February 2, 1990

DEPARTMENT OF STATE

90-4

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M J S

This is an appeal from an administrative determination of the Department of State, dated March 26, 1987, that appellant, M J S , expatriated himself on December 23, 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's renunciation of citizenship was not voluntary because it was induced by pressure from others. We therefore reverse the Department's holding that appellant expatriated himself.

I

Appellant, M J S , acquired United States citizenship by virtue of his birth at [redacted], Michigan on [redacted]. He lived in the United States until 1973 when his mother took him and his sister to Israel. There they joined the Hebrew Israelite Community (so-called Black Hebrews) at Dimona. Appellant grew up in the Community and was educated in its school system.

He states that in 1986 he was told by the Community leadership to renounce his United States citizenship. Before going to the Embassy to renounce, he was allegedly instructed by the Community officials what to do and say. On December 23,

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1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads as follows:

> 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 -
>
> . . .
>
> (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;...

1986 appellant and several other Community members were escorted to the Embassy by an official of the Community to renounce their citizenship. 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 affirmed 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. 2/ The affidavit poses a number of questions to the

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2/ 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 voluntary and not performed under duress, coercion or influence. Request Black Hebrews who wish to renounce to answer following questions in supplemental affidavit:
>
> 1. 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?
>
> 2. Is your decision to renounce in any part based:
>
> (A) On the fact that the GOI is considering deporting you? If so, explain.
>
> (B) On your present financial condition? If so, explain.
>
> (C) On personal or family problems and/or living conditions? If so, explain.
>
> (D) On influence, force and/or coercion that is being brought upon you by any person or persons? If so, explain.

prospective renunciant. The first question reads: "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 reads: "Is your decision to renounce based: (a) on the fact that the Government of Israel is 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 all four parts of that question by writing "no. "

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 in appellant's name, as prescribed by law. 3/ The certificate 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 simply:

2/ (Cont'd.)

> 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.
>
> If no reservations are apparent, administer the oath of renunciation and send all documents to the Department.

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

> Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to

> Enclosed for the Department's approval is a Certificate of Loss of Nationality which was executed by the Embassy in the case of M J S , a Black Hebrew, who made a formal renunciation of his U.S. nationality on December 23, 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.
>
> Mr. S 's U.S. passport is also enclosed.

The Department approved the certificate on March 26, 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 February 20, 1988. 4/

3/ (Cont'd.)

> 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.

4/ The delay in completing consideration of this appeal was occasioned by the fact that the Board waited for a number of months for appellant to reply to the Department's brief which was sent to him in November 1988 and which he received in January 1989. In April 1989, the Board requested that the Embassy at Tel Aviv communicate with appellant to ask him whether he would file a reply. If he did not wish to reply, the Board would decide his case on the basis of the information before it. The Embassy demurred, stating that:

II

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 makes clear that appellant's formal renunciation of United States nationality was executed in accordance with law and in the form prescribed by the Secretary of State. Thus, the first issue to be addressed is whether appellant voluntarily renounced 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 the act was not voluntary. 5/

4/ (Cont'd.)

> 1. Embassy is unable to forward the Chairman's message contained in reftel to Mr. S since the address referred to is that of the Hebrew Israelite Community (HIC) AKA Black Hebrew Community (BHC), in Dimona, Israel.
>
> 2. Mr. S repeatedly requested the Embassy not to forward any correspondence to his address in Dimona since the mail to the HIC is censored. He might run into serious problems if his desire to regain his U.S. citizenship is discovered by the leaders of the HIC.
>
> 3. Mr. S occassionaly [sic] comes to the Embassy to inquire about the status of his case. As soon as he communicates with the Embassy, we shall deliver to him the Chairman's message.

Since appellant received notice months ago that he might within 30 days of receipt of the Chairman's letter reply to the Department's brief, and presumably would have done so earlier had he so wished, the Board has decided that it should wait no longer for appellant to indicate whether he would reply to the Department's brief.

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

To prevail, appellant must, under the preponderance of the evidence rule, establish no more than that the existence of the contested fact - his claim that he was forced to renounce his citizenship - is more probable than its non-existence.

Appellant maintained in his appeal that "I acted out of fear, of going against the Communities [sic] guidelines." He had "never heard experienced or even investigated nothing about renunciation. I was just doing what they told me to do." Suggesting that growing up in the Community had bent him to the will of its leaders, appellant stated:

> Living in the Community for so many years its like you're almost programed [sic] to do everything that everybody else does because if you don't, then you are looked upon to be going against what they are standing for, and that is to say that I truly believe that I had no intention to relinquish my United States nationality under no circumstances. I must say that I truly believe that from living under the influence of the rules and guidelines of the Community I fell totaly [sic] under the influence of being fearful of disregarding thier [sic] rules and guidelines, and all the consiquences [sic] that follow that. Although they said that its a voluntary act, and you

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5/ (Cont'd.)

