November 10, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: A[redacted] A[redacted] P[redacted]

This case comes before the Board of Appellate Review on an appeal brought by A[redacted] A[redacted] P[redacted] from an administrative determination of De rt tate that she expatriated herself on August 15, 1978, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

The issues presented on appeal are whether appellant voluntarily obtained naturalization in Canada, and, if so, whether she intended thereby to relinquish her United States nationality. We find that appellant's naturalization was free and uncoerced but that in becoming a citizen of Canada she did not intend to relinquish her allegiance to the United States. We will therefore reverse the Department's determination of loss of appellant's nationality.

1/ Section 349(a)(1) 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 or naturalization, shall lose his nationality by --
>
> (1) obtaining naturalization in a foreign state upon his own application, . . .

I

Appellant acquired United States nationality by birth at [redacted], on [redacted]. In [redacted] when she was ten years old, appellant was taken by her American citizen parents to Canada where she has since resided. She received her secondary and university education in Canada and completed a law course in June 1978.

On an unspecified date (possibly early in 1978), appellant applied for naturalization as a Canadian citizen. After swearing the prescribed oath of allegiance to the British Crown, she received a certificate of naturalization on August 15, 1978.

In her opening brief appellant described her reasons for seeking Canadian naturalization as follows:

> The Law Society of Upper Canada, being the regulatory body for all practising lawyers and students-at-law in the Province of Ontario, (hereinafter referred to as "the Law Society") required all its members including Appellant, to be Canadian Citizens at the time of admission to the Law Society, pursuant to The Law Society Act, Revised Statutes of Ontario 1980, Chapter 233, Section 28(c). 2/
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> Upon graduation from law school in 1978, Appellant enrolled in the bar admission course administered by the Law Society, as a student-at-law in the first phase, and as a student in the Teaching Term in the second phase, for a total period of eighteen months, culminating in the call to the Bar in April of 1980. As Canadian Citizenship was required at the time of the

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2/ The Ontario Court of Appeal in a decision rendered January 27 1982, in the Matter of Joel Skapinker declared section 28(c) of the Law Society Act inoperative by reason of the provisions of the Canadian Charter of Rights and Freedoms.

> Bar Admission ceremony in April, 1980, proceedings were taken by Appellant in 1978 in order to assure that the process of acquiring Canadian Citizenship would be completed and Appellant's call to the the Bar would not be delayed. Appellant did not consider or pursue Canadian Citizenship until the call to the Bar was imminent.

In September 1981, the Canadian authorities confirmed to the Consulate General at Toronto that appellant had become a citizen of Canada under the provisions of section 5-1 of the Canadian Citizenship Act and that she had sworn an oath of allegiance. Shortly thereafter appellant completed a form for determining U.S. citizenship at the Consulate General, attaching a statement concerning her reasons for obtaining naturalization. On the basis of the information available to it, the Consulate General prepared a certificate of loss of nationality in appellant's name on November 4, 1981, as required by section 358 of the Immigration and Nationality Act. 3/

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 Consulate General certified that appellant, a United States citizen at birth, had acquired the nationality of Canada on August 15, 1978; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on March 4, 1982, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to the Board of Appellate Review.

On February 24, 1983, appellant gave notice of appeal and submitted a brief. Appellant contends that she did not "voluntarily or intentionally terminate her American citizenship upon acquiring Canadian citizenship as required for admission to the Bar of the Province of Ontario,"

An oral hearing was held before the Board on October 7, 1983, at which appellant appeared pro se.

II

Section 349(a)(1) of the Immigration and Nationality Act provides that a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application. The Supreme Court has held, however, that expatriation shall not result from performance of a statutory expatriating act unless the act was performed voluntarily. Afroyim v. Rusk, 387 U.S. 253 (1967); Nishikawa v. Dulles, 356 U.S. 129 (1958); Perkins v. Elg, 307 U.S. 325 (1939).

There is no dispute that appellant sought and obtained Canadian citizenship.

Appellant bears the burden of proving that her naturalization was involuntary, for under section 349(c) of the Immigration and Nationality Act, it is presumed that any of the expatriating acts enumerated in section 349(a) was done voluntarily. The presumption may, however, be rebutted upon a showing by a preponderance of the evidence that the act was performed involuntarily. 4/

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

Appellant contends that she obtained naturalization under circumstances that amount to duress. She states that she was "required" to acquire Canadian citizenship in order to be called to the bar. Her argument is, in essence, that having devoted four and one half years to acquiring a legal education and wishing to practice law in Canada, she had no option but to comply with the then requirements of the Law Society Act of Ontario that persons called to the Bar shall be citizens of Canada.

