October 19, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: A[redacted] J[redacted] H[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, A[redacted] J[redacted] H[redacted], expatriated himself on November 16, 1967, 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 principal issue to be resolved in this appeal is whether appellant's naturalization was accompanied by an intent to terminate his United States citizenship. We conclude that it was performed with the intent to relinquish citizenship. Accordingly, we will affirm the Department's determination of loss of nationality.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), 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, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: Provided, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: . . .

I

Appellant was born at J[redacted], M[redacted] on [redacted], and acquired United States citizenship at birth. His father was a national of the Netherlands at the time; his mother, a British subject and United Kingdom citizen. He departed from the United States with his parents in September **1943**, and resided thereafter in England, the Netherlands, Belgium, Switzerland, and New Zealand. In **1953**, appellant's father was naturalized in New Zealand, and in **1954**, he registered appellant, then a minor, as a British subject and New Zealand citizen. 2/ In January of **1958**, the American Embassy at Wellington Issued appellant, then **14** years of age, a passport.

In **1959**, appellant accompanied his parents to Canada. He stated at a hearing before this Board, that he entered Canada as a New Zealand citizen, having been included on his father's passport. 3/ He resided continuously in Canada since that time.

2/ If it were subsequently determined that appellant's registration as a British subject and New Zealand citizen constituted naturalization under section **349(a)** (1) of the Immigration and Nationality Act, appellant, being under twenty-one years of age, would have lost his United States nationality unless he entered the United States to establish a permanent residence prior to his twenty-fifth birthday. See note 1, supra, Appellant was ten years of age at the time of his registration on May **4, 1954**, as a minor child of his New Zealand citizen father.

3/ Transcript of Proceedings In the Matter of A[redacted] J[redacted] H[redacted]K, Department of State, Board of Appellate Review, June **22, 1984** (hereinafter cited as TR) at **25.**

except for limited periods while engaged in graduate studies in England and while on military assignments. In 1961, appellant joined the Canadian Navy, with the status of a British subject and New Zealand citizen.

While stationed in England in 1967, appellant applied for Canadian citizenship under section 10(2) of the Canadian Citizenship Act. He took the required oath of allegiance, and was granted Canadian citizenship on November 16, 1967..

Fifteen years later, in October 1982, appellant visited the American Embassy at Ottawa to clarify his citizenship status. According to the report of the consular officer at the Embassy, appellant sought information concerning immigration to the United Statesbecause he was interested in employment opportunities in this country. In view of the fact that. appellant might have a claim to United States citizenship, the consular officer requested appellant to complete an application for registration as a United States citizen and an information form to determine his citizenship status.

Upon review of the case, the consular officer believed that appellant lost his United States nationality by his voluntary acquisition of Canadian citizenship, and, in accordance with section 358 of the Immigration and Nationality Act, issued a certificate of loss of nationality, 4/ The consular officer certified that appellant acquired United States citizenship by virtue of his birth in the United States; that he acquired the nationality of Canada by naturalization on November 16, 1967; and thereby expatriated himself under the provisions of section

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

See. 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 3.940, 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.

349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on March 21, 1983. 5/

Appellant's counsel requested the Department to reconsider the adverse action taken, and, upon refusal of his request, gave notice of appeal to this Board on October 14, 1983. A hearing the appeal was held on June 22, 1984.

Appellant essentially contends that the Department has failed to sustain its burden of establishing by a preponderance of the evidence that he intended to relinquish his United States citizenship when he obtained naturalization in Canada upon his own application. He concedes that his act of obtaining naturalization was voluntarily performed.

