April 1, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: P[redacted] J[redacted] P[redacted]

This is an appeal from an administrative holding of the Department of State that appellant, P[redacted] J[redacted] P[redacted], expatriated himself on March 19, 1980, under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by acquiring the nationality of Denmark upon his own application. 1/

I

Appellant, P[redacted] J[redacted] P[redacted], was born at [redacted], thus acquiring United States citizenship by birth. Appellant served in the United States Army from 1962 to 1965, most of that period overseas. He was honorably discharged in 1965. His foreign tour of duty aside, appellant resided continuously in the United States from birth to 1973 when he traveled to Denmark to establish residence there.

Appellant has stated that he moved to Denmark in order to live with his Danish male companion who, appellant avers, was ineligible to enter the United States because of his sexual persuasion. Unable to receive residence and work permits as a citizen of a non-European Community country, appellant stated that after his arrival in Denmark, he

---

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 --
>
> (1) obtaining naturalization in a foreign state upon his own application,...

petitioned the Minister of Justice of Denmark to recognize his homosexual status and to accord him the right to reside and work in Denmark as if married to a Danish citizen. By letter dated December 5, **1973,** the Justice Minister granted appellant the privileges he had requested. 2/ Following the Minister's decision, appellant apparently found some kind of employment; since **1976** he has been teaching in a communal school.

On January 10, **1974,** P[redacted] applied for and received a new passport from the Unite[redacted]tes Embassy. He again applied for and received a passport on November **22, 1978.** Sometime in August **1979,** P[redacted] applied for naturalization as a citizen of Denmark. He subsequently explained his reasons for doing so as follows:

> I have always been a political person, but without voting rights as a citizen of Denmark I was unable to cast my influence in the political process. Due to my job in the local school, this denial and its change was important to me, for in no other way could I influence the political make-up of my employer, the community board.

In connection with his application for naturalization as a Danish citizen, appellant was required to sign a statement which the Embassy has translated as follows:

> I hereby swear that I have not taken any precautions to preserve my previous citizenship despite acquisition of Danish nationality.

In response to an inquiry of the Department, the Embassy stated that there is no requirement under Danish law for persons situated like appellant to renounce or to take an oath of renunciation of United States citizenship.

2/ Although appellant asserts that the Minister's letter, which he states bears Journal Number **1973-371-290,** was furnished the United States Embassy at Copenhagen along with a questionnaire concerning his citizenship status, no copy of such a letter was in the record presented to the Board.

On March 19, 1980, appellant was issued a certificate of nationality by the Danish Ministry of Interior, under the law of March 12, 1980. He received a Danish passport on April 28, 1980. In accordance with established practice, the Danish authorities mailed appellant's U.S. passport and a copy of his Danish naturalization certificate to the United States Embassy.

After receipt of the afore-mentioned documents, the Embassy on May 8, 1980, sent appellant a Uniform Loss of Nationality Letter in accordance with section 224.6 of Chapter 8, Foreign Affairs Manual, advising him of his possible loss of United States citizenship and requesting him to state whether his act of naturalization was performed voluntarily and with the intent to relinquish United States citizenship. Appellant avers that on May 12, he called at the Embassy in reply to the Uniform Letter and at that time also applied for a non-immigrant visa for travel to the United States. Thereafter on May 16 he responded to the Uniform Letter by executing a short form questionnaire. In this questionnaire appellant stated, inter alia, that he performed the act of naturalization voluntarily but without the intent to renounce United States citizenship. Two days later (on May 18) he executed a detailed questionnaire on the basis of which the Embassy, on May 22, 1980, in accordance with the provisions of section 358 of the Immigration and Nationality Act, 3/ prepared a certificate of loss of nationality.

3/ 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.

The Embassy certified that appellant acquired United States citizenship by virtue of his birth at Brooklyn, New York, on May 17, 1941; that he acquired the nationality of Denmark by virtue of his naturalization on March 19, 1980; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. Following receipt of the certificate, the Department requested the Embassy to furnish additional information in order to clarify the facts in the case. The Department also instructed the Embassy to ask P[redacted] to execute another questionnaire. This P[redacted] did on October 2. After a further exchange with the Embassy, the Department on November 24, 1981, approved the certificate of loss of nationality which constitutes the administrative holding from which an appeal lies to the Board of Appellate Review.

