May 15, 1990

DEPARTMENT OF STATE

Decision No. 90-10 BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M T B

This is an appeal by M T B from an administrative determination of the Department of State, dated September 18, 1987, that he expatriated himself on December 3, 1986 under the provisions of section 349(a)(5) of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a consular officer of the United States at Tel Aviv, Israel. 1/

For the reasons that follow, we conclude that appellant renounced his citizenship voluntarily with the intention of relinquishing it. We therefore affirm the Department's determination that he expatriated himself.

I

Appellant B acquired United States citizenship by virtue of his birth at [redacted], Illinois on [redacted], 1947. According to appellant, he was a non-commissioned officer in an Army infantry unit in Viet Nam and later received an honorable discharge. In 1977, at the age of 30, he went to Israel where he joined the Hebrew Israelite Community ("Black Hebrews") at Dimona.

According to appellant, in late autumn of 1986 many members of the Community were arrested and sent to jail where

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1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), 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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> . . .
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or ...

they were held pending deportation to the United States. Allegedly he was told by the leadership of the Community that the only way he might avoid deportation was to renounce his United States citizenship. On December 3, 1986, he stated,

> ...I and approximately five (5) other members of the Black Hebrew Community here in Dimona, Israel were taken to the United States Embassy located here in Tel Aviv, Israel for the express purpose of renouncing our U.S. citizenship. We were briefed by a member of the leadership an hour prior to our arrival at the embassy. Afterwards, we were taken directly to the embassy and the procedures for renunciation were expediently handled.

The record shows that on December 3, 1986, appellant and several other members of the Community went to the Embassy to renounce their citizenship. 2/ Before making the oath of renunciation, appellant was asked to read and did read a statement of understanding, and having done so, affirmed that he had read it and understood its contents. In the statement appellant declared that he was voluntarily exercising his right to renounce his nationality, "without any force, compulsion or undue influence;" that having renounced, he would become an alien vis-a-vis the United States; and that the extremely serious and irrevocable nature of renunciation had been explained to him by the consular officer, and that he understood the consequences.

Appellant also executed an affidavit which the Department has developed for use in the cases of formal renunciation of nationality by Black Hebrews. 3/ The affidavit posed a number

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2/ Affidavit, dated September 18, 1989, of J M. P , the consular officer who handled the proceedings incident to appellant's renunciation, stating that appellant was one of several who renounced that day.

3/ In 1973 a number of Black Hebrews indicated to the Embassy that they wished to renounce their United States nationality. The Department accordingly sent instructions on September 26, 1973 to the Embassy to govern the processing of formal renunciation by Black Hebrews. The instructions read in pertinent part as follows:

> In view of the circumstances involved, Embassy must make certain that renunciation be volun-

of questions to the prospective renunciant. The first question read: "Have you retained an attorney to represent you in this matter of renunciation? If not, why not? Do you want additional time to consult with an attorney, friends or family advisors?" To each part of that question appellant answered "no, I don't need one," and "no." The second question read: "Is your decision to renounce based: (a) on the fact that the GOI [Government of Israel] is considering deporting you?; (b) on your present financial condition?; (c) on personal or family problems and/or living conditions. (d) on influence, force and/or coercion that is being brought upon you by any person or persons?" Appellant answered "no" to all four parts of the second question.

Appellant then made the oath of renunciation, swearing, rather than affirming as he did in the case of the statement of understanding and the special affidavit, that he absolutely and entirely renounced his United States nationality, "together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining."

After the proceedings were concluded, the consular officer executed a certificate of loss of nationality (CLN) in appellant's name, as prescribed by law. 4/ The certificate

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3/ (Cont'd.)

> tary and not performed under duress, coercion or influence. Request Black Hebrews who wish to renounce to answer following questions in supplemental affidavit:
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> [There followed the questions summarized in the text above.]
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> If Consul believes that the renunciant may have any reservations, do not repeat do not administer the oath of renunciation, but send to the Department for decision all documents and a memorandum of conversation in the event of refusal to sign affidavits.
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> If no reservations are apparent, administer the oath of renunciation and send all documents to the Department.

4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

recited that appellant acquired the nationality of the United States by virtue of his birth therein; that he made a formal renunciation of United States nationality; and thereby expatriated himself under the provisions of section 349(a)(5) of the Immigration and Nationality Act. The Embassy forwarded the certificate and supporting documents to the Department under cover of a memorandum which stated in pertinent part:

> Enclosed for the Department's approval is a Certificate of Loss of Nationality which was executed by the Embassy in the case of Mr. M T B , a Black Hebrew who made a formal renunciation of his U.S. nationality on December 3, 1986.
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> The certificate is accompanied by an Oath of Renunciation, a statement of understanding and an additional Affidavit as requested in reftel.
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> Mr. B 's proof of U.S. citizenship was established by the Embassy from his birth certificate, copy attached. Mr. B stated that his last U.S. passport issued in February 1977 in Chicago was lost....