5/ It appears from the record that the Department's approval of the certificate of loss of nationality was based in part on a misapprehension of the applicable Canadian law under which appellant was naturalized. Prior to 1973, applicants for naturalization under section 10(1) of the Canadian Citizenship Act were required by section 19(1) of the Canadian Citizenship Regulationsto make a declaration of renunciation of all other allegiance. No such renunciatory declaration was required of applicants under section 10(2) of the Canadian Citizenship Act, under which section appellant obtained naturalization. The Federal Court of Canada on April 3, 1973, found section 19(1) of the Citizenship Regulations to be ~~ultra vires~~. The Department mistakenly and erroneously thought that appellant made a declaration of renunciation In admitting the error, the Department informed appellant's counsel that, notwithstanding the error "the evidence of record is sufficient to support a holding that Mr. H[redacted] intended to relinquish his claim to U.S. citizenship by o[redacted]ng naturalization in Canada in 1967."

II

Section 10(2) of the Canadian Citizenship Act of 1946, as amended, authorized the responsible Minister, in his discretion, to grant a certificate of citizenship to any person who is a British subject and who makes to the Minister a declaration that he desires such certificate and who satisfies the Minister that he possesses certain prescribed qualifications. Appellant, who was a British subject and a citizen of New Zealand at the time, as well as a United States citizen, and perhaps a Netherlands national too, applied for Canadian citizenship at London in 1967, and was granted a citizenship certificate pursuant to section 10(2). He took the following oath of allegiance at the time of his naturalization:

> I swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen. So help me God.

Appellant's counsel in his submissions to the Board and at the hearing appears to question whether appellant's acquisition of Canadian citizenship under section 10(2) of the Canadian Citizenship Act constituted an expatriating act within the meaning of the term "naturalization" in section 349(a)(1) of the Immigration and Nationality Act. He asserts that appellant's acquisition of Canadian citizenship is not "naturalization" and that it is more akin to the automatic acquisition of citizenship by certain persons under the nationality laws of Ireland and Israel, respectively. Because appellant was a British subject and section 10(2) of the Canadian Citizenship Act authorizes the grant of a certificate of citizenship "to any person who is a British subject", appellant's counsel argues that section 10(2) confers Canadian citizenship status "upon a pre-existing condition - the nationality of a Commonwealth nation," and, therefore, concludes that appellant did not become naturalized "within the meaning of present interpretations" of the Immigration and Nationality Act. Appellant's argument is unencumbered by any precedents or citations to authorities. We find no substance to appellant's position.

The term "naturalization" is defined in section 101(a)(23) of the Immigration and Nationality Act, 8.U.S.C. 1101(a)(23), as "the conferring of nationality of a state upon a person after birth, by any means whatsoever." It is undisputed that appellant here applied for Canadian citizenship, desired a grant of such citizenship, took the prescribed oath of allegiance, and was granted Canadian citizenship under section 10(2) of the Canadian

Citizenship Act. In the process, appellant had to satisfy the Minister that he possessed certain prescribed qualifications of other applicants for naturalization. In our view, there is no question that appellant obtained naturalization in a foreign state upon his own application, and thus performed a statutory act of expatriation.

III

Although appellant admits that he voluntarily obtained Canadian citizenship, he maintains that he did not intend thereby to give up or abandon his United States citizenship. He contends that the Department has failed to prove that he intended to relinquish his United States citizenship at the time he became a Canadian citizen.

On the issue of intent, the Supreme Court declared in Afroyim v. Rusk, 387 U.S. 253 (1967), that a United States citizen has a constitutional right to remain a citizen unless he voluntarily relinquishes that citizenship. Although Afroyim did not define what conduct constitutes "voluntary relinquishment" of citizenship, it nevertheless made loss of citizenship dependent upon evidence of an intent to transfer or abandon allegiance.

