DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

June 30, 1982

CASE OF: D W L

This is an appeal from an administrative determination of the Department of State that appellant, D W L, expatriated himself on May 13, 1980, under the provisions of section 349(a)(5) of the Immigration and Nationality Act by making a formal renunciation of his United States citizenship before a consular officer of the United States in Canada. 1/

I

The appellant, L, was born at on 1, thus acquiring United States citizenship at birth. In 1977, he was convicted for mail fraud and sentenced to five years imprisonment. On July 3, 1978, while serving his sentence, he escaped from the federal correctional institution in Texarkana, Texas, and fled to Canada.

In December 1978, Canadian authorities arrested L, and sentenced him to eighteen months imprisonment in a Canadian correctional institution. According to L he was arrested in Winnipeg for being in Canada unlawfully, working without a work permit, and using a Canadian birth certificate that was obtained by fraud.

On January 29, 1979, L addressed a letter to the Secretary of State in which he "denounced" his United States citizenship, disclaimed all rights as a United States citizen, and declared exclusive allegiance to Canada.

1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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 of naturalization, shall lose his nationality by --
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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 may be prescribed by the Secretary of State: . . .

He requested the Department of State to accept his denouncement of the United States Government and his United States citizenship. In July 1979, six months later, the Department instructed the Consulate General at Winnipeg to inform L[redacted] of the "correct procedures for renunciation without, of course, seeming to encourage him to do so."

In August 1979, L[redacted] informed the Consulate General that he wished to renounce his United States citizenship so that he could become a Canadian. The consular officer, it is reported, explained to L[redacted] the procedure to be followed, and mailed him, a[redacted]equest, information about the act of renunciation. L[redacted], however, did not take any steps at that time to renounce his citizenship. On the contrary, following his release from a Canadian correctional institution in January of 1980, L[redacted] applied for a United States passport at the Consu[redacted]neral. The passport was issued to him on February 13, 1980.

In the interim, the United States Department of Justice sought to extradite L[redacted] from Canada to the United States to serve the balance of his five-year mail fraud sentence. There also remained to be resolved an outstanding indictment and arrest warrant against him for his July 1978 escape from the federal correctional institution in Texas. L[redacted] requested he serve the remainder of his United States sentence in Canada under a prisoner exchange treaty between Canada and the United States. 2/ The Department of Justice advised him by letter dated May 20, 1980, that he would not be eligible to transfer to a Canadian prison under the treaty.

On April, 14, 1980, a Canadian court found L[redacted] extraditable to the United States. He appealed the decision. Pending the outcome of his appeal in the Canadian courts, L[redacted] was detained by the Canadian authorities at the Winnipeg Public Safety Building.

According to a report of the Consulate General dated June 20, 1980, L[redacted] on May 7, 1980, while under detention, requested by letter and by telephone that a consular officer visit him in the Winnipeg Public Safety Building for the purpose of taking his renunciation of United States citizenship. Upon recieving assurances fro[redacted]anadian authorities at the Public Safety Building that L[redacted] could be brought to the Consulate General for that purpose, the consular officer agreed "to spare L[redacted]e and the authorit[redacted]incon-venience of so doi[redacted]himself visiting L[redacted]in the Public Safety Building."

2/ Treaty on the Execution of Penal Sentences, March 2, 1977, United States-Canada, T.I.A.S. No 9552.

Thus, on May 13, 1980, at the Public Safety Building in Winnipeg, L[redacted] made a formal renunciation of his United States citizenship before a consular officer [redacted] United States. Prior to his oath of renunciation, L[redacted] signed under oath a statement of understanding ackno[redacted]g among other matters that the extremely serious nature of a formal renunciation of citizenship had been fully explained to him by the consular officer and that he fully understood the consequences of his intended action. He also acknowledged that he had decided voluntarily to exercis[redacted]ight to renounce his United States citizenship. L[redacted] also on May 13, 1980, executed an affidavit explai[redacted]e reasons for his renunciation, and a citizenship questionnaire for use by the Department of State.