> (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.

> didn't have to do it if you didn't want to, but in the Community if you don't renunce [sic] everybody acknowledge the fact of you not doing as everyone else and you stand out as a creminal [sic].

In deciding this appeal we are mindful of certain well-established principles.

"[T]he right of citizenship being an important civil one 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). Similarly, Akio Kuwahara v. Acheson, 96 F.Supp. 38, 43 (S.D. Cal 1951): "The trier of fact must consider all evidence relating to the mental condition of the actor to determine whether his act was 'unimpelled by another's influence.'"

We are guided also by Justice Frankfurter's injunction: ..."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." Nishikawa v. Dulles, 365 U.S. 129, 140 (1958), concurring opinion.

The means of exercising duress, of interfering with one's freedom of choice, is not limited to force or the 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. In Nakashima the court held that the plaintiff (a dual national of the United States and Japan) did not expatriate herself by voting in an election in Japan (a statutory expatriative act until 1967).

> It is apparent from her testimony that the real effect of the occupation authorities' campaign and the conversations of her neighbors was to inculcate in her a fear that she would acquire a reputation of uncooperativeness and thereby endanger her opportunity to return to the United

States by inviting the wrath of the authorities.

Similarly, Takano v. Dulles, 116 F.Supp. 307, (D. Hawaii 1953). Plaintiff (a dual U.S./Japanese national) voted in Japanese elections because she feared punishment if she did not comply with the order of the occupation authorities granting women the privilege of voting, because she feared loss of her rations, and because she feared failure to vote might hinder her return to the United States. The court held that such factors constituted duress and voided the expatriative act. Accord, Hatsuye Ouye v. Acheson, 91 F.Supp. 129 (D. Hawaii 1950.)

Parental pressure by alien parents on citizen children to renounce their United States citizenship in order to prevent family break-up and avoid draft induction has been held to render formal renunciation of United States citizenship involuntary. Tadayasu Abo et al., 77 F. Supp. 806, 808 (N.D. Cal. 1948). Pressure by persons in a position of authority over the actor to perform the act of formal renunciation may raise a serious doubt whether the renunciation was free of the "taint of incompentency." 6/

In the case before us, appellant unquestionably was influenced by others to renounce his United States nationality, but the pertinent inquiry is whether the quantum of influence was sufficient to render his renunciation involuntary. The quantum of influence which would remove the act of renunciation from the sphere of free choice varies according to the character of the act. Akio Kuwahara v. Acheson, 96 F. Supp. 38, 42 (S.D. Cal. 1951). 7/

6/ In Tadayasu Abo the court observed that plaintiffs and the government agreed that a combination of a number of factors lead to the execution of the renunciations at the notorious Tule Lake camp, including threats and bad camp conditions. What disagreement there was, the court stated, concerned which factors were primary, and which subordinate, as to the effect and impact upon the plaintiffs. The court was of the view that: "such factors, singly or in combination, cast the taint of incompetency upon any act of renunciation made under their influence by Americans interned without Constitutional sanction, as were plaintiffs." 77 F. Supp. at 808. [Emphasis added.]

7/ The plaintiff, a dual U.S.-Japanese national, voted in a Japanese election because he feared the repercussions if he disobeyed the instructions of the occupation authorities to vote.

> ...For example, 'Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States * * *' subsection (h) [of the Nationality Act of 1940], should require a far greater degree of influence or compulsion to justify a finding that it was involuntary than would the act of voting in an election. Likewise, it would seem that being naturalized in a foreign state, subsection (a), or swearing allegiance to a foreign state, subsection (b), or serving in the armed forces of a foreign state, subsection (c), (particularly of an enemy country), or making a formal renunciation of nationality, subsection (f), all are acts which would require a higher degree of pressure than would the act of voting.

96 F.Supp. at 42.

The contemporary evidence bearing on the issue of voluntariness consists of two documents: (1) the statement of understanding in which appellant averred that he was acting voluntarily and (2) the supplemental affidavit in which he declared that no influence, force or coercion had been brought upon him. As we have seen, the Embassy, in reporting this renunciation to the Department, offered no evaluation of appellant's demeanor; nor did it comment on the circumstances surrounding his renunciation.

Appellant told the Board that he tried to obtain evidence regarding "the actual circumstances" surrounding his renunciation from those who renounced when he did, but without success. "They refused to cooperate," appellant stated, "or I should say [were] afraid to testify against the Community." Given the way the Community is said to discipline its members, we do not consider it strange that appellant found it difficult to obtain evidence from other members. To judge whether appellant has carried his burden of proof we must look to circumstantial evidence to determine whether it is sufficient to impeach the contemporaneous evidence.

