February 24, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: K L R

K L R appeals an administrative determination of the Department of State, dated April 7, 1988, that he expatriated himself on October 9, 1977 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Israel upon his own application. 1/

The issues presented by the appeal are whether appellant voluntarily obtained Israeli citizenship and he intended to relinquish his United States nationality. For the reasons given below, we conclude that appellant's naturalization was voluntary but that the Department has not carried its burden of proving by a preponderance of the evidence that appellant intended thereby to relinquish his United States nationality. Accordingly, we reverse the Department's determination that he expatriated himself.

I

Appellant became a United States citizen by birth at [redacted] on [redacted]. He graduated from high school in 1961 and thereafter served for two months in the United States Navy. He received an honorable discharge in November 1961. For the next eight years he worked in New

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1/ In 1977, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), 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...,

Pub. L. No. 99-653, 100 Stat. 3658, (1986), amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

York City, and studied at night for a bachelor of science degree which he received in 1972.

Appellant went to Israel in the summer of 1972, entering as a temporary resident. Shortly thereafter he met his future wife, a citizen of Israel, and decided to become a permanent resident of Israel. He thereupon became eligible to obtain Israeli citizenship under the provisions of the Law of Return. Appellant and his fiancee were married in May 1974. In September 1975 he exercised a statutory option not to acquire Israeli citizenship by signing an "opting out" declaration, in accordance with the provisions of section 2(c)(2) of the Israeli Nationality Law of 1952. 2/ Three children were born to appellant and his wife in Israel in 1978, 1980 and 1982.

In November 1974 appellant was employed on a special contract by the . Research Center, an institute operating under the Israeli Ministry of Agriculture. In August 1976, shortly before his special contract was to expire appellant visited the United States Embassy. According to the notes made by a consular officer, appellant "appeared to inquire about effect of naturalization on his Am. citizenship." The consular officer's record continued:

2/ Section 2(c)(2) of Israeli Nationality Law, 1952, provides that:

> This section [re an immigrant becoming an Israel national under the Law of Return, 1950] does not apply--
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> > (2) to a person of full age who, immediately before the day of his immigration or the day of the issue of his immigrant's certificate, is a national and who, on or before such day or within three months thereafter and whilst still a foreign national, declares that he does not wish to become an Israel national; such a person may, by notice in writing to the Minister of the Interior, waive his right to make a declaration under this clause;

The effect of this provision is to exempt declarants from automatically acquiring Israeli nationality under section 3(b) of the Law of Return.

> Was advised that naturalization would be considered persuasive evidence of intent to relinquish US citizenship and would normally result in its loss. Stated he had to acquire Isr. citizenship to be granted tenure in gov. employment--had previously opted out. Will appear after naturalization to pursue status.

Appellant did not apply for Israeli naturalization at that time, but remained in the employ of Volcani on a temporary basis. On May 4, 1977 he returned to the Embassy where he obtained a full validity passport and was registered as a United States citizen. On that occasion a consular officer made the following record of appellant's visit.

> N.B. Presented cert. from Min. of Int. showing that he opted-out of Israel cit. on 9.17.75. Ltr from Institute shows that employed as special contract. Stated that he wishes to keep his Amcit. and allegiance and has taken no oath of alleg. Under circum. and since this is not an 'important political post,' Cons. Off. believes that Mr. K.R.'s job should not be considered expat. under Sec. 349(a)(4) of INA of 1952. Dept. informed. Employed as technician for checking plant disease.

Appellant states that later in 1977 his employers informed him that unless he obtained tenure as a regular employee he would risk being discharged. Since was part of the Ministry of Agriculture, he could not purportedly gain tenure except by becoming an Israeli citizen. Having opted out of Israeli citizenship in 1975, the only way he could acquire Israeli citizenship was to obtain naturalization. On August 7, 1977 appellant made an application for naturalization at Rehovath.

