March 1, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This case is before the Board of Appellate Review on an appeal brought by [redacted] from an administrative determination of the Department of State that she expatriated herself on April 21, 1965 under the provisions of section 349(a) (1) of the Immigration and Nationality Act by obtaining naturalization as a citizen of the United Xingdom and Colonies upon her own application. 1/

Appellant's having conceded that she voluntarily obtained United Kingdom citizenship, the dispositive issue is whether she performed the statutory expatriating act with the intention of relinquishing her United States citizenship. We conclude that the Department has failed to carry its burden of proving that appellant intended to relinquish her citizenship. Accordingly, we will reverse the Department's holding 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 became a United States citizen by birth at Fairbanks, Alaska, on April 4, 1936. She was educated in the United States and graduated from Stanford University. After studying abroad until 1962, appellant returned to the United States. Shortly thereafter she moved to Canada and married a United Kingdom citizen in 1963.

From 1964 to 1968 appellant was employed by the Toronto Board of Education as a teacher of commercial studies. According to her submissions, she became the sole support of her husband and infant son in 1965 after her husband had been incapacitated in an industrial accident. Appellant maintains that she had been advised by the Toronto Board of Education that she would have to "regularize" her citizenship status or lose her teaching position. At that time, appellant states, the Board of Education was discharging untenured teachers; only those holding Canadian or British citizenship were eligible for tenure.

Accordingly, on March 31, 1965, appellant applied to the British High Commission at Ottawa to be registered as a United Kingdom citizen, as her marriage to a British citizen entitled her to do. 2/

The British High Commission approved appellant's application on April 21, 1965. She became a British citizen as from that date.

Appellant was included on her husband's British passport in 1965. It appears that she held a United States passport prior to 1963 but did not renew it. In 1973 appellant obtained her own British passport which she used extensively. In 1977 she obtained a U.S. non-immigrant visa of indefinite duration, valid for multiple entries.

In 1968 appellant, her husband and two children, who had been born in Canada and held U.S., Canadian and British

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2/ Appellant applied pursuant to section 6(2) of the British Nationality Act of 1948, which entitled a woman married to a citizen of the United Kingdom and Colonies to be registered as a citizen thereof.

nationality, moved to the United Kingdom where appellant resided and found employment as a university lecturer.

In 1981 appellant was offered an assistant professorship at the Texas Technical University. In preparation for the family's move to the United States, appellant in January 1982 communicated with the United States Embassy at London with a view to obtaining a visa for her husband and a passport for herself.

Discovering, as she put it, that her United States citizenship was in question, appellant visited the Embassy in March 1982. She applied for a passport and to be registered as a U.S. citizen; completed a questionnaire to assist the Department in determining her citizenship status: and submitted a sworn statement explaining the circumstances of her registration as a British citizen therein asserting her lack of intention to relinquish her United States citizenship.

On the basis of information supplied by appellant, the Embassy on April 28, 1982, prepared a certificate of loss of nationality in appellant's name, in compliance with section 358 of the Immigration and Nationality Act. 3/

The Embassy certified that appellant had been born a United States citizen; that she obtained naturalization as a citizen of the United Kingdom and Colonies upon her own application; and concluded that she thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

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 Department approved the certificate on May 11, 1982, approval being an administrative determination of loss of nationality from which a timely and properly filed appeal may be brought to this Board.

Appellant gave notice of appeal on April 22, 1983. She requested a hearing which was held on December 13, 1983. Appellant contends that:

> There was no intention to surrender or jeopardize American nationality by registering a5 a British subject, which was not understood by me as an act of naturalization but rather of registering dual citizenship rights acquired by marriage.

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.

It is not disputed that registration by an American national as a citizen of a foreign country constitutes obtaining naturalization in a foreign state. Section 101(a)(23 of the Immigration and Nationality Act defines "naturalization' as "the conferring of nationality of a state upon a person after birth, by any means whatsoever." Nor is it disputed that appellant here applied to be registered as a citizen of the United Kingdom and Colonies, and thus performed an act prescribed by the statute as expatriating.