4/ (Cont'd.)

> 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 Department approved the certificate on September 18, 1987, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review, pursuant to 22 CFR 7.3(a).

The appeal was entered on January 22, 1989.

II

The time limit on appeal to the Board of Appellate Review is one year after the State Department approves a CLN. 5/ An appeal filed after that time shall be denied unless the Board determines for good cause shown that the appeal could not have been taken within the time allowed. 6/ The State Department on September 18, 1987 approved the CLN that was executed in this case. The appeal was filed on January 22, 1989, one year and five months after the time allowed for appeal. Since timely filing is mandatory and jurisdictional, United States v. Robinson, 361 U.S. 220 (1961), the issue posed is whether the Board may entertain this appeal. Whether we may do so, turns on whether appellant has shown good cause why he could not appeal within the one-year period.

"Good cause" is a term of art whose meaning is well settled. It means a substantial reason, one that affords a legally sufficient excuse. Black's Law Dictionary, 5th ed. (1979). It is generally accepted to meet the standard of good cause, a litigant must show that failure to file an appeal or brief in timely fashion was the result of some event beyond his immediate control and which to some extent was unforeseeable.

5/ Section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), reads as follows:

> A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this Chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval of the Department of the certificate of loss of nationality or a certificate of expatriation.

6/ 22 CFR 7.5(a) provides in pertinent part that:

> ... An appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time.

Appellant alleges that he did not appeal within the prescribed limitation because he did not know until approximately November 1988, two months before he entered the appeal, that he might seek review of his case before the Board. This is his explanation of the delay:

> During the whole time I was at the Embassy it was never mentioned to me about the time span allowed for appeal of the renunciation. This was mentioned neither by the embassy officials or the leadership of the community whom were very well aware of this fact. I became aware of the fact that I could have appealed my renunciation much later when I actually received my Certificate of Loss of Nationality. I didn't receive, in my possession, my Certificate of Loss of Nationality until approximately 2 months ago....
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> ...
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> ....All of the mail, like everything else, here, is strictly monitored and controlled and even such personal things as registered mail are received and distributed by those officials of the community delegated to do so. My Certificate of Loss of Nationality was deliberately withheld until after the expiration date for making appeal had passed. This, I feel safe to assume, is a matter of policy in all such cases.

Federal regulations prescribe that a person who has been held to have expatriated himself shall be informed in writing at the time the CLN is forwarded to him of the right of appeal to this Board within one year after approval of the CLN. 22 CFR 50.52. Information about the right of appeal, the time limit on appeal and appeal procedures is set forth on the reverse of the CLN.

In this case, the Department sent a copy of the approved CLN to the Embassy to foward to appellant on September 18, 1987. Although there is no record that the Embassy forwarded the CLN or if it did so, when, it may be presumed that it complied with law and regulations. See Boissonnas v. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1951). In the absence of evidence to the contrary, it is presumed that public officers properly discharge their official duties. What happened thereafter to the Embassy's transmittal letter and the CLN, is not a matter of record. However, we will accept appellant's contention that he did not receive the letter addressed to him when it arrived at the Community's enclave at Dimona where he was living in the

autumn of 1987. For quite possibly it was, as appellant maintains, withheld from him at that time. The Community has apparently often withheld from Community members communications addressed to them. As the Embassy at Tel Aviv stated recently in response to an inquiry of the Board concerning the appeal of another Black Hebrew whether mail to members might be intercepted by Community officials:

> ...Since the Hebrew Israelite members lead a communal life under the authoritative leadership of Ben-Ami Carter, with one central postal address in Dimona, it is most likely that the mail is intercepted and in certain cases withheld from the addressees. 7/

Thus, it seems quite possible that appellant did not receive the appeal information in timely fashion. In the circumstances, we do not consider that it was incumbent upon him to act sooner than he did. Substantial doubt having been raised whether he was informed of his appeal rights in timely fashion, we consider it fair to resolve the doubt in appellant's favor, especially since there is no demonstrable prejudice to the Department if we were to allow the appeal. Accordingly, we proceed to the merits of the case.

III

Section 349(a)(5) of the Immigration and Nationality Act provides that a national of the United States shall lose his nationality by voluntarily making a formal renunciation of United States nationality before a consular officer of the United States in the manner prescribed by the Secretary of State with the intention of relinquishing nationality.