On December 6, 1980, appellant gave notice of appeal. His letters to the Board of January 31 and March 16, 1981, constituted his brief. Appellant contends that his acquisition of Danish nationality was involuntary and that he did not intend to relinquish his United States citizenship when he obtained naturalization in Denmark.

II

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 dispute that appellant applied for and obtained Danish citizenship. The Danish Authorities also confirmed that appellant was naturalized on March 19, 1980.

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. 4/ Such presumption, however, may be rebutted upon a showing, by a preponderance of the evidence, that the act of expatriation was not performed voluntarily.

4/ 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,

Appellant admits that he obtained naturalization in Denmark upon his own application. He asserts, however, in his reply to the Department's brief that he was

> coerced to do so by the original actions of the State Department in denying his male friend a working permit in the United States. His action therefore does not support the presumption of voluntariness in Section 349(c) of the Immigration and Nationality Act.

It is well established that a defense of duress is available to persons who have performed an act of expatriation, for loss of United States citizenship can result only from the citizen's voluntary action. Afroyim v. Rusk, 387 U.S. 253 (1967).

For a defense of duress to prevail, it must be shown that there existed "extraordinary circumstances amounting to a true duress" which "forced" a United States citizen to follow a course against his will, intent and efforts to act otherwise. Doreau v. Marshall, 170 F. 2d 721 (1948). Here the record is lacking in any semblance of duress as a matter of law; the circumstances do not present an extraordinary situation involving survival.

Although appellant alleges in his reply brief that he was coerced to become a citizen of Denmark, he has contradicted that assertion in his reply to the Embassy's Uniform

---

> 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 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.

Loss of Nationality Letter of May 8, 1980, wherein he admitted that he performed the expatriating act voluntarily. Further, the whole pattern of his conduct as shown in the record suggests that his act of expatriation was voluntary.

It was not necessary as a matter of survival or to pursue his choice of life style that appellant become naturalized in Denmark. He admits he had been able to reside and work in that country as an alien after a ministerial decision in 1973 favorable to his situation. The sole reason he adduces for his naturalixation was to be able to vote in Denmark and exert some influence on the local school board by which he was employed. This clearly is an example of an opportunity to make a decision based upon personal choice; he had an alternative.

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. 5/ In our opinion, reading the record in its entirety, his argument falls far short of negating such statutory presumption. We conclude therefore that his acquisition of Danish citizenship upon his own application was a voluntary act of expatriation.

III

Appellant has also contended that he did not intend to give up his United States citizenship when he obtained naturalization in Denmark in 1980.

The Supreme Court in Vance v. Terrazas, 444 U.S. 252 (1980) held that in establishing loss of United States citizenship, the Government must prove intent as well as the voluntary commission of an expatriating act. The intent to relinquish must be shown by the Government, whether the intent is expressed in words or is found as a fair inference from proven conduct. Once the issue of intent has been raised, the Government bears the burden of proving by a preponderance of the evidence that the appellant intended to relinquish his citizenship. This burden is not easily

---

5/ See note 4 supra.

satisfied. As the Department stated in the circular airgram to all diplomatic and consular posts in 1980 on the subject of expatriation in the light of Terrazas v. Yance, where there has been no explicit renunciatory act, the burden of proof is especially difficult. 6/

As evidence of the appellant's intent to relinquish his United States citizenship, the Government has adduced the following considerations: that appellant was oriented to Denmark not the United States; that the oath he subscribed stating that he had taken no precautions to preserve his United States citizenship indicated his agreement to the concept of exclusive Danish citizenship; and that he had held himself out as an alien by applying for a non-immigrant visa to the United States after surrendering his United States passport to the Danish authorities.

