DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

December 30, 1980

CASE OF: R[redacted] M[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, R[redacted] M[redacted], expatriated himself on July 5, 1976, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia, upon his own application. 1/ On May 18, 1979, the American Consulate General at Sydney executed a certificate of loss of United States nationality. It was approved by the Department on July 13, 1979. The approved certificate of loss of nationality constitutes the Department's administrative holding which appellant is appealing to the Board of Appellate Review.

The appellant, M[redacted], was born in [redacted], on [redacted], thus acquiring United States citizenship at birth. In 1972, he went to Australia and obtained employment. According to his passport application, dated February 7, 1972, the purpose of the trip to Australia was stated to be for "migrant possibilities." On July 5, 1976, M[redacted] obtained Australian citizenship.

In March of 1977, the Australian authorities informed the Consulate General that M[redacted] was granted a certificate of naturalization by the Government of the Commonwealth of Australia on July 5, 1976. The Australian authorities enclosed with the letter M[redacted]'s United States passport. Thereafter, the Consulate General sent M[redacted] a letter informing him that by obtaining naturalization, he may have lost his United States nationality under section 349(a)(1)

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

> Sec. 349(a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by--
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> (1) obtaining naturalization in a foreign state upon his own application,...

of the Immigration and Nationality Act. The Consulate General also requested him to complete a form that would provide information about his citizenship status. On June 14, 1977, M[redacted] visited the Consulate General to discuss the matter with a consular officer. In the form which he completed, he stated that he acquired Australian citizenship in order to have greater employment opportunities and did not intend thereby to relinquish his United States citizenship.

It appears from the record that there were several subsequent meetings between M[redacted] and consular officers regarding his citizenship status and intention to return to the United States. Under circumstances which are not clear, principally because of the inadequate record submitted to the Board, M[redacted] executed at the Consulate General, on December 29, 1978, an affidavit of an expatriated person. The affidavit declared that his naturalization in Australia "was my free and voluntary act and that no influence, compulsion, force, or duress was exerted upon me by any other person, and that it was done with theintention of relinquishing my United States citizenship."

In a letter to this Board, dated September 30, 1979, appellant alleged that he signed the affidavit because the Consulate General advised him that unless he did so he could not return to the United States. Appellant explained that he was earlier advised by the Consulate General that he had lost his citizenship; that the only way he could return to the United States would be as an immigrant; that the Consulate General gave him forms for his processing as an immigrant; that he was later told he could not return as an immigrant because he may still be reported as a United States citizen; and that finally, after it was again made quite clear by the Consulate General that the only way for him to return to the United States was to renounce his citizenship, he signed the affidavit of an expatriated person on December 29, 1978. Appellant said he "got tired of waiting and gave up my citizenship so I could get back." According to the Consulate General, M[redacted] informed consular officers at the time he executed the affidavit that if he lost his citizenship case, he wanted to return to the United States as an immigrant. The Consulate

General reported further that because of the length of time involved in resolving a citizenship case, M[redacted] decided to sign the affidavit of an expatriated person and begin the processing of his return to the United States as an immigrant.

On May 18, 1979, the Consulate General prepared a certificate of loss of nationality in accordance with section 358 of the Immigration and Nationality Act. 2/ Although the Consulate General knew in March of 1977 of M[redacted]'s acquisition of Australian citizenship, there is no explanation in the record for the Consulate General's delay of more than two years before executing the certificate of loss of nationality as required by law. The Consulate General certified that appellant acquired United States nationality by virtue of his birth in [redacted]; that he acquired Australian citizenship through naturalization on July 5, 1976, upon his own application; and that he expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate of loss of nationality on July 13, 1979.

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

> 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.

Appellant gave notice of appeal to this Board on September 30, 1979. He contends that his acquisition of Australian citizenship was for the purpose of obtaining employment and that he did not intend to relinquish his United States citizenship when he obtained naturalization in Australia upon his own application.

Section 349(a)(1) of the Immigration and Nationality Act provides that a person who is a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application. There is no question that appellant applied for and obtained Australian citizenship. Appellant, however, alleges that he "was forced" to take out Australian citizenship "to better" himself. While admitting no one forced him to become an Australian citizen, he claimed nonetheless economic duress. Appellant stated that as an immigrant to Australia his opportunities for employment were limited to poor paying and dead end jobs and that under such conditions he would be unable "to buy property, build a home, and have a family."

Under section 349(c) of the Immigration and Nationality Act a person who performs a statutory act of expatriation is presumed to have done so voluntarily. 3/ Such presumption

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3/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), reads:

> (c) 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. Except as otherwise provided in subsection (b), 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.

may be rebutted upon a showing, by a preponderance of the evidence, that the act of expatriation was not done voluntarily. Although appellant concedes that he obtained naturalization in Australia upon his own application, he seeks to rebut the statutory presumption by asserting that his act of expatriation was done under duress.