On the day following the renunciation, a Canadian officer at the Public Safety Building, who was a witne[redacted] the renunciation, informed the Consulate General that L[redacted] wished to retract his renunciation. He reportedly sta[redacted] that L[redacted] had been misled by Canadian immigration authorities [redacted]ieve that if he renounced his United States citizenship he would be permitted to re-enter Canada as a stateless person upon completion of his prison term in the United States. Acti[redacted]hat information, the consular officer telephoned L[redacted] the same day, and requested him to set forth in writi[redacted] reasons why he now wanted to retract his renunciation. By letter dated May 15, 1980, Lawrence advised the Consulate General that he changed his mind after discussing the matter with his wife, children, lawyers, Salvation Army, and the classification officer at the Public Safety Building; that he did not wish to give up his American birthright just because a U.S. Federal Court was "unjust" in his case and the Attorney General's Office in Washington was unwilling to grant mercy; and, that he wished to maintain his United States citizenship status, even if he never returned to the United States. In a subsequent letter dated May 23, 1980, he ascribed his desire to withdraw his renunciation to his uncertainty over the status of his application for Canadian citizenship, which, he learned, was being challenged by the Canadian immigration authorities. It appears that a Canadian federal court in February 1980, ordered the immigration authorities to permit him to apply for Canadian citizenship status while in Canada, and that the immigration authorities took an appeal from the federal court order.

The Consulate General did not consider that La[redacted] letters of May 15 and May 23 or his subsequent tele conversations explained satisfactorily the circumstances which led him to renounce his citizenship in the first place. Nonetheless, notwithstanding the Consulate General's doubts as to the circumstances surrounding the renunciation, the Consulate General on June 10, 1980, executed a certificate of loss of nationality and forwarded it to the Department of State for approval. 3/ The Consulate General certified that L[redacted] renounced his United States citizenship before a con[redacted]fficer on May 13, 1980 and that he thereby expatriated himself on May 13, 1980, under the provisions of section 349(a)(5) of the Immigration and Nationality Act.

In forwarding the certificate of loss of nationality, the Consulate General informed the Department that the consular officer, who administered the renunciation, recommended rejection of the certificate. The Consulate General stated as follows:

> Since there seems [redacted] certain amount of evidence that L[redacted] was misled by Canadian authorities and there is definite doubt as to his actual loyalties, and the circumstances surrounding La[redacted] renunciation were clearly ir[redacted], the consular officer recommends that the Department reject the Certificate of Loss of Nationality. 4/

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

> 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 Unite? 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 ceritificate 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/ Operations Memorandum dated June 20, 1980, from the American Consulate General at Winnipeg, Canada, to the Department of State.

After a protracted review of appellant's case, the Department approved the certificate of loss of nationality on March 25, 1981. During the intervening period, L[redacted] was extradited to the United States in October 1980, [redacted]d his mind again about his renunciation, and wrote to members of the United States Senate, the Secretary of State, and others seeking copies of the documents he signed at the time he renounced his United States citizenship at the Winnipeg detention center. He wanted the documents for the purpose of confirming that he was now no longer a United States citizen. On March 25, 1981, the Department's Office of Citizen Consular Services informed L[redacted] as follows:

> This office is satisfied that your oath was in the form prescribed by the Secretary of State as required by Section 349(a)(5) of the Immigration and Nationality Act as amended, and that it was voluntarily taken. The Certificate of Loss of Nationality confirming your expatriation under that section of law on May 13, 1980, has been approved....

Appellant underwent another change of mind and on May 13, 1981, gave notice of appeal from the Department's determination of loss of United States nationality in his case. In his submissions to the Board, he contended that his renunciation was not done voluntarily. He alleged that at the time of his renunciation he was upset over his wife's health, was in jail, and did not f[redacted]derstand the meaning and consequences of renunciation. L[redacted] further contended that his renunciation was procedurally defective because the act of renunciation was performed at the jail (the Public Safety Building at Winnipeg), and not at the Consulate General.

II

The threshold question confronting the Board in this case is whether appellant's act of renunciation, as he contends, was procedurally defective and fatal to the validity of .the,renunciation. It is clear that a United States citizen has a right to renounce his United States citizenship. It is also clear that to accomplish a valid renunciation of United States nationality in a foreign state the act of renunciation must satisfy requirements prescribed by law.