The Supreme Court has held, however, that performance of a statutory expatriating act shall not result in loss of nationality unless the actor performed the act in question voluntarily and with the intention of relinquishing United States citizenship. 4/

4/ Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

Under the statute, it is presumed that a statutory act of expatriation was performed voluntarily, but the presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act was involuntary. 5/ Accordingly, the burden rests upon appellant to overcome the presumption that she registered voluntarily as a British citizen.

Appellant alleged in her opening brief that economic considerations - the necessity to retain her employment as a teacher in order to support her family during her husband's incapacitation - prompted her to register as a British citizen. She has not, however, maintained categorically that her registration was not an act of free will, or that she acted under such duress that her action might be deemed involuntary. On the contrary, she stated at the hearing that despite the economic difficulties she was experiencing, had she known that by becoming a British citizen she could lose her American citizenship, she and her husband would simply have come back to the United States, since:

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

. . .

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.

> certainly...losing American citizenship is worth slightly more than a job or a salary of maybe $10,000 for a year, for 6 or 7 months until.../her/husband/got/ better. An American citizenship is worth more than that." 6/

It is clear that appellant voluntarily acquired British nationality upon her own application, and we so conclude.

III

The decisive issue in this case is whether appellant intended to relinquish her United States citizenship at the time she registered as a citizen of the United Kingdom and Colonies.

Our determination of this issue is guided by the rule in Vance v. Terrazas. 7/ Therein the Supreme Court held that even though a party fails to prove that he or she performed an expatriating act involuntarily, the question remains whether on all the evidence the Government has satisfied its burden of proof that the act was done with the requisite intent to relinquish citizenship. With respect to the standard of proof required of the Government, the Court said that under section

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6/ Transcript of the Proceedings In The Matter of [redacted] Board of Appellate Review, December 13, 1983, (hereinafter referred to as "TR") 29.

7/ 444 U.S. 252 (1980).

349(c) of the Immigration and Nationality Act 8/, the Government must establish intent by a preponderance of the evidence. Intent to surrender citizenship, the Court further said, may be ascertained from a person's words or found as fair inference from proven conduct. Citing its decision in Nishikawa v. Dulles, 9/ the Court noted that obtaining naturalization in a foreign state, like performance of the other enumerated expatriating acts may be highly persuasive evidence of an intent to relinquish United States citizenship.

It is well settled that intent is to be determined as of the time the act of expatriation was done. 10/ Evidence of intent contemporaneous with the performance of the act is, of course, most probative of the party's intentions regarding United States citizenship. However, a United States Court of Appeals has said that "a party's specific intent to relinquish his citizenship rarely will be established by direct evidence. But, circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship." 11/

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

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.

9/ 356 U.S. 129 (1958).

10/ Terrazas v. Haig, 653 F. 2d 285 (1981).

11/ Id., 288.

The Department of State maintains that there is no evidence dating from the time of appellant's naturalization that would disclose her intent regarding her United States citizenship. Appellant, however, submits that an intention to preserve her United States citizenship is evidenced by three specific indicators.

In 1965 before applying to be registered as a British citizen, appellant alleges, she telephoned the United States Embassy at Ottawa to inquire what affect such action might have on her American citizenship. She had been told, she states, that there would be no problem for her. At the hearing she said she could not forget the official's words: "I guarantee you that you will not have trouble returning to the United States any time you wish to." 12/ Relying on what she considered to be knowledgeable advice, appellant proceeded to apply for registration.

The Department disputes appellant's contention, asserting that:

> Before the Afroyim decision in 1967 /Afroyim v. Rusk, 387 U.S. 2537 performing an expatriating act caused loss of citizenship unless It was performed under duress. No United States official would give an opinion over the phone that a U.S. citizen could acquire British citizenship without loss of U.S. nationality.

