizen." (Affidavit of August 10, 1988.)

Appellant concedes that he has identified himself on a number of occasions as a Canadian citizen, using a Canadian passport to travel abroad (apparently only once to England in 1988), and identifying himself as a Canadian upon entering the United States from Canada, with either a Canadian identity card or driver's license. Appellant was of course a citizen of Canada, and entitled to avail himself of Canadian documentation. Since it appears that appellant believed he had expatriated himself by obtaining Canadian naturalization, it would be logical for him to feel constrained to use Canadian identity documents. Indeed, as he stated in one of the citizenship questionnaires he executed in May 1988, "I thought the only passport I could travel on was my Canadian passport." We therefore are not persuaded that appellant's use of Canadian documentation shows more probably than not that he earlier intended to relinquish United States citizenship.

Nor are we able to assign significant evidential weight to the fact that appellant did not seek advice from United States authorities before obtaining Canadian naturalization and has not voted in United States elections since 1969. As the Board has repeatedly pointed out in analogous cases appealed to it, his not doing those things could be ascribed quite as convincingly to indifference, negligence, or a multitude of other factors as to a will previously formulated to give up United States citizenship.

We are puzzled by appellant's statement in a citizenship questionnaire that he has not filed U.S. income tax returns since 1976. He has not explained why he ceased filing, and the record sheds no light on the matter. Nonetheless, the failure to file over such a long period is in itself not sufficient to establish an intent in 1976 to relinquish United States citizenship, especially since there is no evidence that appellant is a tax evader.

Balancing all the evidence of record, we think that the Department has strained to find that appellant probably intended to relinquish his United States nationality in 1976. We are therefore in agreement with the consular officer who processed appellant's case that although appellant showed a marked indifference to the responsibilities of citizenship, the evidence is insufficient to support a finding that appellant intended to relinquish citizenship.

Accordingly, we hold that the Department has not carried its burden of proving that appellant intended, more probably than not, to relinquish his American citizenship 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

J. Peter A. Bernhardt, Member

George Taft, Member