January 29, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW 90-2

IN THE MATTER OF: P D R

The Department of State made a determination on April 21, 1988 that P D R expatriated herself on October 29, 1976 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/ Mrs. R appeals.

The sole issue for the Board to decide is whether the Department has carried its burden of proving that appellant intended to relinquish her United States citizenship when she obtained Canadian citizenship. For the reasons that follow, we conclude that the Department has not met its burden of proof. Accordingly, we reverse the Department's determination that appellant expatriated herself.

I

Appellant, P D R , became a United States citizen by birth at New York City on [redacted]. She attended high school in New York City and after graduation in 1968 worked there for two years. She married a Canadian citizen in 1970 and moved with him to Canada.

"Due to my financial state I needed a job that had security," appellant stated to the Board. She found such a job with Canada Post Corporation as a postal clerk. At the time of her hiring, 1976, Canadian citizenship or landed immigrant status was a requirement of employment, preference being given to citizens. Appellant applied for Canadian

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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 ...

citizenship. She alleges that prior to completing the naturalization process, "I queried the U.S. Consul here in Vancouver about my U.S. status if I accepted Canadian citizenship for employment purposes." She was informed, she states, that "I may lose my U.S. citizenship." She was, however, "given the impression that since I was applying for Canadian citizenship for employment purposes, I had a good chance of not losing my U.S. citizenship." Appellant was granted Canadian citizenship pursuant to section 10(1) of the Canadian Citizenship Act on October 29, 1976. At that time she made the prescribed oath of allegiance with reads as follows:

> 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 was employed by Canada Post Corporation from November 1976 to January 1987. She obtained a Canadian passport in 1981 and used it to travel abroad and to Puerto Rico.

In the autumn of 1987 when appellant inquired about her citizenship status at the Consulate General at Vancouver, her naturalization in Canada came to the attention of United States authorities. After the Canadian Citizenship Branch had confirmed that appellant had obtained naturalization, the Consulate General sent a letter to appellant on November 5, 1987 to inform her that she might have expatriated herself. She was asked to complete a form titled "Information for Determining U.S. Citizenship," and informed that before completing the form she might discuss her case with a consular officer. She completed the citizenship questionnaire in December 1987 as well as a supplemental information form and had an interview with a consular officer.

On January 12, 1988, 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 appellant's name. 2/ The certificate recited that appellant

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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

acquired United States citizenship by birth at New York City; that she obtained naturalization in Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

After reviewing the case, the Department informed the Consulate General that it required more information before it could act on the certificate. At the Department's request, the Consulate General addressed certain questions to appellant who replied in a statement dated February 22, 1988. After receiving appellant's statement, the Department concluded that there were sufficient grounds to warrant approving the certificate, and accordingly did so on April 21, 1988. The Department's action in approving the certificate constitutes an administrative determination of loss of nationality which may be appealed to this Board. The appeal was entered on March 13, 1989.

II

It is not disputed that appellant duly obtained naturalization in a foreign state (Canada) and thereby brought herself within the purview of section 349(a)(1) of the Immigration and Nationality Act. But the statute prescribes that nationality shall not be lost by performance of an expatriative act unless the act was done voluntarily with the intention of relinquishing United States nationality.

Appellant concedes that she became a Canadian citizen of her own volition. The dispositive issue thus is whether appellant intended to relinquish her United States citizenship when she acquired Canadian citizenship.

2/ (Cont'd.)

> 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.

Intent to relinquish United States citizenship is an issue the government has the burden to prove. Vance v. Terrazas, 444 U.S. 252, 270 (1980). The standard of proof is a preponderance of the evidence. Id. at 267. Intent may be proved by a person's words or found as a fair inference from proven conduct. Id. at 260. It is the party's intent at the time the expatriative act was done that the government must prove. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). Here the Department must prove that appellant probably intended to relinquish her United States citizenship in 1976 when she became a Canadian citizen. For proof by a preponderance means proof which leads the trier of fact to conclude that the existence of the contested fact is more probable than its non-existence. 339 McCormick on Evidence, 3rd Ed.

The Department asserts that the primary evidence of appellant's intent in 1976 is the fact that she obtained naturalization in a foreign state and made an oath of allegiance to a foreign sovereign. While pointing out that those acts, standing alone, will not support a finding of intent to relinquish citizenship, the Department maintains that appellant "showed an unambiguous intent." Continuing, the Department argues that:

> Upon being informed that she might lose her U.S. citizenship if she became a Canadian and that if she did so she would have to have her status determined by the State Department, chose to become a Canadian and made no effort to clarify her U.S. citizenship status until eleven years later when her circumstances had changed. At this time she no longer worked for the Canadian government and she had apparently acquired property in Puerto Rico to which she intends to retire..
>
> Appellant's conduct after her Canadian naturalization until her about-face in 1987 further illustrates her intent to relinquish her U.S. citizenship. 5/ Aside from making no attempt to clarify her citizenship status, Mr. Ryan [sic] conducted herself as and held herself out to be solely a Canadian citizen even in her dealings with American INS authorities.

5/ Footnote omitted.

The only evidence of appellant's intent at the time she obtained Canadian naturalization is the fact that she performed an expatriative act and made a concomitant oath of allegiance to Queen Elizabeth the Second. It is settled that naturalization, like any other enumerated statutory act of expatriation, may be highly persuasive, but is not conclusive, evidence of an intent to relinquish United States citizenship. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J., concurring). Making an oath of allegiance to a foreign sovereign or state may provide substantial evidence of intent to relinquish citizenship but alone is insufficient to prove renunciation. King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972). An oath of allegiance that contains only an express affirmation of loyalty to the country whose citizenship is sought, however, leaves "ambiguous the intent of the utterer regarding his present nationality." Richards v. Secretary of State, CV 80-4150, memorandum opinion (C.D. Cal. 1980) at 5.