The record shows that appellant's formal renunciation of United States nationality was executed in accordance with law and as prescribed by the Secretary of State. He thus brought himself within the purview of the statute. Thus, the first issue we address is whether appellant voluntarily made a formal renunciation of his United States nationality.

In law, it is presumed that one who performs a statutory expatriative act does so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that

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7/ Telegram from the U.S. Embassy, Tel Aviv, to the Department, No. 13577, Sept. 22, 1989.

the act was not voluntary. 8/ Therefore, to prevail, appellant must establish that his renunciation was the result of circumstances that deprived him of the opportunity to make a free choice.

"I was in fact pressured/coerced under threat of reprisals by the leadership of the Black Hebrew Community to renounce my U.S. citizenship," appellant declared in a very short affidavit executed on April 13, 1989. In later submissions he pointed out that the Black Hebrew Community is a rigidly controlled one. Members live under conditions which appellant likened to those in Iran under the Ayatollah Khomeini . If he had not renounced his citizenship as directed, "it would have been tantamount to being exiled from the Community," he asserted. In particular he feared that he would be deported, as many Community members had already been, if he did not do what he was told to do. Appellant continued that he had seen many families in the Community destroyed by years of separation of either the father or mother from the family; his main concern therefore had been the fate of his own family. (He is married to a Community member who also renounced her citizenship. They have two children.) 9/ Appellant also

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8/ 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.

9/ His wife, G P , appealed to the Board from loss of her nationality. In a decision issued on March 22, 1990 the Board concluded that she acted involuntarily, and reversed the Department's determination of loss of citizenship.

suggests that the coercive nature of his renunciation is underlined by the fact that he was escorted to the Embassy by a Community lieutenant who briefed him and the other renunciants on how to act and who monitored the proceedings at the Embassy closely.

Citizenship being an important civil right can only be waived as the result of free and intelligent choice." Inouye et al. v. Clark, et al., 73 F. Supp. 1000, 1004 (S.D. Cal. 1947), reversed on procedural grounds, Clark, Atty. Gen. et al. v. Inouye et al., 175 F.2d 740 (9th Cir. 1949). A voluntary act is one "proceeding from one's own choice or full consent unimpelled by another's influence. To determine whether an act is voluntary, "the trier of fact must examine all relevant facts and circumstances which might cause the actor to depart from the exercise of free choice and respond to compulsion from others." Kasumi Nakashima v. Acheson, 98 F.Supp. 11, 12 (S.D. Cal. 1951).

In examining appellant's claim that he was coerced into making a formal renunciation of United States nationality, we are also guided by the injunction of Mr. Justice Frankfurter in his concurring opinion in Nishikawa v. Dulles, 365 U.S. 129, 140 (1958):

> ...Where a person who has been declared expatriated contests that declaration on grounds of duress, the evidence in support of this claim must be sympathetically scrutinized. This is so both because of the extreme gravity of being denationalized and because of the subtle, psychologic factors that bear on duress.

The means of exercising duress - interfering with one's freedom of choice - is not limited to force or threat of force. Fear of loss of an important right or privilege "can be more coercive than fear of physical violence." Kasumi Nakashima v. Acheson, supra, at 13. See also Takano v. Dulles, 116 F. Supp. 307, (D. Hawaii 1953).

Although there is limited direct evidence that appellant was ordered to renounce citizenship, circumstantial evidence leaves little doubt that, as he maintains, he acted in response to instructions of the Community leadership. The Board takes note that since 1973 the Community has directed many members to renounce their citizenship. Approximately 360 have done so since 1973; 275 between 1985 and 1988. Those who have appealed loss of their nationality to the Board have given such consistent accounts of the pressure brought upon them as to lend

credibility to this appellant's contention. 10/ Nor is there doubt that appellant and the others who renounced when he did were escorted to the Embassy by a Community official who listened to the preliminary briefing about renunciation that was given to the renunciants by the local employee of the Embassy and who remained in the waiting room while each renunciant performed the act in the consul's office. 11/

Against appellant's allegations that he was subjected to duress and the circumstantial evidence that pressure was exerted on him, are the two statements he signed on the day he renounced in which he declared that his act was voluntary. These statements are, of course, evidentially important, but not dispositive. They must be weighed against all the relevant facts and circumstances in the case that bear on the issue of voluntariness.

In weighing all the evidence, we must determine whether the quantum of influence brought to bear on appellant was sufficient to render his act involuntary. To determine whether the quantum of influence rose to the level of legal duress entails making a judgment whether he had a reasonable alternative to relinquishing his citizenship. Several considerations lead us to the conclusion that despite the fact that appellant probably was told to renounce his

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10/ See Matter of M.E.G., decided February 13, 1986; Matter of I.Y.A., decided June 30, 1988; Matter of M.A.I., decided June 30, 1988; Matter of S.J.P., decided June 30, 1989; and Matter of L.P.C., decided July 5, 1989; and Matter of T.A.H, decided January 23, 1990; Matter of M.J.S., February 2, 1990; Matter of V.P.A, February 22, 1990, and Matter of G J P , March 22, 1990.

