DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

Decision # 96-5 October 18, 1996

IN THE MATTER OF: D J K

This case is before the Board of Appellate Review on the appeal of D J K from an administrative determination of the Department of State that he expatriated himself on December 5, 1994, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Korea upon his own application.[1]

For the reasons that follow, we conclude that appellant voluntarily reacquired his birthright Korean nationality with the intention of relinquishing his United States nationality. Accordingly, we affirm the Department's decision of appellant's expatriation.

I

Appellant was born in Korea on [redacted]. The record indicates that he immigrated to the United States in 1982 and acquired United States citizenship by virtue of naturalization before the Federal District Court for the Northern District of Georgia on December 13, 1985. He thereby automatically lost his Korean nationality. According to appellant, he married in 1990 and has a daughter. His wife and daughter apparently reside in the United States; the record does not disclose their citizenship status.

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1 Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1) (1988), provides:

> (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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> (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; . . .

For a number of years, appellant states, he operated his own business; after his marriage, he and his wife jointly ran one in Los Angeles. A U.S. passport was issued to appellant in 1985, which he lost in 1994. A replacement was issued to him in August 1994.

Appellant returned to Korea in the autumn of 1994 and applied to the Minister of Justice to reinstate his birthright Korean nationality. On December 5, 1994, the Minister informed appellant that he had approved his application and advised him:

> In the event when you do not lose your former nationality within 6 months from this notification date, your Korean Nationality will be lost again, therefore please lose your former nationality within above period and submit copy of the Certificate of former nationality to this office.[2]

A few days later, on December 16, appellant visited the consular section of the Embassy at Seoul. There he filled out a form titled "Information for Determining U.S. Citizenship." In completing the form, appellant signed a "Statement of Voluntary Relinquishment of U.S. Nationality," which reads in operative part: "I performed the following act [obtained naturalization in a foreign state] voluntarily and with the intention of relinquishing my U.S. nationality." He also executed a second sworn statement "in connection with my intention to lose my U.S. citizenship matter this time." It reads in relevant part as follows:

> As matter of fact, I immigrated to the United States in 1982. and obtained the U.S. citizenship on Dec. 13, 1985 and lived until Sept 12,1994.
> However, I lived more than 12 years in the United States, I just was unable to satisfy my life in the United States of America.
> Therefore I finally decided to live in Korea permanently and to start my new business in Korea.
> I intent to give up my U.S Citizenship voluntarily and no one forced me to give up my US Citizenship/[3]

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2 The record does not disclose the source of this translation.

3 In his opening brief, however, appellant gave the following reason for deciding to reacquire Korean nationality.

> I decided to reacquire Korean citizenship because I wanted to obtain title to my mother's house in Korea. I am the oldest male child of my parents' three children, and my father passed away in 1990. My younger brother and sister live in Korea. I was afraid that if my mother died, I would lose my inheritance because, not being a Korean citizen, I could not hold title to property in Korea.

The consular officer who handled appellant's case prepared a certificate of loss of nationality in appellant's name on December 19, 1994, as required by law.[4] The officer certified that appellant was born in Korea in [redacted]; that he acquired the nationality of the United States by virtue of naturalization in 1985; that he regained the nationality of Korea on December 5, 1994, and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act (INA). The Department approved the certificate on January 10, 1995, such action constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

Two months later at the Embassy, appellant applied for a non-immigrant visa. His application was refused, a consular officer later stated, on the grounds that he was unable "to show compelling ties to a residence abroad at the time of his application."

Appellant entered this appeal through counsel on February 26, 1996.

II.

As an initial matter, the Board must decide whether it has jurisdiction to hear and decide this appeal. The Board's jurisdiction depends upon whether the appeal was filed, or may be deemed to have been filed, within the applicable limitation, for timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). With respect to the limit on appeal to the Board of Appellate Review, section 7.5(b)(1), of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), provides that:

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4 Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501 (1994), 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. Approval by the Secretary of State of a certificate under this section shall constitute a final administrative determination of loss of nationality under this chapter, subject to such procedures for administrative appeal as the Secretary shall prescribe by regulation, and also shall constitute a denial of a right or privilege of United States nationality for purposes of section 1503 of this title.

