July 6, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D[redacted] R[redacted] L[redacted]

This case has been brought to the Board of Appellate Review by D[redacted] R[redacted] L[redacted] on appeal from an administrative determination of the Department of State that he expatriated himself on June 27, 1973, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

The issues we must decide are (1) whether appellant sought Canadian citizenship voluntarily, and (2) if he did so, whether that act was accompanied by an intent to relinquish United States citizenship. It is our conclusion that appellant obtained naturalization of his own free will, but that the Department has not sustained its burden of proving that his naturalization was accompanied by the requisite intent to surrender United States citizenship.

Accordingly we will reverse the Department's holding of loss of 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 [redacted]

An affidavit appellant executed on September 24, 1983, gives the following curriculum suae vitae: He was educated in the United States, and served honorably in the United States Army from late 1945 to April 1947. He received a bachelor of science degree in agriculture from Cornell in 1951. He is married to a United States citizen and has three children, all United States citizens; one, born in Canada, has dual nationality. From 1951 to 1958 appellant was employed in the United States. In 1958 he was transferred to his employer's subsidiary in Canada as a technical adviser on canning. In 1966 he was promoted Director of Research and Technical Services, a position he held as of the date of this appeal. As an extension of his job, he is chairman of the Food Safety Container Integrity Committee of Canada which represents all Canadian can manufacturing and food processing companies in Canada in their dealings with the competent agen of the Canadian Government in setting standards, drafting legislation and enforcing industry-wide regulations throughou Canada.

After his promotion in 1966, appellant states that he "began to feel mounting pressure...to become a naturalized Canadian in order to become more effective in carrying out my responsibilities with Canadian business and regulatory agencies."

He further states that he sensed that Americans in his company were not being promoted as readily as Canadians and that "the Canadian people and Government were expressing an interest in using Canadian talent."

Appellant applied to be naturalized as a Canadian citize and on June 27, 1973, after taking the prescribed oath of allegiance to the British Crown, was issued a certificate of Canadian citizenship. According to his own statement, he obtained a Canadian passport which he has used since 1975 exclusively for business travel. 2/

2/ The record does not indicate whether appellant ever held U.S. passport. According to the United States Consulate Gene at Toronto, appellant was last documented in Canada as a Unit States citizen in October 1970 when he was issued an identity card at Toronto.

In the spring of 1982 the Consulate General at Toronto learned of appellant's naturalization, and after receiving confirmation thereof from the Canadian authorities, wrote appellant on April 26th to inform him that he might have expatriated himself. As requested by the Consulate General, he completed a questionnaire to facilitate the determination of his citizenship status and returned it to the Consulate General with a letter dated May 20th explaining the circumstances under which he had become a Canadian citizen. It does not appear that appellant was interviewed by a consular officer.

In compliance with section 358 of the Immigration and Nationality Act, the Consulate General prepared a certificate of loss of nationality in appellant's name on May 28, 1982. 3/ The Consulate General certified that appellant acquired United States nationality at birth; that he obtained naturalization in Canada upon his own application; and concluded that he had thereby expatriated himself 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 the 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 July 20, 1982, approval constituting an administrative determination of loss of nationality from which a properly filed and timely appeal may be brought to this Board. Appellant gave notice of appeal through counsel on July 15, 1983.

He submits that his naturalization was obtained under pressure and that he did not intend to relinquish his United States citizenship.

II

Under law, a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application. 4/

It is not contested that appellant sought and obtained Canadian citizenship. Loss of nationality shall not result, however, unless the expatriating act in question was performed both voluntarily and with the intention of surrendering United States citizenship. 5/

4/ Note 1, supra.

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

The statute presumes that a person who does an act prescribed as expatriating acts voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was done involuntarily. 6/ The burden thus rests on appellant to prove that his acquisition of a Canadian citizenship was involuntary.

In his notice of appeal, appellant said that he "did not perform Canadian naturalization voluntarily." In his opening brief and accompanying affidavit, appellant posits a case of duress, which may be summarized as follows: He felt "mounting pressure" after promotion in his company to become naturalized in order to become more effective in carrying out his responsibilities with Canadian business and regulatory agencies. Americans were not being promoted as readily as Canadians, and there was a general view in Canada that Canadian "talent" should be used.

6/ 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.

The "mounting pressure" appellant allegedly felt does not pass judicially settled tests for determining legal duress.

The general rule was laid down in Doreau v. Marshall. 7/ There the court said:

> 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 not authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary.

The court made clear, on the other hand, that performing an expatriating act even in a difficult situation as a matter of expediency is not duress.

Appellant's situation was hardly "extraordinary" within the meaning of Doreau. He may have found that as an American citizen his effectiveness in dealing with Canadian regulatory agencies and businesses was limited, but he has not alleged, let alone proved, that it would have been impossible for him to perform his duties efficiently had he not become a Canadian.

Furthermore, he offers no evidence to show that the consequences of not obtaining naturalization would have been so serious as to have threatened his livelihood and ability to support his family. In a word, he has not shown that he had no alternative to obtaining naturalization. It seems evident to us that appellant had a choice, and freely elected to become naturalized.

7/ 170 F. Supp. 721, 724 (1948).

