DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

Decision No. 94-2 June 22, 1994

IN THE MATTER OF: E Y K -- On Motion for Reconsideration

The Board of Appellate Review on December 21, 1993, affirmed an administrative determination of the Department of State that E Y K expatriated himself under the provisions of section 349(a)(5) of the Immigration and Nationality Act by voluntarily making a formal renunciation of his United States citizenship before a consular officer of the United States at Jerusalem, Israel with the intention of relinquishing that citizenship.[1] Within the time prescribed by the regulations, K moved, through counsel, for reconsideration of the Board's decision. The Department of State filed a timely memorandum in opposition.

We grant the motion and affirm our original decision.

I

K insists that he renounced his citizenship involuntarily because "excessive external pressure subjected him to extreme duress which his psychiatric condition rendered him unable to withstand." The Board did not, he asserts "give full weight to his psychiatric condition" at the time of his renunciation. The pressure to which he refers was that allegedly exerted by R G , President of the Association of Russian Immigrant Scientists and head of its political arm, the Party. According to the statement of G which K introduced in the original proceeding, he had to impose pressure on K to induce him to stand as a candidate of the Party for the Knesset elections of

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[1] Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), provides:

> 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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> . . .
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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 amy be prescribed by the Secretary of State; . . .

June 1992. After G learned that K was an American (as well as Israeli) citizen, and as such ineligible to stand for the Knesset, G further "demanded that Professor K take all necessary steps in order to meet the legal requirements even if it would take him to renounce his United States citizenship, or else he would be responsible for the collapse of the whole Party."

K states that G 's demand that he renounce his United States citizenship, if necessary, "triggered" his depression. "G knew K 's sensitive spots and pressed him on them to get what he wanted." The pressure was mental rather than physical but nonetheless it was duress. "K was susceptible to G 's pressure as one who strived for the recognition and support of the Russian scientific community of Israel."

In support of his motion, K asks the Board to accept medical evidence supplementary to what he introduced in the original proceedings. In its memorandum in opposition to the motion, the Department of State maintained that such supplementary evidence is inadmissible because K has not shown that it could not have been discovered before the Board reached its decision on his appeal. We agree.

It is well-settled that in order to obtain relief from judgment on the basis of newly discovered evidence, the moving party must show that the evidence was in existence at the time of the trial, that the evidence was not in his possession before judgment was rendered, and that the evidence was not and could not have been discovered by the exercise of reasonable diligence. American Cetacean Society v. Smart, 673 F.Supp. 1102, 1106, (D.D.C. 1987). K has not shown, as it is incumbent upon him to do, that the medical evidence he now wishes to introduce was not available to discovery before the Board rendered its decision on his appeal and that with due diligence he could not have obtained and submitted it before judgment. The supplementary evidence is therefore inadmissible.

The inadmissible supplementary medical evidence aside, K 's case for reconsideration rests essentially on his contention that the Board did not adequately consider the assessment of his mental health made by Dr. S , the Israeli psychiatrist who examined him some 6 months after he renounced his citizenship.

We restate Dr. S 's principal conclusions.

-- On November 23, 1992, he "received the impression" that K "has been suffering since 1986 from prolonged depressions of the major depression type, having a definite endogenic variation."

-- "The trigger for the development of this depression" was a confrontation K had with the head of his college Department.

-- K 's doctors in the United States treated his depression "more as an adaptation reaction;" he did not therefore receive any real anti-depressant treatment.

-- Accordingly, "there was no significant improvement in his mental state and he did things as a result of this impairment to his judgment that he would not have done had he not been in a depression of this type and intensity."

-- Two examples of impaired judgment are: his resignation in 1990 of his college position and his almost immediate recantation and request for reinstatement; and spending money at that time without thinking and later regretting having done so.

The Board gave most careful consideration to the opinion of Dr. S .[2] It gave equally close scrutiny to the reports of Dr. S , the American psychiatrist whom K consulted over a three-year period from the onset of his depression in the spring of 1986 to the spring of 1988.