In response to the Board's request that the Department submit a copy of appellant's naturalization application, the Embassy at Tel Aviv asked the Israeli citizenship authorities to furnish a copy. The latter informed the Embassy on November 10, 1988 that they were not authorized to release copies of such applications, but were able to provide most of the details in their file on appellant. The pertinent part of the Israeli report reads as follows:

> According to the material which we have in our office, Mr. K [R] submitted

> to our office in Rehovoth on August 7, 1977 an application for naturalization in accordance with the provisions of Paragraphs 5 to 8 of the [Citizenship] Law. In his application, he declared that he is a citizen of the United States, and he did not request that the Minister of the Interior exempt him from the requirement to renounce his other [U.S.]citizenship in order to obtain Israeli citizenship. On October 9, 1977, he declared his allegiance to the State of Israel and obtained Israeli citizenship. In his application for naturalization, K R also stated that he is married to R R (nee E), who was born on January 3, 1947 and who is an Israeli citizen. In accordance with the provisions of Paragraph 7 of the Citizemship Law, he could have been exempt from renouncing his previous citizenship. For your convenience we cite Paragraph 7 of the [Citizenship] Law verbatim: If a husband or wife is an Israeli citizen or has applied for citizenship, and fulfills all the requirements of Paragraph 5(a) or if he is exempt from them, the spouse will be able to obtain Israeli citizenship by naturalization even if he or she does not fulfill all the requirements of Paragraph 5(a). 3/

Appellant was granted Israeli citizenship on October 9, 1977 after making the following declaration of allegiance: "I, _____, declare that I will be a loyal citizen of the State of Israel." In due course he was given tenure at and worked there until 1987 when he retired.

In August 1978 appellant informed the Embassy that he had obtained Israeli naturalization and surrendered his United States passport to the Israeli authorities. The Embassy asked him to complete a questionnaire to facilitate determination of his citizenship status. He did not return the questionnaire.

3/ English translation, Division of Language Services, Department of State, LS No. 127771 (Hebrew) 1988.

In April 1984 when appellant visited the Embassy he was again asked to complete a citizenship questionnaire. He did not do so; nor did he visit the Embassy again until April 1987. On the latter occasion he stated that he had to travel to the United States on an emergency. To enable him to travel, the Embassy issued him a limited validity passport. Appellant informed the Embassy that he wished to consult an attorney before completing the citizenship questionnaire. Appellant returned to the Embassy on September 10, 1987 where he executed an affidavit in which he outlined the circumstances that led to his naturalization in Israel in 1977. He stated that he had originally opted-out of Israeli nationality in order to maintain his U.S. citizenship and later applied for naturalization as it was necessary to be a citizen of Israel to obtain tenure at his place of employment, the Israeli Ministry of Agriculture. He also completed a citizenship questionnaire.

On October 1, 1987, in compliance with the provisions of section 358 of the Immigration and Nationality Act, a consular officer executed a certificate of loss of nationality in the name of appellant. 4/ The officer certified that appellant acquired the nationality of the United States by virtue of his birth therein; that he acquired the nationality of Israel upon his own application; and thereby expatriated himself on October 9, 1978 under the

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4/ 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.

provisions of section 349(a)(1) of the Immigration and Nationality Act. The Embassy forwarded the certificate to the Department recommending approval. The Department approved the certificate on April 7, 1988, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. Appellant entered an appeal through counsel on May 3, 1988. Oral argument was heard on September 2, 1988. Appellant was not present but was represented by counsel.

II

Section 349(a)(1) of the Immigration and Nationality Act provides that a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application voluntarily with the intention of relinquishing his nationality. 5/

There is no dispute in this case that appellant duly obtained naturalization in Israel upon his own application and thus brought himself within the purview of the statute. The first issue we address therefore is whether appellant acted voluntarily when he acquired Israeli citizenship.

In law, it is presumed 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 not voluntary. 6/ Thus, to prevail, appellant must come

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5/ See note 1 supra.

6/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), reads as follows:

> (c) 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. Except as otherwise provided in subsection (b), 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 presump-

forward with evidence sufficient to show that he acted against his fixed will and intent to do otherwise.