For a defense of duress to prevail, it must be shown that there existed "extraordinary circumstances" amounting to true duress which forced a United States citizen to follow a course of action against his fixed will, intent and efforts to act otherwise. Doreau v. Marshall, **170** F. 2d **721 (1948).** The opportunity to make a free and deliberate choice is the essence of voluntariness. Jolley v. Immigration and Naturalization Service, **441** F. 2d **1245 (1971).** As the Court noted in Jolley, the mere difficulty of the choice facing the citizen -- to perform or not perform an expatriating act -- is not deemed to constitute duress.

The circumstances in which appellant found herself were hardly "extraordinary". Her economic survival was not at stake. What was at issue was whether she could pursue her chosen profession in Canada. The numerous cases where economic duress was successfully pleaded do not support her position. 5/

Here, appellant made a personal choice when she sought Canadian citizenship. Any duress she may have felt to obtain such citizenship was self-generated. She may not contend that the requirements of the Law Society Act, as they stood at the time, amounted to duress. No one compelled her to seek Canadian citizenship in order to be called to the Bar.

We conclude that appellant's acquisition of Canadian citizenship was free and uncoerced. She has thus failed to overcome the statutory presumption that her performance of the expatriating act was voluntary.

5/ See, for example, Stipa v. Dulles, **233** F. 2d **551 (1956);** and Insogna **v.** Dulles, 116 F. Supp. **473** (1953).

III

Even though appellant has not overcome the presumption that her naturalization was voluntary, it must be determined whether she became a Canadian citizen with the intention of relinquishing her United States citizenship. The Supreme Court held in Vance v. Terrazas, 444 U.S. **252** (1980), that if a person fails to prove his act of expatriation was involuntary, the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship.

The Supreme Court made clear in Terrazas, that under section 349(c) of the Immigration and Nationality Act, 6/ the Government must establish by a preponderance of the evidence that the actor intended to divest him or herself of United States citizenship, Such intent, the Court declared, may be ascertained from a person's words or found as a fair inference from proven conduct.

A person's intent is to be determined as of the time the act of expatriation took place. Terrazas v. Haig, **653** F. 2d **285** (1981). "A party's specific intent to relinquish his citizenship rarely will be established by direct evidence", that court held; however, "circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship."

In the main, the Department argues that appellant:

-- Performed two acts that are inconsistent with United States citizenship: (1) obtaining naturalization in Canada and swearing an oath of allegiance to the British Crown, and (2) pledging allegiance to the Crown a second time when she was admitted to the Ontario bar,

-- Knew she might lose her American nationality by obtaining naturalization but proceeded anyway.

6/ See note 4, supra.

-- Is wholly oriented to Canada; her links to the United States are tenuous at best.

The record shows that appellant first raised the issue of her intent in October 1981 in a statement attached to the citizenship questionnaire she completed at the Consulate General at Ottawa, Therein she stated in part:

> To me, my "americanism" is so deep-rooted and so basic that I would never feel Canadian and would never have voluntarily decided to become a Canadian citizen. ... When considering my intent, please remember that I came to Canada as a child with my family and had no opportunity to return to the U.S. until university, at which point the prohibitive costs of an American university education forced me to remain in Canada.

In her submissions and at the hearing appellant reiterated that she did not have the intention of relinquishing United States citizenship. There is, however, no contemporaneous evidence to support or refute appellant's declarations; nothing in the record is expressive of her intent at the time she acquired Canadian citizenship in 1978. The only evidence of record concerning her intent at the relevant time is the oath she swore to the British Crown wherein she declared her allegiance and obligated herself to be a loyal Canadian citizen.

Voluntary naturalization in a foreign state, like performance of the other enumerated acts of section 349(a) of the Immigration and Nationality Act, the Supreme Court stated in Terrazas, is highly persuasive evidence of an intention to relinquish United States citizenship, citing Nishikawa v. Dulles, supra. Standing alone, however, it is not conclusive evidence of such an intent, the Court stated. An oath of allegiance to a foreign sovereign, while also substantial evidence of intent, is insufficient, without more, to prove intent. King v. Rogers, 463 F. 2d 1188 (1972); Baker v. Rusk, 296 F. Supp. 1244 (1967). Unlike an oath of allegiance that requires one to renounce his present nationality, an oath of allegiance such as the one this appellant swore leaves "ambiguous the intent of the utterer" regarding her United States nationality. Richards v. Secretary of State, CV80-4150, D.C.C.D. Cal. (1982).