Dr. S stated in an assessment made on May 9, 1988, that K 's symptoms - depressed mode, insomnia, irritability, headaches and general aches - appeared to be an outgrowth of a struggle within the university department in which Dr. K felt he had been treated unfairly.

> In my opinion {Dr. S declared} he suffers with an 'Adjustment Disorder with Depressed Mood.' If administratively feasible, the symptomatology would likely be greatly relieved, even eliminated, if he could be assigned a teaching role 'apart' from his present chairperson.

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[2] In his motion (p.4), K states that the Board dismissed Dr. S 's evaluation of his mental condition "by saying that 'odd or bizarre behavior is not presumptively equatable with mental incompetency.'" That citation to the Board's opinion is inaccurate. The Board made the foregoing statement, not in respect of Dr. S 's evaluation, but in reference to statements made by K 's wife, daughter and sister that in the spring of 1992 he was acting "strangely."

K. asserts that the Board erred in giving Dr. S s opinion greater weight than that of Dr. S ; arguing that his depression was a continuing, latent condition that re-surfaced when G subjected him to pressure to run for the Knesset and, if necessary, relinquish his United States citizenship.

The Board obviously is not equipped to pronounce the opinion of one psychiatrist more valid than the other's. Confronted with the differing assessments of two presumptively qualified practitioners, the Board could only take a pragmatic approach to determine whether K probably was or was not able to function rationally when he renounced his United States citizenship.

Dr. S. stated that K suffered from depression of a major type, which is commonly understood to imply dysfunctional mental processes; yet we noted that he cited no examples of dysfunctional behavior on K 's part. Resigning his college position one day (in 1990) and shortly thereafter recanting and asking to be reinstated; spending money at that time that he later regretted are acts so banal and explainable on grounds other than irrationality that they hardly can be called manifestations of mental instability.

We noted, too, that nothing of record established with reasonable certitude that after K. left the United States and went to Israel in 1991 his depression continued. It was therefore not unreasonable to assume that Dr. S had rightly predicted that once K was out of contact with "the phobic object," his college department head, his condition would be alleviated, even eliminated.

Might K 's depression have been resuscitated in the spring of 1992 because G pressed him to take all necessary steps to qualify the Party to stand for the Knesset elections? Perhaps, but not even Dr. S ventures to assert that on May 12, 1992, K acted contrary to his true will and purpose to do otherwise; his carefully drafted opinion observes simply that "during periods of exacerbation" K "did things as a result of impairment of judgment" that he would not have done otherwise.

K. has not demonstrated wherein the Board misapprehended or misunderstood the facts regarding his mental state and that we thus erred in concluding he was mentally competent to make a valid voluntary renunciation of his United States citizenship. Since we are satisfied that his mental health was not significantly impaired when he relinquished his citizenship, we find no reason to change our conclusion that any pressure G may have exerted on K did not constitute legal duress. He and G. appear to have been friends; and while K may not have relished the idea of being a party politician, he was very loyal to the emigre Russian scientific community and plainly

wanted to do whatever he could to advance its interests.

K 's formal renunciation of United States citizenship was a voluntary act.[3]

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[3] K argues that if the Board had followed its own precedents and applied to his case the criteria it applied in Matter of M.T.B. and Matter of D.McM.K. it would have concluded that he had renounced his citizenship involuntarily.

Those cases are inapposite.

Matter of M.T.B. was an appeal by a member of the Black Hebrew community in Israel who renounced his citizenship at the direction of the community leadership, pursuant to community policy to avoid deportation of members from Israel to the United States through forfeiture of U.S. citizenship. The Board held that appellant, a mature, resourceful man, was probably better able than many other appellants similarly situated to resist pressure to renounce, and thus his renunciation was voluntary. A few months later when appellant moved for reconsideration of the Board's decision, the Department filed a memorandum, not in opposition, but urging the Board to take account of a new Department policy under which scores of certificates of loss of nationality had already been vacated on grounds that the environment of the Black Hebrew Community was, per se, not conducive to a free choice with respect to renunciation of citizenship. The Board found this rationale persuasive and concluded that M.T.B.'s renunciation was tainted. The Board reached the same conclusion with respect to several other male Black Hebrew appellants who also moved for reconsideration of their cases.