The very essence of expatriation is that it be voluntary. Doreau v. Marshall, 170 F. 2d (1948). Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. Perkins v. Elg, 307 U.S. 325 (1939). It is recognized that loss of United States citizenship can result only from the citizen's voluntary action. Nishikawa v. Dulles, 356 U.S. 129 (1958); Afroyim v. Rusk 387 U.S. 253 (1967); Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245 (1971). Even assuming that there may have been present some degree of economic compulsion in appellant's situation, the question to be decided is whether it was sufficiently compelling and overriding to render his expatriating act involuntary as a matter of law.

In his letters of September 17 and 30, 1979, to the Board, appellant stated that he acquired Australian citizenship for the sole purpose of acquiring gainful employment. In a memorandum submitted to the Board on March 25, 1980, appellant explained further the circumstances surrounding his naturalization. He stated that no one had to twist his arm to obtain Australian citizenship, but that he wanted to improve his economic status. As an immigrant, he explained, he had to take jobs with low pay and no future. He also stated there was "a lot of ill feeling" towards him because of his American citizenship status. Appellant pointed out that there were "a lot of jobs" which required applicants to be Australian citizens or British subjects. For these reasons, he contends his expatriating act was compelled by economic duress.

For a defense of duress to prevail, it must be shown as stated in Doreau v. Marshall, 170 F. 2d (1948), that there existed "extraordinary circumstances amounting to a true duress" which "forced" a United States citizen to follow a course of action against his fixed will, intent, and efforts to act otherwise. In Insogna v. Dulles, 116 F. Supp. 473 (1953), plaintiff, a United States citizen, accepted a government job in her village in Italy in order to subsist in the war ravaged economy of that country. The Court found that plaintiff's acceptance of government employment in such cir-

cumstances was not a voluntary renunciation or abandonment of United States nationality, but was the result of actual duress which overcame her natural tendencies to protect her birthright.

In Stipa v. Dulles, 233 F. 2d (1956), the circumstances were also such as to justify a finding of economic duress. Stipa, a United States citizen, accepted employment as an auxiliary in the Italian Police Force for the purpose of earning a livelihood at a time he could find no work in any factory or any employment whatsoever. It was held by the Court that his employment was compelled by economic duress.

In the instant case the record is lacking in any semblance of duress as a matter of law. There is no showing that appellant's acquisition of Australian citizenship was the result of pressure or coercion so extreme as to have left him no reasonable choice or alternative in the matter. Appellant could have avoided naturalization if such was his desire in 1976. As the Department stated in its memorandum of January 31, 1980, to the Board, appellant managed to live and work as an alien in Australia from June of 1972 until his naturalization in July of 1976. There is no evidence of any significant changed circumstances which would compel applicant to acquire Australian citizenship after four years.

From all that appears of record, appellant made a free choice to suit his economic advantage, and cannot be found legally to have acted under the compulsion of an overwhelming extrinsic force in acquiring Australian citizenship. There is no evidence that he made any effort to act in a manner otherwise than he chose in the circumstances. The opportunity to make a decision based upon personal choice, is the essence of voluntariness. Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245 (1971). He took a calculated affirmative step to acquire Australian citizenship and, having exercised his choice, may not be relieved of the consequences flowing from it. We find unpersuasive appellant's argument that he acted under duress in acquiring Australian citizenship.

Under the provisions of section 349(c) of the Immigration and Nationality Act, appellant bears the burden of rebutting by a preponderance of the evidence the statutory presumption

that his naturalization was voluntary. 4/ In our opinion, appellant failed to rebut this presumption by a preponderance of the evidence. Accordingly, we find that appellant's naturalization as a citizen of Australia upon his own application was a voluntary act of expatriation.

Appellant, however, also contends that he did not intend to relinquish his United States citizenship when he became an Australian citizen in 1976. He stated in his letters of September 17 and 30, 1979, to the Board, that he had no intention of giving up his United States citizenship; that his acquisition of Australian citizenship was solely for the purpose of obtaining employment.

Appellant, as we have seen, signed on June 14, 1977, the form given him by the Consulate General in which he stated that he did not intend to relinquish his citizenship when he was naturalized as an Australian citizen. We have also seen that on December 29, 1978, he executed an affidavit at the Consulate General in which he declared this time that his naturalization was done with the intention of relinquishing his United States citizenship. In view of the fact, however, that the circumstances surrounding his execution of the affidavit were unclear, the Department informed the Board on January 31, 1980, that it "will not rely on the Affidavit as additional evidence of his intent."