In response to the Board's request in connection with the appeal of another Black Hebrew, the consular officer who administered the oath of renunciation to this appellant, outlined in an affidavit executed on September 18, 1988 the general procedures he followed in 1986 in handling formal renunciation by Black Hebrews. He stated that after each

renunciant had been given a copy of the statement of understanding and the supplemental affidavit,

> ...I then took each person separately into my office where, in the presence of two Foreign Service Nationals, I conducted the interview which lasted up to an hour. I had the person read each question in the affidavit and Statement of Understanding and I discussed each question with him/her. I explained the seriousness of renunciation of citizenship and the consequences of being stateless. I informed the person that renunciation of citizenship is an irrevocable act and that the only way a renunciant could reacquire U.S. citizenship was through the naturalization process. I questioned the person about his motives in seeking to renounce his citizenship. The would-be renunciants, without exception, stated that they had come to renounce their citizenship voluntarily and were not under duress from any source. I would then offer the person additional time to think over his decision and presented the option of deciding not to renounce.
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> If the renunciant still wished to proceed with the renunciation, I would have him execute the affidavit and statement of understanding. I asked the person to read the oath of renunciation. I would then offer a final opportunity to change his mind. If he chose to continue, I would administer the oath of renunciation and inform the renunciant that he was no longer a United States citizen.

The consular officer's statement indicates that he observed the Department's guidelines on formal renunciation. It does not, however, shed light on this appellant's probable state of mind on December 23, 1986.

Although there is limited direct evidence that appellant was ordered to renounce his citizenship, circumstantial evidence indicates that he acted in response to the 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 similar accounts of the pressure exerted upon them to renounce as to lend credence to them. 8/ Nor is there any question 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 on renunciation given the renunciants by the local employee, and who remained in the waiting room while each renunciant performed the act. 9/ The mere presence of the Community official injects an obvious coercive element into the case.

The backdrop against which appellant renounced his United States citizenship is of paramount relevance to the issue of whether his renunciation probably was or was not a voluntary act. It is not easy to assess precisely how palpable was appellant's fear about the possible consequences if he were to defy the instructions of the Community leaders, but given what is known of the Black Hebrew Community, its authoritarian character, insistence on obedience, the capacity of its leader

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8/ 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.

9/ 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.

The Embassy official who handled appellant's case was not in an easy position. Since expatriation is a "natural and inherent right" of all citizens, the officer was constrained in how far he could go to discourage appellant. We accept that in accordance with the Department's instructions, he evidently made a fair effort to elicit and document expressions of voluntariness from appellant before accepting his renunciation. (See note 2 supra.)

Ben Ami Carter to mezmerize his followers, especially young ones like this appellant (he was 20 years old when he renounced), it is not mere speculation to believe that his concerns were genuine. Furthermore, as we have seen, appellant was taken to Israel and initiated into the Community at the age of seven. It requires little effort to credit appellant's statement that living in the community for so many years, "its like you're almost programmed to do everything everybody else does." Through no fault of his own, appellant found himself in the bizarre world of the Black Hebrews whose leaders exercised authority over him. One so conditioned to give obedience of his superiors is not likely to resist the commands of authority. "Feebleness on one side and overpowering strength on the other imply duress. Yuichi Inouye v. Clark, 73 F. Supp. at 1003.

The Embassy itself injected doubt into the issue whether appellant's renunciation was voluntary when it reported to the Department in 1988, in response to a request for information surrounding appellant's renunciation, that:

> Though there is little doubt that Mr. S was interviewed separately and privately [out of the presence of the other renunciants and the Community escort] at the actual taking of the oath of renunciation, the dominating influence of the leader Ben Ami Carter is well documented. Carter's charismatic flair may be waning but his authority and influence over the Black Hebrew Community remains.

Was appellant subjected to a more intense degree of pressure than American citizens who were also citizens of Japan who were warned by the occupation authorities in the cases cited above to comply with the policy of the military government and vote in a foreign election? Given his age, aculturation and lack of apparent alternatives to renouncing his citizenship, we are of the view that the evidence shows a quantum of outside influence which would remove his act from the sphere of free choice. Formal renunciation of the precious right of citizenship should not be accomplished under a cloud.

We are thus of the view that appellant has rebutted the presumption that he renounced his United States citizenship voluntarily. Accordingly, since he has succeeded in proving that his act was not voluntary, there can be no expatriation. Vance v. Terrazas, 444 U.S. at 270.

III

The Department's determination that appellant expatriated himself is hereby reversed.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member