> 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.

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.

The Department approved the CLN that was issued in this case on January 10, 1995. The appeal was entered on February 26, 1996, 57 days after the time allowed for appeal.

We start with the fact that appellant did not receive a copy of the approved CLN until February 10, 1995, when he went to the Embassy to pick it up in person.[5] Although the regulations provide that an appeal must be taken within one year after approval of the CLN, fairness and common sense dictate that the limitation be deemed to run from the time that the person concerned receives the CLN. For only at that time is he or she officially put on notice of the right of appeal and the applicable limitation; this information is printed on the reverse of the CLN. Appellant's delay thus becomes merely 16 days.

In the particular circumstances of this case, such delay clearly is de minimis. In late January 1996, counsel for appellant was retained by appellant's wife. On January 25, 1996, counsel wrote to the Department to request a copy of the case record. He also wrote to the Board to request appeal forms and copies of all published opinions of the Board since the Board began publishing selected opinions in 1984. In his letter to the Department, counsel referred to appellant by name and stated that he had been retained to represent him on an appeal. In his letter to the Board, counsel did not mention appellant by name, but did state that he had a client who wished to appeal. The Department sent counsel a copy of the case record on February 6, 1996. The Board sent counsel copies of published opinions relevant to his client's case, which counsel received on February 14, 1996. The appeal was entered on February 26, 1996.

Counsel explains why he did not enter the appeal sooner.

> It is significant that at the time Counsel was retained in this matter, he did not have the benefit of access to published BAR decisions as these decisions are not available in bound volumes. Accordingly, Counsel was not aware of the

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5 Having been informed by telephone on January 26, 1995, that the CLN issued in his name had been approved by the Department and that a copy was at the Embassy, appellant elected to go there to pick it up rather than have it mailed to him.

> Board's liberal interpretation of the regulation that the one year appeal period begins to run on receipt of the CLN, not the date of approval as stated in the regulation [a position the Board took in Matter of N.K.C. Feb. 14, 1991]. After he received the appeal forms from the Board on February 2, 1996, Counsel did not hurry to file the appeal as he assumed that the deadline to file had already passed, and he thought it prudent to perform additional legal research before filing the appeal. Counsel was thus not able to determine that the appeal period would expire February 10, 1996, until after that date had already passed. Certainly, if Counsel had access to the BAR decisions at the time he was retained in this matter, the appeal would have been timely filed (prior to February 10, 1996).

Counsel and appellant urge the Board to deem counsel's actions prefatory to the actual filing of the appeal as constituting constructive compliance with the requirements of 22 CFR 7.5(a). This we will do. Although we think counsel would have been prudent to file the appeal immediately after he was retained by appellant's wife, we also believe that not to allow the appeal would unjustly punish appellant for what we consider counsel's good faith delay in filing.

Accordingly, we hold that the appeal is not untimely, and will proceed to consider the substantive issues presented.

III.

Section 349(a)(1) of the INA provides that a citizen shall lose his citizenship by obtaining naturalization in a foreign state voluntarily with the intention of relinquishing his United States citizenship. There is not dispute that, by reacquiring his birthright Korean citizenship, appellant obtained naturalization within the meaning of section 349(a)(1) of the INA.

As to whether he voluntarily reacquired Korean nationality, appellant concedes that his act was uncoerced. Thus the sole issue for determination is whether he intended to relinquish his United States nationality.