The Department considers "the strongest inference" of appellant's intent to be the oath he took before becoming an Australian citizen. The oath, it is understood, required appellant to pledge allegiance "to Her Majesty Elizabeth the Second, Queen of Australia," to renounce "all other allegiance," and to swear to faithfully observe the laws of Australia and fulfill his duties as an Australian citizen. In this connection, it should be noted that the record before the Board does not contain an authenticated copy of the text of the oath of allegiance actually taken by the appellant. The Department simply quotes the text of the oath in its memorandum of law to the Board, as it is found in the Australian law on citizenship, and presumably considers that quoting the text without more, constitutes evidence of the oath taken by appellant. Granting, however, that appellant took an oath of allegiance of the nature described above, we do not believe that, in the circumstances of this case, the taking of the oath was sufficiently probative of an intent to relinquish United States citizenship.

4/ See Note 3, supra.

On the issue of intent, the Supreme Court declared in Afroyim v. Rusk, 387 U.S. 253 (1967), that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that citizenship." The Supreme Court rejected the view that Congress has any general power, expressed or implied, to take away an American's citizenship without his assent. While Afroyim did not elaborate upon what conduct would constitute a voluntary relinquishment of citizenship, it nevertheless made loss of citizenship dependent upon evidence of an intent to relinquish citizenship. The Attorney General in his Statement of Interpretation of Afroyim observed that once the issue of intent is raised in a citizenship case, the burden of proof is on the party asserting that expatriation has occurred and that this burden is not easily satisfied by the Government. 5/

In Vance v. Terrazas, 444 U.S. ___ ___ (No. 78-1143, January 15, 1980), the Supreme Court held that, in establishing loss of citizenship, the Government must prove an intent to surrender United States citizenship, in addition to the voluntary performance of an expatriating act. The Court referred to Afroyim's emphasis on the individual's assent and said that an intent to relinquish United States citizenship must be shown by the Government, whether "the intent is expressed in words or is found as a fair inference from proven conduct." Thus, on the issue of intent, Terrazas reaffirmed and clarified Afroyim. As the Court declared, "Afroyim requires that the record support a finding that the expatriating act was accompanied by an intent to terminate United States citizenship." This requirement of proving intent adds a constitutional element to loss of citizenship that is not found in the statute.

In the instant case, we are not persuaded that the record supports a finding of appellant's intent to relinquish his United States citizenship. There is nothing properly in the record before the Board by way of contemporaneous information or statements made by M[redacted] at the time he sought Australian citizenship with respect to his intention to give up his United States citizenship. The basic issue is whether or not M[redacted] in acquiring Australian citizenship intended at the same time to abandon or relinquish his United States citizenship. The record is devoid of any such evidence of appellant's intent in 1976.

5/ Attorney General's Statement of Interpretation, 42 Op. Att'y. Gen. 397 (1969).

The Department argues that appellant's naturalization itself is highly persuasive evidence of an intent to abandon his United States citizenship. There may be some justification for this position if there were no countervailing evidence of a contrary intent. Here M[redacted] stated in the form given to him by the Consulate General in 1977, that he did not intend to relinquish his United States citizenship. M[redacted] also submitted to the Board an affidavit executed at Sydney on August 3, 1979, by David [redacted], a banker, who had known him since June of 1972. [redacted] declared that M[redacted] "never wanted or intended to give up his citizenship of the United States of America." Furthermore, as the Attorney General pointed out in his Statement of Interpretation of Afroyim, the administrative authorities must make a judgment based on all the evidence whether the individual comes within the terms of the statute and has voluntarily relinquished his citizenship.

Taking into account the record before the Board, it is our judgment that the Government has not satisfied its burden of proof that appellant's expatriating act was performed with the necessary intent to relinquish his United States citizenship. 6/ The record leaves the issue of his intent at least in doubt. In such circumstances, the Supreme Court has said that the facts and law should be construed as far as reasonably possible in favor of the retention of citizenship. Nishikawa v. Dulles, 356 U.S. 129, 134 (1958); Schneiderman v. United States, 320 U.S. 118, 122 (1943).

In view of the foregoing and on the basis of the record before the Board, we are unable to conclude that the Department's administrative holding that appellant expatriated himself by obtaining naturalization is supportable as a matter of law. Accordingly, the Department's administrative holding of July 13, 1979, to that effect is reversed.

Julia W. Willis
JULIA W. WILLIS, Chairman

Edward G. Misey
EDWARD G. MISEY, Member

Gerald A. Rosen
GERALD A. ROSEN, Member

6/ See Note 3, supra.