Section 349(a)(5) of the Immigration and Nationality Act of 1952, as amended, (hereinafter referred to as "the Act"), is the present legal authority for renunciation. 5/ It provides that a person who is a national of the United States shall lose his nationality by 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. There is no dispute that appellant endeavored to make a formal renunciation of United States nationality on May 13, 1980, before a consular officer in Canada. There is less certainty, however, whether his renunciation was valid under the law.

As we have seen, the Consulate General reported that the circumstances surrounding appellant's renunciation were "clearly irregular" and recommended that the Department reject the certificate of loss of nationality. The Consulate General referred to the fact that the U.S. consular officer administered appellant's oath of renunciation at the Public Safety Building where appellant was being detained, instead of at the Consulate General. The Consulate General said that, subsequently, "the consular officer learned that this procedure was not correct."

The Department contended in its brief that although the action of the consular officer in taking appellant's renunciation at the Public Safety Building "was at variance with the procedure generally followed", this by itself did not render the renunciation invalid. The Department argued that the standard procedure is not of the nature of law, and thus is not binding. We do not entirely concur.

Section 349(a)(5) of the Act, which sets forth the requirements for loss of nationality by formal renunciation, is identical with section 401(f) of the Nationality Act of 1940, which provided the first statutory procedure for formal renunciation of citizenship. 6/ Prior to

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5/ See note 1 supra.

6/ Section 401(f) of Chapter IV of the Nationality Act of 1940 read:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization shall lose his nationality by:
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> . . .
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> (f) 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 (54 Stat. 1169; 8 U.S.C. 801); . . .

the enactment of the Immigration and Nationality Act of 1952, the Senate Committee on the Judiciary investigated the immigration and naturalization systems of the United States. With respect to the statutory procedure of a formal renunciation provided under section 401(f) of the Nationality Act of 1940, the Committee stated:

> Formal renunciation by a native-born or a naturalized citizen abroad may be made only at a consulate of the United States before diplomatic or consular officers. The form for making such renunciation is prescribed by the Secretary of State, and is to be in affidavit form and includes pertinent data relating to the person's place and date of birth, his residence, the manner in which he acquired United States citizenship, that he desires to renounce such citizenship and that he does so renounce, absolutely and entirely. 7/

The Committee did not recommend to the Congress that the statutory procedure of section 401(f) be amended.

It may also be noted in this connection that the Department's published regulations relating to formal renunciation of United States citizenship outside the United States adhere to the requirements of section 349 (a)(5) of the Act. The regulations require that a person desiring to renounce his United States nationality "shall appear" before a diplomatic or consular officer of the United States in the manner and form prescribed by the Department. 8/

Although the Department's published regulations and the procedure described in its Foreign Service Manual do not specifically state that the would-be renunciant must make his formal renunciation only at a diplomatic or consular post abroad, it is nonetheless clear from the language of section

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7/ Senate Committee on Judiciary, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. Rep. No. 1515, 81st Cong., 2d Sess. 750 (1950).

8/ Section 50.50 of Title 22, Code of Federal Regulations, 22 CFR 50.50 (1980).

349(a)(5) of the Act and the Department's regulations, and, indeed, it has been the firmly established practice, that the renunciation take place at a diplomatic or consular post abroad where a diplomatic and consular officer maintains an official office. Moreover, as noted above, the legislative history of section 401(f) of the Nationality Act of 1940, in which the same provision appeared in identical language, pointed'out that formal renunciation by a United States citizen abroad "may be made only at a consulate of the United States before diplomatic or consular officers." The Department's published regulations also state that a United States citizen desiring to renounce "shall appear" before such officers.

It is difficult to conceive that the law and regulations providing for an appearance of a United States citizen before a diplomatic or consular officer in order to make a formal renunciation of United States nationality would sanction the taking of the oath of renunciation at any place other than an embassy or consulate. A United States citizen, it is true, may not be denied the right to take the oath of renunciation. In recognition, however, of the gravity and consequences of an act of renunciation, the law provides a statutory procedure for formal renunciation: appearance before a diplomatic or consular officer in a foreign state and in the form prescribed by the Secretary of State.