As the Department pointed out in its memorandum in opposition to K 's motion for reconsideration, Matter of M.T.B. is one of several sui generis decisions of the Board. The Black Hebrew cases (the 12 or so that were appealed to the Board and hundreds that were not appealed) are unique. For in the end the Department restored citizenship to virtually all Black Hebrews who renounced citizenship, save for a limited number who conceded (expressly or implicitly) that they renounced voluntarily. K 's situation in no way resembles that of M.T.B. or other Black Hebrews similarly situated. He did not live in a hostile environment, fearful that he might be deported if he did not renounce his citizenship.

Lastly, K seeks support from a statement the Board made in its opinion on M.T.B.'s motion for reconsideration: "even pressure exerted on a presumptively strong, resourceful person cannot stand as a matter of law." That statement clearly was unnecessarily broad and should have been qualified. It cannot be

II

K further submits that the Board did not observe well-settled judicial standards to determine whether he intended to relinquish his United States citizenship.

> In the Board's discussion of Prof. K 's intent, it applies the standard which Terrazas {Vance v. Terrazas}, 444 U.S. 252 (1980) specifically rejects - namely, that 'intent to abandon citizenship is inherent in the act.' (p. 15). Terrazas held 'that in proving expatriation, an expatriating act and an intent to relinquish citizenship must be proved by a preponderance of the evidence.' (Emphasis added). Terrazas, p. 17. By attaching an inherent intent to the act, the Board effectively wiped out the double-tiered burden of proof standard which was placed on the State Department.

In stating that intent to relinquish citizenship is inherent in the act of formal renunciation of citizenship, the Board did not, of course, "wipe out the burden of proof standard" prescribed by Terrazas[4] The Board required that the Department

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considered an immutable principle.

Matter of D.McM.K. was an appeal by a woman with a long (since 1979) history of mental illness who renounced her citizenship one day in 1993 and only days later was admitted to hospital for treatment of a condition diagnosed as bipolar (manic depressive) affective disorder, characterized by hypomanic episode. Unlike K 's case, there was an abundance of precise, consistent, contemporaneous psychiatric evidence of the woman's condition to establish beyond reasonable doubt that on the day she renounced her judgment had been impaired by mental illness far more extreme than anything K could prove.

[4] Formal renunciation of United States citizenship is such a categoric, unambiguous act (in distinction to other statutory expatriative acts) that if the act be adjudged voluntary, it follows with virtual certainty that the actor intended to relinquish citizenship. "A voluntary act of renunciation is a clear statement of desire to relinquish United States citizenship,"

establish (and concluded it had established) that K performed a valid expatriative act. Further, the Board required that the Department assume the burden of proving that K intended to relinquish his citizenship when he made a formal renunciation of that citizenship. The Board concluded that the Department had met its burden of proof by introducing K 's oath of renunciation. The oath taken at the time one renounces citizenship "is sufficient evidence to meet the Secretary's [of State] burden [of proof]," the court said in Maldonado-Sanchez v. Shultz, 706 F.Supp. 54, 60 (D.D.C. 1989), citing Richard v. Secretary of State, 752 F.2d 1413, 1421 (9th Cir. 1985). "The burden then shifts to the plaintiff to show that he did not, at the time of renunciation, intend a permanent loss of citizenship." Maldonado-Sanchez at 60.

After the Department introduced K 's oath of renunciation as evidence of his intent to relinquish citizenship, it was incumbent upon him to show that it was not his intention to relinquish citizenship by presenting evidence negating intent. After carefully examining all the evidence, we concluded that he had failed to show lack of such intent.

K additionally maintains that the Board ignored the court's holding in Richards v. Secretary of State, supra, that citizenship shall not be lost by one who performs an expatriative act (even if he or she knows it to be expatriative), unless he or she has a conscious purpose to lose it. K states that the consul concerned provided evidence that he did not intend to lose his citizenship.