Absent conclusive evidence of appellant's intent at the relevant time, we must examine her conduct immediately prior to and after naturalization to determine whether it evinces an intention to relinquish United States citizenship.

Appellant alleges that around the Christmas holidays in late **1977** or early **1978** she made two inquiries to find out what the consequences would be for her United States citizenship if she became a Canadian citizen. 7/ One was a telephone call to the United States Consulate-General at Ottawa. The second was a telephone call to a citizenship consultant. 8/

From both sources, appellant alleges, she received discouraging advice, although she was vague about what she was told. She summed up her reaction to those two conversations by stating at the hearing that "I was very pessimistic about my American citizenship." 9/

In its brief, the Department disputed that appellant had called the Consulate General. It noted that had she called, a notation to that effect would have been made on the form for recording such inquiries. Furthermore, the Department stated,

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7/ Transcript of Proceedings in the Matter of Alisa Ann Posesorski before the Board of Appellate Review, October 7, **1983**, (hereinafter cited as TR), p. 27.

8/ **TR pp. 29-36.**

9/ **TR p. 33.**

if she had made a citizenship inquiry she would have been encouraged to prepare an affidavit indicating that she did not intend to relinquish her citizenship.

At the hearing, however, counsel for the Department stated his belief that before 1979 the Consulate General did not encourage prospective applicants for Canadian citizenship to execute an affidavit of non-intent. 10/ He also pointed out that it was not the practice of the Consulate General to record telephone inquiries about citizenship matters; this would only have been done if a personal visit had been made. 11/

We are not satisfied that the Department has refuted appellant's contention that she did attempt to find out what effect naturalization would have on her United States citizenship. Thus, accepting appellant's assertion that she attempted to make inquiries, we see plausible evidence to support appellant's allegation that she lacked the requisite intent to surrender her United States nationality.

Nonetheless, we find unconvincing appellant's excuse that after having received discouraging information about her case from two sources over the telephone, she was too busy with her law course to make further, more definitive inquiries. She was then attending a bar admission course in Toronto; and the U.S. Consulate General there was readily available to her. Appellant was negligent in not trying to obtain an official interpretation before she acted. No one can be so busy as to be unable to find the time to get an authoritative opinion about the consequences of a step that could jeopardize the most fundamental individual right.

In the circumstances of this case, however, we are not persuaded that even though appellant realized that she might lose her citizenship and showed deplorable indifference to the consequences of her act, such realization is to be equated with an intent to relinquish citizenship. This is especially true, we believe, where a person has not been categorically cautioned by an official source. Furthermore, intent may often be revealed by the person's purpose in taking a particular course of action. Here, the link between purpose and intent is not apparent. Appellant's stated purpose in becoming a

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10/ TR p. 31.

11/ TR p. 28.

Canadian citizen was to gain admission to the Ontario Bar. There was no apparent reason or necessity for appellant to wish to give up her American citizenship.

In addition to obtaining naturalization in 1978, appellant performed only one other act according to the record that is suggestive of an intent to relinquish her United States citizenship -- swearing an oath on admission to the Ontario Bar.

The record does not contain the text of that oath. The Department, however, has not shown wherein the oath she took rendered it impossible for appellant to perform the duties or enjoy the rights of an American citizen. In itself this oath, like her oath of allegiance on becoming a Canadian citizen, is insufficient evidence of an intent to abandon United States citizenship. Baker v. Rusk, supra.

Appellant alleges that after naturalization she did not vote in Canada, obtain or travel on a Canadian passport, or hold herself out solely as a Canadian citizen. The Department has impeached none of these contentions.

We dismiss as lacking merit the Department's contention in its brief that appellant's intent regarding her American nationality is shown by the fact that she has lived many years in Canada and thus is primarily oriented to Canada. One may live anywhere as long as one wishes for any legitimate reason without indicating thereby an intention to abandon United States citizenship. Schneider v. Rusk, 377 U.S. 163 **(1964)**.

In its decision in Terrazas, the Supreme Court noted with approval the guidelines the Attorney General had issued following the Court's decision in Afroyim v. Rusk. The Attorney General stated:

> In each case, the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of the expatriation provision and has in fact voluntarily relinquished his citizenship.

In surveying all the evidence, we are unable to find any act or statement by appellant that unmistakably demonstrates an intention to surrender her United States nationality.

We conclude therefore that the Department has failed to bear its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States citizenship when she obtained naturalization in Canada.

IV

On consideration of the foregoing and our review of the entire record before us, we are unable to conclude that appellant's voluntary act of naturalization in Canada was accompanied by the requisite intent to relinquish her United States citizenship. Accordingly, we will reverse the Department's determination of loss of her nationality.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member