December 12, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: L[redacted] A[redacted] M[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, L[redacted] A[redacted] Mc[redacted]n, expatriated herself on April 10, 1975, 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 obtained naturalization in Canada voluntarily and, if so, whether she intended to relinquish her United States citizenship. We find that appellant's acquisition of Canadian citizenship was free and uncoerced, but that it was not performed with an intention to surrender her United States nationality. Accordingly, we will reverse the Department of State's determination of loss of nationality.

I

Appellant acquired United States nationality by birth at [redacted], 19-34. She received a ba[redacted]in[redacted]ers College, Columbia University in 1960, and in the same year entered Canada as a

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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 Pose his nationality by --

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

landed immigrant (admitted for permanent residence.) According to appellant's submissions, after her first marriage to a Canadian citizen was terminated, she left Canada with her two children in **1967** and returned **to** the United States where she worked at Ogdensburg in the field of psychiatric nursing. In **1968** she married another Canadian citizen and returned with him to Canada, again as a landed immigrant.

According to appellant's affidavit of August 12, **1982,** she and her husband were unaware at the time of their marriage that he had any claim to U.S. citizenship. (It appears that he had been born in Canada of a U.S. citizen father.) "Not knowing or being made aware of this fact," appellant stated, "I re-applied for landed immigrant status and returned to Canada." She continued: "Had we known that he was an American citizen we would have remained in the United States."

Appellant continued to work in the field of psychiatric nursing after her marriage, commuting from her home in Canada to the Ogdensburg, New York area. In **1971** she stopped work, at the request of her husband.

By 1974 her husband's business began to run into difficulties, and it became evident to her that she would have to return to work to help support her family. Having made inquiries, she ascertained that most opportunities for professionals in her field of nursing were in institutions run by the Federal Government or the provincial government of Ontario. Canadian citizenship allegedly was a requisite to employment in such institutions.

On an unspecified date appellant applied for naturalization as a Canadian citizen. As stated in her August 12, 1982 affidavit, she applied for naturalization for the following reasons:

> The financial pressure and stress continued and with a great deal of regret and sadness I was forced to apply for citizenship to enable me to compete successfully for employment against Canadian nurses.

Upon taking the prescribed oath of allegiance to the British Crown, appellant was granted a certificate of Canadian citizenship on April 10, 1975. In 1977 she found employment at an institution of the Ontario Correctional Service at Kingston.

On August 12, 1982, appellant appeared at the United States Embassy at Ottawa to register as a U.S. citizen. She

stated that she visited the Embassy to clarify her own citizenship status after her husband had learned from an officer of the Immigration and Naturalization Service that he might have a claim to United States citizenship. 2/ Appellant completed a questionnaire to assist the Department in determining her citizenship status, stating therein that she had obtained naturalization in Canada in **1975**.

After receiving confirmation of appellant's naturalization from the Canadian authorities, the Embassy on August 30, 1982, prepared a certificate of loss of nationality in appellant's name, as required by section **358** of the Immigration and Nationality Act. 3/

2/ Appellant's husband's claim was found by the Embassy to be valid, and a passport was issued to him late in **1982**.

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 had acquired United States nationality at birth; that she had obtained naturalization in Canada upon her own application; and, thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on September 30, 1982, approval constituting an administrative determination of loss of nationality from which a properly filed and timely appeal may be brought to this Board.

On January 10, 1983, appellant brought this appeal through counsel.

Appellant contends that she became a Canadian citizen "solely to obtain a job and under economic duress." She also asserts that "it was never the intention of the deponent to adjure [sic] or reject her ... United States citizenship."

Appellant requested an oral hearing which was held September 26, 1983.

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 acquired naturalization in Canada.

But the Supreme Court has held that performance of a statutory expatriating act shall not result in loss of nationality unless a person has surrendered it voluntarily. Perkins v. Ely, 307 U.S. 325 (1939); Nishikawa v. Dulles, 356 U.S. 129 (1958); Afroyim v. Rusk, 387 U.S. 253 (1967).

The law presumes that one who performs a statutory act of expatriation has done so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the

evidence that the act was not done voluntarily. 4/ Accordingly, the burden would rest with appellant to prove that she obtained Canadian citizenship involuntarily.

The rule in Doreau v. Marshall, 170 F. 2d 721 (1948) is the standard for determining whether the act was done voluntarily or not. There the court declared:

> If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is no authentic abandonment of his own nationality.

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

> 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.

The court stated, however, that "the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, is not duress."