> As noted in the April 1993 Consular Officer's Telegram to the State Department, K specifically stated that he did not intend to lose his U.S. citizenship and asked about putting his citizenship 'in trust.' The Consular Officer confirms that K 'asked if there was a way to place his citizenship 'in trust' (as did most of the candidates) in order to run for the Knesset. (See Exhibit 13). To paraphrase he told the consul: I don't want to give up my American

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Davis v. District Director, Immigration and Naturalization Service, 481 F.Supp. 1178, 1181 (D.D.C. 1979); aff'd 652 F.2d 195 (D.C. Cir. 1981); cert. denied 454 U.S. 942 (1981). See also Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971). The formal renunciation of plaintiff Jolley was, the court stated, "on its face unequivocal."

> citizenship but I'm forced to. Such a statement even when made by a strong mature person is not the equivalent of expatriatory intent under the rule of law established by the cases cited above. How much the more so in the case of K with his proven record of reacting irrationally and impulsively when faced with pressure. (Emphasis in original.)

The Board was of the opinion that K had indeed expressed a conscious purpose to relinquish his citizenship. He did not, as far as the record shows, say to the consul in a meeting at the Embassy around early May 1992 that he did not intend to relinquish his citizenship, but rather that he wanted to place it "in trust." When he was informed that he might not renounce his citizenship conditionally (that is, place it in trust), he accepted from the consul papers relating to formal renunciation of citizenship and promised to study them carefully. When he returned to the Embassy on May 12, 1992, he informed the consul that he wished to proceed with renunciation because he felt his decision to run for the Knesset was very important. (Embassy telegram to the Department, April 23, 1993.) Thereafter he gave expression to a conscious purpose to relinquish citizenship by signing the oath of renunciation. Other contemporary evidence of K 's conscious purpose is found in a telegram the Embassy sent the Department only two days after he made the oath of renunciation in which the Embassy noted that "K is anxious to renounce his citizenship immediately."[5]

Finally, K asserts that the Board's original decision is "at odds" with the decision in Action S.A. v. Marc Rich & Co., Inc., 951 F.2d 504 (2nd Cir. 1981).

Rich is wholly inapposite. In that case, a United States citizen obtained naturalization in Spain after making an oath of allegiance that contained renunciation of previous citizenship. The court held that the citizen lacked the requisite intent to

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[5] K did not have at hand his certificate of naturalization as a United States citizen. The Embassy could not therefore insert the precise data as to date and place of naturalization in the renunciation papers. It requested that the Department obtain and forward such data so that it might complete the documents. Obviously, since K had already made the oath of renunciation, the Embassy meant that K was anxious to complete the formalities of expatriation as soon as possible.

relinquish his United States citizenship because, subsequent to obtaining Spanish citizenship, he conducted himself in numerous ways as a United States citizen. Despite what the court described as "mouthing words of renunciation before a Spanish official," he had manifested by his behavior afterwards an intent to remain a United States citizen. (Rich at 507.)

K argues that his oath of renunciation is of no more legal significance than that made by the citizen in Rich; when he signed the oath of renunciation he too was merely "mouthing the words." His true intent was not to lose his citizenship.

We need not labor the point that making a solemn oath of renunciation of United States citizenship before a consular officer of the United States in the manner prescribed by law and the form prescribed by the Secretary of State cannot be dismissed as "mouthing words." Furthermore, after he renounced his citizenship K did nothing to manifest an intent to continue to be a United States citizen; indeed, he acted as an Israeli citizen and campaigned for the parliament of Israel as a citizen of that country.

K has adduced no considerations that warrant our modifying or reversing our original conclusion that he intended to relinquish his United States citizenship.

III

Upon consideration of the foregoing, we hereby affirm our decision of December 21, 1993, that K voluntarily renounced his United States citizenship with the intention of relinquishing that citizenship.

Alan G. James, Chairman

Mary Elizabeth Hoinkes, Member

Frederick Smith, Jr., Member