Although the statute provides that any of the enumerated statutory expatriative acts, if proved, are presumed to have been committed voluntarily,[6] "it does not also direct a presumption

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6 Section 349(b), INA, 8 U.S.C. 1481(b), provides:

> (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

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that the act was performed with an intent to relinquish United States citizenship. That matter remains the burden of the party [the Government] to prove by a preponderance of the evidence." Vance v. Terrazas, 444 U.S. 252, 268 (1980). Intent, the Court said, may be expressed in words or found as a fair inference from proven conduct (444 U.S. at 260). The intent to be proved is the party's intent at the time he or she performed the expatriative act, in this case when appellant reacquired Korean nationality. Terrazas v. Haig, 653F.2d 285, 287 (7th Cir. 1981).

The Department submits that appellant's intent "is clearly shown by his own words and actions at the time of his Korean naturalization." He was aware of the Korean legal requirement that in order for naturalization to be valid, the person concerned must submit proof that he has lost his prior nationality. That is the reason, the Department asserts, why appellant also executed a statement on December 16, 1994, in which he stated that his specific intent was to relinquish United States citizenship. He wanted to give up his U.S. citizenship to comply with the Minister of Justice's notice that he had to give up U.S. citizenship to retain Korean citizenship. The preponderance of the evidence here, the Department argues, clearly shows that appellant not only voluntarily but intentionally relinquished his U.S. citizenship.[7] His "self-serving denial" that he did not act with complete awareness of the consequences of his act is, the Department maintains, inconsistent with his prior expression of intent and is not supported by the evidence.

Appellant contends that he did not fully understand the consequences of his actions, and so did not make "a knowing, intelligent waiver of his citizenship rights." Accordingly, he lacked the requisite intent to relinquish his United States citizenship.

He makes the following specific allegations, among others:

- Because of his "poor English skills," he did not fully understand either of the two statements he signed at the Embassy on December 16, 1994.
- The consular officer who handled his case did not give him any warning about the seriousness of his actions. Counsel observes that it is significant that the consular officer who processed appellant's case apparently never developed

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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.

7 The Department of State obviously did not consider that the instant case comes within the purview of the Department's evidentiary standard to adjudicate putative loss of nationality cases. Under that standard, the Department presumes that one who obtains naturalization in a foreign state (or performs certain other statutory expatriative acts) intends to retain, not relinquish, citizenship. The presumption is considered inapplicable, however, where a citizen expressly indicates at the time of naturalization an intention to relinquish citizenship.

In the Board's view, the Department correctly determined that the presumption to retain citizenship was not applicable here.

the fact that he had left a wife in the United States and, therefore, never specifically warned him of his possible separation from his wife should he be refused a visitor's visa to enter the United States.
- Someone at the Embassy, not he, drafted the second renunciatory statement he made.

Counsel observes that his client's case is one of an individual

> who was temporarily blinded by self-interest and who acted precipitously before he had the opportunity to fully consider the consequences of his actions. For, as he failed to fully consider and understand the consequences of his relinquishment of his United States citizenship, [appellant] also failed to fully understand and consider the transaction which would transfer his mother's house to him [see note 3]. Thus, as [appellant] states in his affidavit, as it turned out, after he relinquished his U.S. citizenship, he learned that taking title to the house was not economically feasible, and he abandoned the transaction.

That appellant did not fully understand the consequences of the renunciatory statements he signed at the Embassy is borne out, he alleges, by the fact that he never attended school in the United States and never held a professional position there. In the twelve years he lived in the United States his employment did not require daily use of English. Although he was able to pass the literacy test for naturalization, he "never developed strong English language skills." The fact that appellant was assisted by Embassy personnel to draft his own statement that he intended to relinquish U.S. citizenship "gives further credence to his lack of complete understanding of the proceedings."

It is well settled, of course, that a citizen may waive citizenship or other constitutionally guaranteed rights, but waiver must conform to well-established principles. See Johnson v. Zerbst, 304 U.S. 457 (1938).

> It has been pointed out that 'courts indulge every reasonable presumption against waiver' of constitutional rights[12] and that we 'do not presume acquiescence in the loss of fundamental rights.'[13] A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. [Footnotes omitted.]