Neither motivation nor the difficulty of the choice makes an action involuntary if the actor is free to choose between alternatives. 8/

In contemplation of law, appellant was not subjected to duress to become a Canadian citizen. We therefore find that he has failed to rebut the legal presumption that he obtained naturalization in Canada voluntarily.

III

Although appellant obtained naturalization in Canada voluntarily, the question remains whether, on all the evidence, the Government has met its burden of proof that appellant intended to relinquish his United States nationality when he performed that act of expatriation. 9/

8/ Prieto v. United States, 289 F. 2d 12 (1961); Jubran v. United States, 255 F. 2d 81 (1958). Similarly Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245 (1971): "...The opportunity to make a personal choice is the essence of voluntariness." At 1250.

9/ Vance v. Terrazas, note 4, supra.

It is the Department's burden to prove by a preponderance of the evidence that appellant intended to relinquish his United States citizenship when he obtained naturalization in Canada. 10/ Intent may be shown by appellant's words or found as a fair inference from proven conduct, 11/ and is to be determined as of the time the statutory expatriating act was done. 12/

Obtaining naturalization in a foreign state may be persuasive evidence of an intent to relinquish citizenship, but it is not conclusive evidence. 13/ The Department therefore must prove intent by other actions or words of appellant evidencing a purpose to terminate United States Citizenship.

The oath that appellant swore to the British Crown, which did not require appellant to renounce his United States citizenship, alone is insufficient to prove intent. King v. Rogers, 463 F. 2d 1188 (1972). 14/

10/ Id.

11/ Id.

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

13/ Vance v. Terrazas, note 4, supra, citing Nishikawa v. Dulles, 356 U.S. 129 (1958).

14/ See also Richards v. Secretary of State, CV 80-4150, slip op. (C.D. Cal. August 16, 1982). An oath that contains only an express affirmation of loyalty to the country whose citizenship is sought "leav/es/ ambiguous the intent of the utterer regarding his present nationality." At 5.

Since there is no evidence bearing on appellant's intent dating from appellant's commission of the statutory expatriating act (save his naturalization and oath he took to the British Crown), the Department submits that appellant's other conduct proves his intent to relinquish United States citizenship. The Department stresses that appellant has lived in Canada for 25 years, 11 as a citizen; and that he obtained and travelled on a Canadian passport. Furthermore, appellant did not consult U.S. authorities before becoming naturalized, and apparently did not vote in the United States or pay income tax after becoming a Canadian citizen. The Department sums up its case by stating that: "The circumstances suggest rather that in 1973 appellant had concluded that his life lay in Canada and he made a choice to cast his lot with that country."

The basic question is whether the foregoing facts are sufficiently probative to permit one to draw a fair inference that appellant probably intended to relinquish his United States citizenship when he acquired the citizenship of Canada. We think that they are not.

We accept appellant's assertion that he went to Canada and remained there for business reasons, clearly legitimate justification for his long residence abroad. As the Supreme Court stated in Schneider v. Rusk, 377 U.S. 163 (1964):

> Living abroad, whether the citizen be naturalized or native born, is no badge of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, or other legitimate reasons.

Appellant's use of a foreign passport, of course, may be suggestive of an intention to hold himself out solely as a Canadian citizen, but it is no more than suggestive, especially in the absence of evidence that he used it to enter the United States, and in view of appellant's uncontroverted assertion that he used the Canadian passport exclusively for business, not personal, travel. Although appellant was mistaken in his apparent belief that he had automatically acquired dual nationality, that appears to have been his perception. Thus, it is altogether possible that appellant used his Canadian passport as a matter of convenience rather than in derogation of his American citizenship.

Nor do we draw the same inferences as the Department does either from the fact that before becoming naturalized appellant did not find out what implications naturalization might have for his American citizenship, or from his admitted neglect of some of the civic obligations of United States citizenship. The "did nots" ascribed to appellant are at best equivocal indicators of an intent to relinquish citizenship. This is so because the enumerated omissions could as rationally be ascribed to lack of foresight, prudence, alertness or any other human failing as they could be to a purpose and design to give up his American citizenship. Granted, appellant's failure to do the things he ought to have done to assert his American citizenship falls short of the conduct of that hypothetical reagent, the ordinary prudent or reasonable man. But it is not inconsistent to reproach him for lack of caution and at the same time accept that he might have acted as he did for reasons that are not remotely akin to an intention to divest himself of United States citizenship.

The record shows no unambiguous act or statement by appellant in derogation of an intention to remain a United States citizen. His own pleadings, though undocumented, presen a fair picture of a person who wishes to preserve his connections with the United States, despite his long sojourn abroad.

The Department's case of intentional abandonment of appellant's United States citizenship rests on an unsure footing. It has not shown affirmatively, as we believe it must do under the controlling decisions, that appellant willed loss of his citizenship. We therefore conclude that the Department has failed to carry its burden of proving by a preponderance of the evidence that appellant obtained Canadian citizenship in 1973 with the intention of relinquishing his United States citizenship.

IV

In consideration of the foregoing analysis and a careful review of the entire record in this case, it is our judgment that appellant did not expatriate himself. Accordingly, we reverse the Department's holding of loss of his nationality.

Alan G. James, Chairman

Mary E. Hoinkes, Member

George Taft, Member