Appellant asserts that he did not obtain naturalization voluntarily; he acted under economic duress. As early as 1976 he had told a consular officer that he had to acquire Israeli citizenship to be granted tenure in his job. From August 1973 to November 1974 he had been unemployed; the only job he was able to find in his field was one with an agency of the Israeli government. When he was told in 1977 that he would have to become an Israeli citizen in order to be tenured his wife was pregnant. He therefore needed to hold his job to ensure his family's security. Through counsel, appellant notes that after the general election in Israel in May 1977, far reaching changes were anticipated in many government agencies; since appellant was only a temporary employee without tenure he feared he might be fired. "All these came together on October 9, 1988," counsel maintained, "to create such economic duress on appellant ..., that the presumption of voluntariness is overcome."

Appellant has not, in our opinion, overcome the statutory presumption that he acted voluntarily when he obtained naturalization in Israel.

It is settled that duress, if proved, voids an expatriatory act. To prove duress, a claimant must show that extraordinary circumstances which he neither created nor could control forced him to perform the proscribed act against his fixed will and intent. Doreau v. Marshall, 170 F.2d 721, 724 (3rd Cir. 1948).

Duress connotes absence of choice, lack of reasonable alternatives to doing a statutorily proscribed act. The courts have held that economic pressures can be so great as to deny citizens alternatives to performing an act they probably would otherwise have eschewed. Stipa v. Dulles,

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6/ Cont'd.

> tion may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

Pub. L. No. 99-653, 100 Stat. 3655 (1986), repealed subsection (b) of section 349, but did not redesignate subsection (c), or amend it to delete reference to subsection (b).

233 F.2d 551 (3rd Cir. 1956); Insogna v. Dulles, 116 F.Supp. 473 (D.D.C. 1953). In Stipa v. Dulles, petitioner performed a statutory expatriating act (served in the police force of Italy) because he could find no work whatsoever and after World War II there was nothing for him to do in Italy. The court found that Stipa's testimony of his dire economic plight and inability to find employment was "amply buttressed by common knowledge of the economic chaos that engulfed Italy in the post war years." 233 F.2d at 556. In Insogna v. Dulles, the court concluded that the plaintiff performed an expatriative act involuntarily because of her need to subsist. "Self preservation has long been recognized as the first law of nature," the court stated, adding that "...common knowledge of the economic conditions and fears prevailing in a country at war [Italy] lends credence to the plaintiff's testimony." 116 F.Supp. at 475.

In a recent case, Richards v. Secretary of State, 752 F.2d 1413, (9th Cir. 1985), the appellant allegedly became a Canadian citizen under economic duress - the need to find employment. The court agreed with appellant that an expatriative act performed under economic duress is not voluntray, citing Stipa and Insogna. The issue before the Ninth Circuit, however, was whether the district court erred in holding that the appellant was under no economic duress when he became naturalized. The Ninth Circuit distinguished Stipa and Insogna from the appellant's case, noting that conditions of economic duress had been "found under circumstances far different from those prevailing here." The court found it unnecessary, however, to decide whether economic duress "exits only under such extreme circumstances." It simply ruled that some economic hardship must be proved to support a plea of involuntariness, and found that the district court had not erred in finding that the appellant was under no economic duress. 752 F.2d at 1419. In our view, Stipa v. Dulles and Insogna v. Dulles, although decided thirty years ago, remain valid for the proposition that extreme economic hardship must be proved in order to void an expatriative act.

The issue thus is whether appellant has proved that the economic concerns he faced rise to the level of true economic duress.

We will not argue that appellant might not have had cause to be concerned about his job with in 1977. We simply note that he has not convinced us that he and his family actually faced so grave a threat to their economic survival as to excuse his performance of an expatriative act. But the more pertinent inquiry is whether appellant had an alternative to forfeiture of his United States citizenship.

Since appellant bears the burden of rebutting the legal presumption that he acted voluntarily, he must at least show that he tried, unsuccessfully, to find employment that would not require him to perform an expatriative act. See Richards v. Secretary of State, 752 F.2d 1413, 1419 (9th Cir. 1985). A fundamental weakness in appellant's case is that he has neither alleged nor adduced evidence to show that he seriously sought permanent employment that did not entail his obtaining Israeli citizenship. In his affidavit of August 1976 he states (revealingly) that the job with was the only one he could find in his field. Since he has not shown that he could not have found any renumerative employment in any other field, we are unable to accept his arguments that economic factors forced him to become an Israeli citizen.

We conclude therefore that appellant has not rebutted the statutory presumption that his naturalization in Israel was a voluntary act.