The Department maintains that there is no record of appellant's call in 1965, so there is no way of knowing what office she called, to whom she spoke, what questions were asked and what answers were given. In brief, the Department challenges appellant's credibility on the ground that the advice she said she obtained was wrong and therefore would not have been given

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12/ TR 18.

Whether appellant made such inquiries is not susceptible of documentary proof. Her allegations cannot, however, be dismissed summarily. To have made an inquiry would have been consistent with her other actions at the time. Thus it is plausible that appellant sought assurance that her United States citizenship would not be jeopardized. We are not persuaded by the Department's argument to the contrary.

Appellant has also submitted written evidence of her lack of intent at the critical time. In an affidavit executed November 9, 1983, David Christopher Hanss, chairman of the board of a major United Kingdom business, deposed that he has known appellant since 1964; that he has had a close social and business association with appellant and her husband in both Canada and the United Kingdom; and that appellant told him in 1965 that she had to register as a British citizen to keep her teaching position at a time of financial difficulty for her family. Neither in 1965 nor subsequently, Hanss stated, had appellant ever indicated to him any intention to renounce her United States citizenship, but indeed, evidenced quite the contrary intent, then and later, to consider herself a dual national.

Appellant further alleges that "...the form of the application /for registration as a British citizen7 is such that it does—not appear to be an application for naturalization but rather registration of rights acquired by marriage." 13/

13/ The apparent simplicity of the process whereby a woman married to a British citizen could register for citizenship tends to bear appellant out. The copy of the application in the record indicates that one may register merely by making application, submitting proof of her marriage and proof of her husband's United Kingdom nationality. Appellant signed the form and swore to the truthfulness of the statements she had made before a notary. The form was sent to the British High Commission at Ottawa where it was approved three weeks later on April 21, 1965. As appellant has observed at the hearing, the process bore no resemblance to the lengthy procedures her grandparents had gone through to become naturalized citizens of the United States. TR 16, 76.

She points out that she was not required to renounce her United States citizenship; that she had stated clearly in the application that she was a United States citizen: and that she left blank a space where one was to insert the name of a specific country of which one had formerly been a citizen. 14/

Appellant adds that she does not recall taking an oath of allegiance to the British Crown. 15/ She concludes by stating: "Because of the absence of any formal renunciation of her American citizenship on the application form she signe there is no clear evidence of expatriation on the part of Appellant."

14/ Neither in its brief nor at the hearing did the Departme make argument or comment with respect to this contemporary statement which is relevant to appellant's intention regardi United States citizenship.

15/ The stamp of the British High Commissioner at Ottawa recording approval of the application bears the notation: "...the oath of allegiance [having been] duly subscribed..." We note, however, that the copy of the application in the record contains no form of oath of allegiance.

Appellant testified at the hearing that she could not understand why the statement about her having taken an oath of allegiance was on the certificate. "I did not go through any formal oath-taking procedures....I did this by mail and I going to a lawyer's office for a - just to do a notarization. TR 54. Appellant also stated that years later after she had noticed the statment about her having taken an oath of allegi she telephoned the British High Commission and had learned that they no longer held a copy of her application for registration. TR 47-48.

Appellant's foregoing submissions are suggestive of lack of intent in 1965 to relinquish her United States citizenship. The Department, however, has asserted that the pattern of appellant's conduct after 1965 reveals an intention to surrender her United States nationality.

On the one hand, the Department submits, "she has acted in all things as a British citizen;" on the other, she has not exercised any sights of United States citizenship or acted in any way to indicate that she retained her allegiance to the United States, By living in the United Kingdom for fourteen years, participating in British life, voting there, and travelling to the United States on a British passport appellant showed that she had transferred her allegiance to the United Kingdom, argues the Department.

We disagree.