11/ See telegram from the United States Embassy at Tel Aviv, No. 14505, October 12, 1988

> One of Mr. Ben Ami Carter's [Community leader] 'Lieutenants' has escorted prospective renunciants (not exceeding four persons at one time) to the Embassy. He has remained with them in the CITSVCS interior waiting room until every one is interviewed separately, and has then escorted them out of the Embassy after the renunciation procedure is over. He is never present during the renunciation procedure.

citizenship, he was not confronted with a situation that left him without opportunity to make a choice.

In 1986, when he renounced his citizenship, appellant was nearly 40 years old and apparently in good health. He had served in the United States Army as a non-commissioned officer and had seen combat in Viet Nam, for which he reportedly was awarded the Bronze Star. Presumptively, appellant was a person of more than average courage, experience and resourcefulness. Thus, the situation in which he found himself in 1986 was stronger and therefore patently different from those of several other Black Hebrews (a very young man and several young women) whose appeals we have heard and decided in their favor. Furthermore, there is no evidence that appellant would have been physically abused or restrained if he had tried to remove himself and his wife and children from the confines of the Community. What apparently constrained appellant from defying the Community leadership was not lack of courage or capacity to fend for himself and his family, but a sense that because the Community fulfilled some kind of spiritual or psychological need, being forced to leave it as punishment for disobedience would be intolerable. Outside influence there may have been. Appellant's failure to stand up to it, however, sprang not from his being in a position of weakness vis-a-vis the Community leadership, but rather from what appears to have been his perception that loss of his citizenship was of lesser import than possible loss of his rights and privileges as a member of the Community. 12/

In short, appellant has not shown that the pressure to which he says he was subjected was so strong as to negate his freedom of choice. For he has not established that he lacked an alternative to resist the demands of the Community. Thus, appellant was in effect in a situation where he had sufficient opportunity to make a decision based on personal choice. Such a situation cannot objectively be described as one of duress. See Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971).

Appellant has not rebutted the statutory presumption that he renounced his United States nationality voluntarily.

12/ He is now obviously of a different mind. When he entered this appeal in 1989 he stated that he was appealing because he was "totally disgusted with my existence here in Israel as a member of this Community and I do not desire, if at all avoidable, to return to the United States as an immigrant."

IV

Finally, there is the question whether appellant intended to relinquish his United States nationality when he formally renounced it. The government bears the burden of proving by a preponderance of the evidence that such was his intention. Section 349(b) of the Immigration and Nationality Act (note 8 supra) and Vance v. Terrazas, 444 U.S. 252 (1980). Intent may be proved by a person's words or found as a fair inference from proven conduct. Id. at 260.

Formal renunciation of United States citizenship in the manner mandated by law and in the form prescribed by the Secretary of State is, on its face, unequivocal and final. "A voluntary oath of renunciation is a clear statement of desire to relinquish United States citizenship." Davis v. District Director, Immigration and Naturalization Service, 481 F.Supp. 1178, 1181 (D.D.C. 1979). Intent to abandon citizenship is inherent in the act. The words of the oath of renunciation are unambiguous:

> I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

Our sole inquiry therefore is whether appellant executed the oath of renunciation knowingly and intelligently, as well as voluntarily. The record shows that appellant, a mature person, acted in full consciousness of the consequences of his act. He signed two statements in which he acknowledged that he knew what he was doing and what the consequences of renunciation were. That he was able to understand the consequences of his own acts is also suggested by a brief reference he made in one of his submissions that in Viet Nam he served in the same infantry unit as Lt. William Calley of the Mai Lai Massacre. Furthermore, he knew that deportation to the United States would be obviated if he were to renounce his United States nationality; he acted to ensure that it would be.

We perceive no inadvertence or mistake of law or fact on appellant's part.

In sum, appellant's voluntary forfeiture of his United States nationality was accomplished in due and proper form and with his full consciousness of the gravity of the act.

V

Upon consideration of the foregoing, we conclude that appellant expatriated himself on September 3, 1986 by making a formal renunciation of his United States citizenship before a

consular officer of the United States in the form prescribed by the Secretary of State.

Accordingly, we affirm the Department's administrative determination of September 18, 1987 to that effect.

Alan G. James, Chairman

Edward G. Misey, Member

Howard Meyers, Member