The evidence contemporaneous with appellant's naturalization is too scant to support a finding that she intended to relinquish citizenship. In such circumstances it is incumbent upon the trier of fact to assess the circumstantial evidence to determine whether it establishes the requisite intent. Terrazas v. Haig, 653 at 288.

The Department finds strong evidence of a renunciatory state of mind in the fact that appellant concedes she was advised that naturalization in a foreign state is expatriative, yet proceeded to obtain Canadian citizenship. We do not agree.

It has been said that a deed is not done with intent to produce a particular consequence unless that consequence is the aim of the deed. 3/ In attempting to ascertain appellant's state of mind in 1976, the pertinent inquiry therefore is whether relinquishment of her United States citizenship was an inherent element in appellant's obtaining citizenship. The answer to that query is: "Not necessarily." Her sole aim, she contends, was to acquire Canadian citizenship so that she might have job security. Therefore, in order to prove that her aim was also to divest herself of United States citizenship the Department must adduce a greater quantum of evidence than it has done, for appellant's knowledge is not at issue. Her state of mind in 1976 is at issue.

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

Knowledge and intent are separate and distinct concepts. The method of proving intent is a problem distinct from proving knowledge, even where the latter is also available. Wigmore on Evidence, section 300, 3rd edition. Mere knowledge that an act is expatriative is not enough to establish a person's specific intent with respect to United States citizenship. Something more than knowledge must be shown. Richards v. Secretary of State, 752 F.2d 1413, 1420 (9th Cir. 1985). A United States citizen effectively renounces his citizenship by performing a statutory expatriative act only if he means the act to constitute a renunciation of that citizenship. Id. The Richards court found that the plaintiff meant his act of obtaining naturalizaation in Canada to constitute renunciation of his American citizenship because he expressly declared that he renounced all allegiance and fidelity to the United States. In the case before the Board, appellant performed an expatriative act but did nothing at the relevant time to show that she meant that that act should constitute a renunciation of United States citizenship. In short, a perception that she might lose her American nationality does not necessarily indicate a renunciatory state of mind.

Furthermore, if appellant was sufficiently concerned to make a prior inquiry about the effect of naturalization upon her nationality (the Department seems disposed not to challenge her claim that she made such an inquiry), is that act not a signal that she really did not aim to lose United States citizenship by acquiring Canadian citizenship?

The Department also submits that appellant's conduct after her naturalization confirms its contention that she intended in 1976 to relinquish her United States citizenship.

First, the Department implies that she made no effort for eleven years to assert a claim to citizenship because she intended to divest herself of citizenship, but when her circumstances changed, she found it to her interest to try to recover it.

Why appellant did not act sooner to assert a claim to citizenship is not entirely clear, but we are not persuaded that inaction even for eleven years is more plausibly ascribed to a prior intent to relinquish citizenship than to some other reason.

Appellant states that after 1976 she believed she was in an ambiguous position concerning her citizenship status. "I hadn't lost my U.S. citizenship but officially I wasn't a U.S. citizen," she stated in her reply to the Department's brief. She added that in 1976 when she accepted a position with Canada Post Corporation, "I planned to work there ten years in order to get myself out of the financial mess I was in. After that time, I would enquire about my U.S. status and I was confident that I

would retain my U.S. citizenship because I only took Canadian citizenship for employment purposes."

It seems to us that the most adverse construction one might put on appellant's procrastination in clarifying her citizenship status is that she was foolish to put off the day of reckoning. The reasons she gives for not acting sooner are no less plausible than the inference of a renunciatory intent the Department draws.

In short, it is not more likely than unlikely that her delay in clarifying her citizenship status manifested an original design to relinquish her American citizenship.

The Department's contention that appellant's specific intent in 1976 is illustrated by her not doing things that a diligent American citizen living abroad would do is no more persuasive in this case than in analogous foreign naturalization cases that have been appealed to the Board. Not voting or paying taxes (or filing tax returns) in the United States, not seeking consular advice before obtaining naturalization, not registering one's offspring as United States citizens are inadequate and unsatisfactory indicia of intent to surrender United States citizenship. They have little probative value because the explanation for not doing them could just as reasonably be laziness, indifference, lack of knowledge, absorption in other matters, as it could be a specifically formulated prior intent to relinquish United States citizenship. These facts do not speak for themselves on the issue of one's intent with respect to United States citizenship.

Appellant was shortsighted to use Canadian travel documentation and not even try to document herself as a United States citizen. But we think it going too far to conclude from such facts that appellant probably intended in 1976 to relinquish her American citizenship. She says that she used a Canadian passport because she was uncertain of her United States citizenship status. Of course, she could have established quickly whether she was a United States citizen simply by taking her case to a consular office. But not having done so and feeling uncertain whether she was or was not a United States citizen , she let matters drift. Negligence is as likely an explanation of such conduct as an earlier intent to relinquish United State citizenship.

One might address a good many "shoulds" and "oughts" to appellant with respect to her United States citizenship. But a specific intent to relinquish citizenship should not, in our judgment, be inferred from her ill-considered, dilatory, often inconsistent conduct.

We do not think that a preponderance of the evidence shows appellant intended to expatriate herself in 1976 when she became a Canadian citizen. The Department has not carried its burden of proof.

III

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

Alan G. James, Chairman

Howard Meyers, Member

George Taft, Member