III

The dispositive issue here is whether appellant intended to relinquish his United States nationality when he obtained naturalization in Israel.

Whether a citizen claimant intended to relinquish United States citizenship is an issue that the government must prove by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 263, 267 (1980). Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The intent the government must prove is the party's intent at the time he or she performed the expatriating act. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). Under the "preponderance of the evidence" rule, the Government must prove that a party more probably than not intended to relinquish United States nationality.

The Department grounds its case that appellant intended to relinquish his United States citizenship mainly on the following evidence:

> --he obtained naturalization in a foreign state, an act that may be highly persuasive evidence of an intent to relinquish citizenship;
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> --although he was informed officially that naturalization in a foreign state is

expatriative, he proceeded to obtain Israeli citizenship;

--he could have requested to be exempt from making a declaration in his naturalization application that he renounced United States nationality but he did not do so;

--he willingly surrendered his United States passport to the Israeli authorities when he made his application for naturalization;

--not until 10 months after his naturalization did he consult the United States Embassy about his citizenship status;

--although he consulted the Embassy in 1978, it was not until 1987 that he complied with its request that he fill out a form to facilitate determination of his citizenship status.

It is, of course, settled that obtaining naturalization in a foreign state may be highly persuasive evidence of an intent to relinquish United States nationality, but it is not conclusive evidence of such an intent. Vance v. Terrazas, supra, at 261. Although appellant made a formal declaration of allegiance to Israel when he received a certificate of Israeli citizenship, he was not required to renounce United States citizenship at that time. The foregoing evidence alone therefore will not support a finding of intent to relinquish United States nationality.

But what weight to give the evidence that appellant did not request to be exempt from declaring in his naturalization application that he renounced his United States nationality? The Board requested that the Department obtain and submit a copy of appellant's application for naturalization. As we have seen, the Israeli authorities would not release a copy, but instead summarized the information in appellant's dossier, noting that he had not requested to be exempt from making the renunciatory statement.

The Board understands that applicants for naturalization are required to mark one of the following boxes on the application form:

> ( ) I am a citizen of _____, I hereby renounce my former nationality
>
> ( ) I hereby request the Minister of Interior exempt me from the condition to renounce my former nationality, for the following reason: (a written separate explanation preferred).

At the Board's request, appellant executed a declaration on November 10, 1988 in which he made the following statements about what transpired on the day he applied for naturalization.

> ...
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> 2. I cannot remember exactly the proceedings at the Ministry of Interior Office on the day that I filed an application for naturalization in Israel. To the best of my recollection the following happened: I came to the office and told them I needed to become an Israel [sic] citizen because of my work. The clerk saw that I had previously opted out of Israel [sic] citizenship and gave me an application form to be naturalized. I could not fill out this form because I did not understand it.
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> 3. The clerk asked for my Identify Card and filled out the form for me.
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> 4. The clerk did not give me any guidance except to show me where to sign. If I had received guidance, I would not be in this predicament.
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> 5. I do not remember how long it took to complete the formalities on the day I submitted the application. I remember that I had a long wait on line and then there was a further wait while they located my file.
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> 6. I do not remember a line on the Israeli naturalization application that said that I wished to be

exempted from renouncing my prior nationality, or not to be exempted. 7/

Although the Board has not examined appellant, we believe his declaration is entitled to fair evidential weight. Quite possibly a clerk did fill out the application, as appellant avers. The record suggests that appellant is not a very practical person, and may indeed have been confused by the application form. It seems not unusual in Israel for clerks at Ministry of Interior offices to fill out application forms for applicants for naturalization. See Parness v. Shultz, 669 F.Supp. 7 (D.D.C. 1987), where the plaintiff, a person of unbusiness-like habits, applied for naturalization in Israel and completed the application form by answering questions put to him by a Ministry clerk. Here we have only appellant's word that the clerk did not call his attention to the possibility that he might claim an exemption from making a renunciatory declaration. However, given appellant's statement only four months earlier to a consular officer that if he were required to obtain Israeli naturalization, he wanted to keep his United States citizenship, it is not unreasonable to assume that appellant would have asked to be exempt, had the clerk told him of his options.