That appellant's orientation was mainly toward Denmark is hardly inconsistent with an intent to remain an American citizen. Voting in elections in a foreign country where one resides - no longer per se an expatriating act - is not incompatible with retention of United States nationality. The absence of definite plans to return to the United States does not put appellant in a different situation from countless Americans who reside permanently abroad. Appellant's failure to vote in the United States or file income tax returns there, while not to be condoned, do not in themselves set him apart from a good many Americans living abroad or indicate an intention to sever permanent ties to the United States.

The record is not clear whether the oath appellant subscribed in connection with his application for Danish naturalization included more than the statement that he had taken no precautions to preserve his United States citizenship. The Embassy, however, informed the Department that applicants for Danish citizenship are not required to renounce their original citizenship or to take an oath of renunciation. According to the Embassy, the Danish Government's rationale requiring applicants to take the oath subscribed by P[redacted] is to discourage the creation of dual nationality. While the Danish Government is not favorably disposed toward dual nationality, it will not,

---

6/ Department of State Circular Airgram No. 1767, August 27, 1980.

the Embassy has stated, deny or revoke Danish nationality solely on the basis that the applicant retains his former nationality. In the circumstances we do not think it reasonable to assume that appellant, by subscribing the aforementioned oath, should have concluded that he was thereby indicating his agreement with the concept of exclusive Danish citizenship. Evidently, such a concept is at most a general objective of the Danish Government, not a categorical imperative that is rigorously enforced and widely accepted as a matter of policy.

Appellant admits that he applied for a non-immigrant visa in May **1980,** but contends that this act should not be interpreted as an indication that he no longer considered himself an American citizen. He alleges that he wished to travel to the United States and to do so on his United States passport which the Embassy held; only when he was denied use of that passport did he apply for a visa in his Danish passport. This request, he asserts, was denied because the Embassy reportedly told him a non-immigrant visa could not be is[redacted]o someone who might be an American. Viewing P[redacted]s action in context, we do not believe that his application for a non-immigrant visa leads to the inescapable conclusion that P[redacted] considered himself an alien vis-a-vis the United States. [redacted]s explanation is plausible, and any doubts about the inferences to be drawn from his application must be resolved in his favor.

In brief, we do not believe that the genrally accepted inferences of intent to relinquish United States citizenship can be drawn conclusively from the actions of appellant which the Department has cited.

In support of the contrary conclusion, we find appellant's words and actions from May to October **1980,** highly persuasive evidence of his subjective intent. From the moment he received the Embassy's Uniform Loss of Nationality letter, he established a consistent pattern of conduct that negates the contention that he intended to relinquish United States citizenship when he became naturalized in Denmark.

In all'of the questionnaires he executed at the request of the Embassy in connection with the determination of his citizenship status, appellant strenuously reiterated that he did not intend to relinquish his United States citizenship.

Beginning in May 1980, two months after he had obtained Danish citizenship and thus virtually contemporaneous with the alleged act of expatriation, and continuing throhgh the last questionnaire he executed in October 1980, appellant repeatedly asserted that he still considered himself an American citizen, This, it should be noted, was well before the Department had approved his certificate of loss of nationality. Here, we find credible evidence of appellant's state of mind at the time he applied for and obtained Danish citizenship.

We are also impressed by the fact that on December 6, 1980, less than two weeks after the Department approved a certificate of loss of nationality, appellant filed notice of appeal to the Board. His promptitude in filing an appeal lends added evidence to his contention that he did not intend to relinquish United States citizenship.

Taking into account the entire record before the Board, it is our judgment that the Government has not satisfied its burden of proof that appellant's act of naturalization in Denmark was performed with the necessary intent to relinquish United States citizenship.

IV

In consideration of the foregoing and on the basis of the present record before the Board we are unable to conclude that the Department's administrative holding that appellant expatriated himself by obtaining naturalization in Denmark is supportable as a matter of law. Accordingly, the Department's administrative holding of November 24, 1980, is reversed.

Alan G. James, Chairman

Edward G. Misey, Member

Gerald A. Rosen, Member