Whether appellant in the case before us made an intelligent waiver of his right to United States citizenship is central to the disposition of this case.

We consider it is significant that, only days after receiving notice that his application to regain Korean citizenship had been approved, appellant went to the Embassy where, as he stated in an affidavit, "I told an officer than I wanted to give up my American citizenship." Such

conduct leaves little room for doubt that he understood his Korean citizenship was contingent upon his ensuring that his American citizenship was terminated.

It is also probative of the Department's contention that he was aware of the consequences of his actions that appellant signed an addendum to his personal statement of intent to relinquish U.S. citizenship which reads as follows:

> All documents submitted for voluntary relinquishment of my U.S. citizenship has been explained and reviewed with me by an American Consular Officer as well as by a Foreign Service National. When necessary, translation was provided in Korean and I fully understand the consequences of giving up my American citizenship.
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> 미국시민권을 자발적으로 포기하기 위하여 제출한 모든 서류는 본인과 미국영사 그리고 한국인직원이 다 함께 설명 받고 또한 정밀하게 살폈습니다. 필요에 따라서는 한국어로 통역되었으며 본인도 미국시민권을 포기하는 중요성을 충분히 이해합니다.

Even were we to accept appellant's statement that he had inadequate command of English, that factor would be of little evidentiary significance in light of the foregoing statement and the Korean translation that follows it.

As to appellant's allegation that the consular officer did not warn him of the consequences of losing U.S. citizenship, we do not know what the officer may or may not have told appellant, there having been no substantive record of the proceedings made at the time. However, we do not believe the officer had a duty to explain that becoming an alien would cost him all the rights and privileges of a U.S. citizen. A reasonably prudent man, which appellant appears to be, would be expected to realize that an alien would not be able to travel to the United States unless he was documented as an alien. And, of course, appellant's applying for a non-immigrant visa in itself adds weight to the Department's contention that he knew he had expatriated himself.

Not having examined appellant, we are unable, of course, to make an absolute judgment about his proficiency in English. However, we are of the view that in light of the facts and circumstances surrounding this case, he probably understood what he was doing. For one thing, he has presented no evidence beyond his own declaratory statements that his ability to understand English is as shaky as he claims. Furthermore, it is pertinent that he resided in the United States for twelve years. Absent evidence to the contrary, it is not unreasonable to assume that appellant, like other ambitious, relatively young Koreans who immigrate and start businesses here (appellant was 31 years old when he went to the United States), became fairly comfortable with English over time. A university graduate, who did business in Korea before he immigrated and afterwards in the United States, appellant's background and experience not unreasonably

lead one to believe that he probably could and did comprehend that he was waiving his right to United States citizenship when he made two sworn statements that he voluntarily and intentionally relinquished his United States citizenship.[8]

Appellant's words and proven conduct manifest unambiguously his intention to relinquish his United States citizenship. Although he contends differently, he has submitted no persuasive evidence to show that he did not make an intelligent and knowing forfeiture of his American citizenship when he elected to reacquire Korean citizenship, and subsequently when he took steps to ensure that forfeiture of his U.S. citizenship would result.

At the moment appellant recovered his Korean nationality, all the evidence shows it was his will and purpose to divest himself of his United States nationality. The Department has carried its burden of proof.

IV

Upon consideration of the foregoing, it is our conclusion that the Department's determination that appellant expatriated himself by reacquiring his Korean nationality should be and hereby is confirmed.

Alan G. James, Chairman
Frederick Smith, Jr.,Member
George Taft, Member

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8 We do not understand the relevance of appellant's argument that his failure (inability?) to understand or anticipate that the transfer of his mother's house to him would be economically unfeasible, supports his contention that he was incapable of understanding the consequences of relinquishing his U.S. citizenship. There is no evident nexus between the two matters.

Indeed, this argument of appellant might lead one to wonder whether the failed deal over his mother's house is one of the reasons he is now trying to reverse the Department's decision that he expatriated himself.