Furthermore, the applicable statute gave appellant an automatic exemption from making a renunciatory declaration in his naturalization application. Given appellant's May 1977 statement to a consular officer that he wanted to retain his United States citizenship, we find it difficult to accept that appellant would not only decline to avail himself of the exemption but also expressly renounce his United States citizenship. As in the case of the plaintiff in Parness, it is not unreasonable to assume that this appellant did not, as he further alleges, read the application form carefully before signing. At the hearing his counsel said that while appellant "knows a lot about plants and plant diseases, he does not know a great deal about other things but acts on his own." 8/ Counsel's

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7/ As noted above, the Board heard oral argument on the appeal on September 2, 1988 at which appellant did not appear but was represented by counsel. The Board and counsel for the Department put a number of questions to counsel about appellant's naturalization which counsel could not answer and therefore undertook to ask appellant to answer by affidavit.

8/ Transcript of Hearing in the Matter of K R , Board of Appellate Review, September 2, 1988 (hereafter referred to as "TR"). 9, 10.

observation about his client's vague attitude toward important matters is lent weight by the muddle over his filing United States income tax forms, which counsel presented to the Board at the hearing. The following exchange between the Board and appellant's counsel will illustrate:

> Board: Can you explain why, except in one or two cases, the years that these cover are on forms that do not coincide with those years? In other words, the 1986 return is on an '85 form. The returns for 1978 through 1986, in fact, are all on a 1985 form.
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> Counsel: Well, there are two things--
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> Board: You can read that here.
>
> Counsel: Yes, I know what you mean; I know what you mean.
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> I would say there are two things that appear to me to be very clear.
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> One is that returns for several years were filed at once. I think there is a situation here where there may be several returns that were filed year by year. And then there are, perhaps, two batches of returns that were filed -- several of them in one year.
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> The other thing is that I have adverted to it previously: Mr. R[redacted] is not very careful about these things. He wants to do them, but he wants to do them in his own manner. 9/

In short, there is reason to doubt that appellant acted knowingly and intelligently when he signed the application for naturalization in Israel that included an express renunciation of United States nationality. Since doubt about the facts must, to the extent reasonable, be resolved in favor of the citizen, we conclude that it is not established by a preponderance of the evidence that appellant intentionally renounced his United States nationality when he signed an application for Israeli naturalization. Nishikawa v. Dulles, 356 U.S. 129, 134 (1958), citing Schneiderman v. United States, 320 U.S. 118, 122 (1943).

9/ TR 34, 35.

We also find unpersuasive the rest of the Department's evidence of appellant's alleged intent to relinquish United States nationality.

Knowledge that an act is expatriative does not in itself necessarily signify intent that loss of citizenship shall result from that act. Knowledge and intent are different concepts; proof of one does not constitute proof of the other.

Surrendering his passport to the Israeli authorities, while somewhat symbolic of a renunciatory intent, is not, without more, persuasive evidence of such an intent. Suffice it to observe that Israeli law mandates that applicants for naturalization should surrender passports issued by their country of origin.

Appellant's delay in clarifying his citizenship status and his dilatoriness about completing the citizenship questionnaire are peripheral to the issue of his intent in 1977. Being somewhat vague and apparently reticent, appellant may possibly not have considered it important to move quickly to clear up the uncertainty about his citizenship status.

Not only does the evidence adduced by the Department seem weak, but several factors suggest appellant's lack of intent to relinquish citizenship. Shortly before applying for Israeli citizenship, appellant stated clearly to a consular officer that he wished to retain United States citizenship. Furthermore, he applied for and was issued a United States passport in 1977. There is no indication that he obtained and used an Israeli passport. And in 1987 when he needed to go to the United States on an emergency, he applied for a United States travel document, rather than avail himself of his right to claim an Israeli one.

On balance, the evidence does not establish with fair probability that appellant intended to relinquish his United States citizenship when he obtained naturalization in Israel upon his own application. It follows that the Department has not carried its burden of proving that he had the requisite intent.

IV

Upon consideration of the foregoing, we conclude that the Department's determination that appellant expatriated himself should be and hereby is reversed.

Alan G. James, Chairman

Frederick Smith, Jr., Member

George Taft, Member