In those cases in which a defense of economic duress has been successfully pleaded, the courts have required a showing that the petitioner's survival could have been in jeopardy had he or she not performed an expatriating act. 5/

Here, appellant posits a case of economic duress, alleging that her husband's business ventures had run into such difficulty that she was forced to find employment in order to keep the family afloat financially. Because the only real job opportunities available to her were in positions requiring Canadian citizenship, she contends that she was forced to acquire Canadian nationality.

The question we must examine is whether the family's financial plight was so severe and appellant's alternatives to seeking Canadian citizenship so limited that appellant was coerced, as a matter of law, to seek Canadian citizenship.

At the hearing appellant's husband testified that his income had dwindled to zero by 1974 thus placing on appellant the entire financial burden of maintaining the household. 6/ He explained that in 1968 or 1970 he had started a brok-

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

6/ Transcript of Proceedings in the Matter of Laura Ann McManman, Board of Appellate Review, Department of State, September 26, 1983, (hereinafter referred to as TR), pp. 10-27.

erage business selling veneer products in the United States. His gross income from the business had been as high as $100,000 per year. In 1973 the company supplying him with veneer was sold to foreign interests and his source of supply dried up. Having forseen the probable demise of the veneer business, appellant's husband began, around 1974, to put all his earnings from the veneer venture into a different company which he had formed. By 1974 the second venture began to run into serious difficulties, due largely to causes beyond his control. His total losses eventually reached $250,000. When his wife was naturalized in 1975, all his assets had been invested in the second company, which produced no income, The couple allegedly had no savings and no personal or real property.

Appellant and hex husband clearly were in straitened circumstances by 1975 when appellant, in search of renumerative employment, sought naturalization as a Canadian citizen. But it seems clear that their predicament resulted from a conscious business investment decision of appellant's husband, not from circumstances totally beyond his control. Their situation, however acute, was not in a legal sense "extraordinary", leaving appellant no alternative to becoming a Canadian citizen so that she might obtain a job to maintain the family.

Even though the financial situation of appellant's family was serious, she must still show that she had no feasible employment alternatives that would not have required her to become a Canadian citizen.

She contends that beginning in 1974 she tried to find employment in her own field, as well as outside of it, that did not demand Canadian citizenship, but was unsuccessful. Only after her efforts proved fruitless did she seek a position at an instituion where Canadian citizenship was a prerequisite, 7/

Appellant has not, however, offered any proof that she made those efforts and failed. Without evidence more probative than her own statements, we are unable to conclude that appellant was subjected to economic pressure amounting to legal duress.

7/ TR pp. 8, 36, 39.

Furthermore, appellant has not persuaded us that she did not have a feasible work alternative in Ogdensburg, New York, where she had worked from 1969 to 1971. The reasons she gave at the hearing why she could not have commuted in 1974/1975 from her home in Canada to Oydensburg are not convincing. 8/ In 1977 appellant found employment that required Canadian citizenship at an institution at Kfngston, Ontario: She put up with considerable inconvenience to take that job, spending the week at Kfngston and returning home on weekends because of inadequate daily transportation. 9/ We fail to understand why she could not have made similar arrangements and commuted to Ogdensburg only some twelve miles away. Moreover, it does not appear that she even considered inquiring whether there might be an opening for her in Oydensburg in 1974/1975.

8/ TR pp. 32 and 44.

9/ TR pp. 8 and 44.

Appellant has not shown that she became naturalized against her fixed will and intention to do otherwise. The family's difficult financial condition does not meet the legal test of "extraordinary circumstances" Beyond appellant's control; she has not convinced us that she had no alternative to becoming a Canadian citizen, Such pressure as she mgy have felt to become a Canadian citizen is not, as a matter of law, duress. . .

We conclude therefore that appellant has not overcome the statutory presumption that her acquisition of Canadian citizenship was voluntary.

III

.Even though we have found that appellant's naturalization was voluntary, it must still be determined whether she performed the allegedly expatriating act 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 intention to relinquish citizenship.

The Court declared that under section 349(c) of the Immigration and Nationality Act 10/ 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," the Court held in Terrazas v. Haig. However, "circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship."

10/ See Note 5, supra.

The Department of State rests its case for loss of citizenship mainly on the following contentions:

a) appellant was willing to become a Canadian citizen although she realized, as she admitted in **1982**, that she might lose her American nationality thereby;

b) her failure to consult the United States authorities before she became naturalized or anytime until **1982** shows an indifference to United States citizenship; and

c) appellant's long residence in Canada - twenty of the last twenty-two years - shows that her ties are overwhelmingly to Canada not the United States.