Apart from the taking of the oath of renunciation at the detention center at the Public Safety Building in Winnipeg, there is a question whether appellant's oath of renunciation was "in such form as may be prescribed by the Secretary of State." The oath of renunciation to which appellant subscribed on May 13, 1980, read as follows:

> That I desire to make a formal renunciation of my American nationality, as provided by section 349 (a)(6) of the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

It should be noted that appellant's renunciation was made pursuant to section 349(a)(5) of the Act and not section 349(a)(6), as referred to in the oath of renunciation. Section 349(a)(6) provides for a renunciation of citizenship in the United States during a state of war in such form as may be prescribed by the Attorney General. 9/ None of these conditions obtained in appellant's situation.

With the enactment of Public Law 95-432, approved October 10, 1978, the statutory section of the law providing for renunciation in a foreign state before a consular officer of the United States was designated as section 349(a)(5). The Department instructed all American diplomatic and consular posts in October 12, 1978, to change the oaths of renunciation and statements of understandings accordingly. This obviously was not done at the Consulate General at Winnipeg in appellant's case in 1980, and, therefore, the form of the latter's oath of renunciation with the language reading "as provided by section 349(a)(6) of the Immigration and Nationality Act and pursuant thereto" was not in order. It was not the form prescribed by the Secretary of State.

The Department's brief in this appeal considers the incorrect reference to section 349(a)(6), instead of section 349(a)(5), of the Act as a "slight error" and "more akin to a typographical error." The fact of the matter is that section 349(a)(6) does not and did not provide for a formal renunciation of nationality in a foreign state at the time appellant sought to renounce his citizenship on May 13, 1980. In a technical sense, it was not possible for him, pursuant to section 349(a)(6) of the Act, to absolutely and entirely renounce his United States nationality in Canada.

9/ Section 349(a)(6) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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 of naturalization, shall lose his nationality by --

. . *

(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or...

Section 349(a) (6) provides for renunciation in the United States in time of war, in such form as prescribed by the Attorney General, before an officer designated by the Attoreny General, and when the Attorney General shall approve such renunciation as not contrary to the interests of national defense.

The incorrect statutory authority cited in the oath of renunciation taken by appellant is not "miniscule". It is in the nature of a substantive mistake which has a bearing on the validity of the act of renunciation. Granted that appellant understood and took an oath of renunciation, it was not, however, in the form prescribed by the Secretary of State as required by section 349(a)(5) of the Act. The Secretary of State instructed all diplomatic and consular posts on October 12, 1978, to change the language in the oath of renunciation to reflect the correct and proper legal authority for renunciation, section 349(a)(5) of the Act. This instruction amended the prior form prescribed by the Secretary of State, and, as set forth in the Department's Foreign Service Manual, the amended prescribed form "must be followed without change, except for writing 'Embassy', in place of 'Consulate'or 'Consulate General' where appropriate.'' 10/

Furthermore, we note that the two witnesses to the renunciation and the statement of understanding executed by appellant in the presence of the consular officer were Canadian officers or employees at the Public Safety Building where he was detained. This appears to be contrary to the procedure and regulation in the Department's Foreign Service Manual which states:

> Witnesses may be diplomatic or consular officers, local employees, companions of the would-be renunciant, or other private persons who may be available. 11/

Neither of the two witnesses here fell within those categories.

10/ Volume 8, Citizenship and Passports, Foreign Affairs Manual, Department of State, Section 225.6(b) (1969); 8 FAM 225.6(b).

11/ Volume 8, Citizenship and Passports, Foreign Affairs Manual, Department of State, Section 225.6(g) (1969); 8 FAM 225.6(g).

We are unable to consider the above procedural defects in the circumstances here as "procedural trivialities". On the contrary, it is our view that appellant's oath of renunciation was not administered in the manner provided by law or in the form prescribed by the Secretary of State.

III

On consideration of the foregoing, we are unable to conclude that appellant's oath of renunciation on May 13, 1980, was legally effective and, accordingly, reverse the Department's administrative determination of March 25, 1981.

Because of the conclusion reached, herein, we find it unnecessary to reach the other issues presented by the record.

Alan G. James, Chairman

Edward G. Misey, Member

James G. Sampas, Member