Appellant makes a credible case that she considered herself to be a dual national, and acted accordingly. As she put it at the hearing:

> In living in England, I lived as someone with dual nationality. I participated in British life. And when I went home to the United States, I participated there as an American. 16/

Thus perceiving her citizenship status, appellant might have acted like a British citizen without intending to relinquish her United States citizenship. Even travelling to the United States on a British passport is less than unambiguous

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16/ TR 25.

evidence of an intent to transfer her allegiance. She was unwise to consider that obtaining a United States passport, instead of a U.S. visa for a trip in 1973, was *so* inconvenient as not to be worth the effort. And she contravened U.S. travel regulations by using a foreign passport to enter the United States. But it is not evidentially adequate, in terms of the burden of proof resting on the Department, to construe appellant's use of a British passport in the particular circumstances of this case as a sufficiently clear indication that she intended to abandon her United States citizenship.

The Department also submits that appellant's failure to exercise her American civic rights and duties - file income tax returns, pay income taxes, vote in the United States for a number of recent years: resister herself or her children as United States citizens; obtain a United States passport - demonstrates abandonment of United States citizenship.

Asked by the Board at the hearing to explain precisely how these failures of appellant evidenced her intent in 1965, counsel for the Department replied:

> You possibly could call it a negative inference. But if she had registered herself as a U.S. citizen, had she registered her children as U.S. citizens, had she obtained U.S. passports, had she inquired or done anything about absentee voting, those would be considered consistent with no intention to relinquish in 1965. It is a negative argument. And in that way not doing those things is consistent with an intent to relinquish in 1965. But as you can see from the record, we have no direct evidence of her intent at the time of naturalizing except the registration as a British citizen. There is not any contemporary evidence. And the Department is relying on later acts as its evidence. 17/

17/ TR 74-75.

The Board does not see that such "failures" evince an intent to relinquish United States citizenship.

In her written submissions and at the hearing appellant set forth a fair case that she intended to preserve United States nationality. She has stated that she has close, continuing ties to the United States; that after obtaining British citizenship she voted in Alaska for several years, at least: travelled to the United States regularly to visit family and friends in Alaska and elsewhere: and owns bank accounts in the United States. The Department has gainsaid none of these contentions.

Furthermore, while we do not condone appellant's failure to exercise all her citizenship rights or to perform all her citizenship duties during her long residence abroad, the Board believes that such lapses could be explained by many mundane reasons, hardly unique to appellant, and thus are insufficient in appellant's case to prove positive intent through negative inference.

Although at the hearing appellant protested that she was not aware of the range of rights and duties of American citizenship, she conceded that she had not been particularly careful and had "stumbled badly over some - over some laws and regulations that should have been followed." 18/ It seems to us that the most damaging interpretation one could place on appellant's post-1965 conduct is that she was imprudent in not taking the evidentiary steps that might have been desirable to show an absence of intent to relinquish United States citizenship.

In the end, the issue of intent turns on the burden of proof that law and the Supreme Court's interpretations place on the Department. Negative inferences cannot adequately be interpreted positively to show intent to surrender citizenship.

18/ TR 76.

It is not enough for the Department to point to actions that might be construed as indicative of an intent to relinquish citizenship. The Department must show affirmatively, by a preponderance of the evidence, that in 1965 appellant intended to sever her allegiance to the United States.

Here the preponderance of the evidence does not demonstrate a clear intention on the part of appellant to renounce her United States citizenship in 1965 - the time at issue. Appellant's actions in the year 1965 and in the years thereafter are not inconsistent with her expressed belief that she retained that citizenship, when she acquired British citizenship, and that she was unaware that she might have placed in jeopardy her United States citizenship by her failure to place on the record indicia of an intent to maintain that citizenship until she was so advised in 1982.

The Board is of the view that on all the evidence the Department has not met its burden of proof.

IV

In consideration of the foregoing and our review of the entire record, we conclude that although appellant voluntarily registered as a British citizen, she did not do so with the intention of relinquishing her United States citizenship. We therefore reverse the Department's determination of loss of nationality.

Alan G. James, Chairman

Mary E. Hoinkes, Member

Howard Meyers, Member