The record shows that appellant's first statement regarding her intent was made in August 1982 in the questionnaire she was asked to complete by the Embassy at Ottawa. In a sworn statement attached to the questionnaire, she declared:

> Becoming a Canadian citizen was knowledgable based on the needs to assist my husband, myself and my children in a financially disastrous period. I have met this obligation with sacrifice. It has never been my intention to abjure or reject my American heritage and inheritance. I remain proud to be an American and want to return to my own country and become a contributing citizen once again.

In an affidavit accompanying the appeal appellant reiterated the foregoing assertion, as did she at the hearing. 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 **1975**.

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 citizen of Canada.

The Supreme Court stated in Terrazas, citing Nishikawa v. Dulles, supra, that voluntary naturalization in a foreign state, like performance of the other acts enumerated in

section 349(a) of the Immigration and Nationality Act, is highly persuasive evidence of an intention to relinquish United States citizenship. Standing alone, however, it is not conclusive evidence of such an intent. Id, An oath of allegiance to a foreign sovereign, while also substantial evidence of intent, is insufficient, without more, to prove Intent, Xing v. Rogers, 463 F. 2d 1188 (1972).

Absent more probative evidence of appellant's intent at the time she became a Canadian citizen, we must examine her conduct immediately prior to and after naturalization to determine whether, as the Department contends, it evinces an intention to divest herself of United States citizenship.

Before applying for naturalization, appellant did not seek authoritative advice about its possible consequences for her United States citizenship. In failing to do so she was admittedly imprudent. She conceded candidly at the hearing that she had avoided making inquiries then because she feared to learn what she suspected; namely, that naturalization could endanger her U.S. citizenship. 11/ She stated, however, that it was never her intention to give up her United States citizenship. 12/ Fearing that she had lost her United States citizenship by operation of law, appellant made no effort after 1975 to clarify her status until she was encouraged to do so in 1982 by an official of the Immigration and Naturalization Service. 13/

Fearing that one might lose one's nationality by performing a particular act is a far cry, in our view, from intending to renounce one's citizenship. We think appellant is entitled to be believed when she states that the only reason she sought naturalization was to find employment that would help maintain her family and that had it not been for

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11/ TR. pp. 39-40.

12/ TR. p. 45.

13/ TR. p. 40.

the necessity of finding employment she would never have become a Canadian citizen. "Had I not faced that type of pressure I would not have sought citizenship in Canada." 14/ Purpose and intent are distinguishable; the link between wanting (or feeling the necessity) to acquire a particqlar nationality and intending to surrender one's present nationality is tenuous at best.

We are unpersuaded by the Department's argument that appellant's long residence in Canada and her obvious orientation to Canada can be equated with an intent to relinquish United States citizenship. Obviously, appellant had made a life in Canada and had lived there for some twenty of the past twenty-two years, But, as the Supreme Court has made clear, residence abroad for whatever legitimate reason is no indication of transfer of allegiance from the United States to the country in which the citizen is living. Schneider v. Rusk, 377 U.S. 163 (1964). In a time when hundreds of thousands of Americans live abroad in a private capacity for many years, a case of abandonment of nationality based on the length of time one has lived in a foreign country does not rest on a very firm foundation. That appellant's long foreign residence was in Canada, a country with which the United States shares so many common values, makes the Department's contention in the circumstances of this case even less persuasive.

Appellant asserts that after becoming a Canadian citizen she performed no overt act that manifested an intention to divest herself of United States citizenship. She stated that she did not vote in Canada, obtain or use a Canadian passport, 15/ The Department has not demonstrated the contrary.

14/ TR pp. 53, 54.

15/. TR pp. 35, 45.

The Department's case rests on inferences of intent from appellant's conduct that are at best too ambiguous to warrant a confident judgment as to its meaning. It is well established that an intention to relinquish citizenship cannot be inferred from conduct that is as indicative of an intention to retain citizenship as it is of an intention to surrender it.

In its decision in Terrazas, the Supreme Court noted with approval the guidelines the Attorney General had issued in 1969 following the Court's decision in Afroyim. The Attorney General had 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. 15/

In surveying all the evidence, we are unable to find any act or statement by appellant that conclusively demonstrates an intention to divest herself of United States nationality.

We conclude therefore that the Department of State has failed to carry its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States nationality when she obtained naturalization in Canada upon her own application.

IV

On consideration of the foregoing and after reviewing the whole record before us, we conclude that although appellant voluntarily sought and obtained naturalization in Canada, she lacked the requisite intent to transfer her allegiance from the United States to Canada. Accordingly, we reverse the Department of State's determination of loss of appellant's United States citizenship.

Alan G. James, Chairman

Warren E. Hewitt, Member

Mary E. Hoinkes, Member

15/ 42 Op. Atty. Gen. 397 (1969).