The Supreme Court affirmed and clarified this holding on intent in Vance v. Terrazas, 444 U.S. 252 (1980). The Court said that the Government must prove an intent to surrender United States citizenship, as well as the performance of the expatriative act under the statute. The Court stated that an intent to relinquish United States citizenship must be shown by the. Government, whether "the intent is expressed in words or is found as a fair inference from proven conduct." The Court made it clear that it is the Government's burden to establisn by a preponderance of the evidence that the expatriating act was accompanied by an intent to terminate United States citizenship. 6/

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

The Supreme Court in Terrazas favorably noted the administrative guidelines set forth in the Attorney General's Statement of Interpretation of Afroyim. 7/ The Attorney General said that "voluntary relinquishment" of citizenship is not confined to a written renunciation but can also be manifested by other actions declared expatriative under the statute if such actions are in derogation of allegiance to the United States. The Court also pointed out in Terrazas, that although any of the specified statutory acts of expatriation "may be highly persuasive evidence in a particular case of a purpose to abandon citizenship," 8/ the trier of fact must in the end conclude whether the citizen not only voluntarily committed the expatriating act, "but also intended to relinquish his citizenship."

7/ Attorney General's Statement of Interpretation, 42 Op. Atty. Gen. 397 (1969).

8/ Quoting from Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), (Black, J., concurring).

In this connection, it should be noted, as the U.S. Court of Appeals, Seventh Circuit, observed in Terrazas v. Haig, 653 F. 2d 285 (1981), 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. 9/

Appellant's counsel argues that appellant's naturalization in the circumstances of this case "does not meet the threshold criterion of 'highly persuasive evidence'" of an intent to relinquish United States citizenship, and that in any event it was not appellant's intention to relinquish his citizenship when he acquired Canadian nationality. Appellant's counsel further argues that appellant's declaration at the hearing that he did not intend to renounce his United States citizenship "still remains unimpeached" and, is to be accorded greater weight than his actions and conduct since his naturalization in 1967. 10/

9/ The U.S. Court of Appeals, Seventh Circuit, referred to an earlier Ninth Circuit decision in King v. Rogers, 463 F. 2d 1188 (1972), in which it was stated that the Secretary of State may prove intent by acts inconsistent with United States citizenship or by affirmative acts clearly manifesting a decision to accept foreign nationality.

10/ TR at 53.

Appellant explained at the hearing that he became a Canadian citizen in 1967 to facilitate his handling of "highly classified" communications in his military assignment. His New Zealand passport had expired at the time, he had been "running into all sorts of security,problems," and "it seemed like a good time" to become a Canadian citizen." 11/ Appellant, according to his testimony, gave no thought at the time to the effect his Canadian naturalization might have on his United States, New Zealand or Netherlands citizenships. However, in response to a question in a citizenship information form, which he executed in 1982, he stated that he knew that by acquiring Canadian citizenship he might have lost his United States citizenship.

The record before us is devoid of any statements or declarations of appellant expressing his intent about his United States citizenship at the time he applied for and obtained naturalization as a citizen of Canada. Apart from appellant's statement at the hearing in 1984, some seventeen years later, there is no contemporaneous corroborative evidence in the record to support appellant's declaration that he did not intend to relinquish his United States citizenship. There is no direct evidence on the matter.

11/ TR at 30-31.

There is, however, evidence of appellant's actions at the time he was naturalized and of his subsequent conduct, from which the requisite intent to relinquish citizenship may properly be established. In the first instance, it is clear from appellant's statements and those of his counsel made at the nearing that appellant applied for Canadian citizenship on the basis of his having the status of a British subject and New Zealand citizenship, "a member of the Commonwealth." 12/ In fact, as noted previously, appellant was naturalized under section 10(2) of the Canadian Citizenship Act which pertained only to applicants who were British subjects.

The record further shows that appellant knowingly and willingly sought and obtained naturalization as a citizen of Canada, took an oath of allegiance to Queen Elizabeth the Second, her Heirs and Successors, and obligated himself to faithfully observe the laws of Canada and fulfill his duties as a Canadian citizen. He gave his full consent to accept a foreign nationality. Under the administrative guidelines of the Attorney General, which, as noted above, were favorably mentioned by the Supreme Court in Terrazas, voluntary naturalization in a foreign state may be highly persuasive evidence of an intention to relinquish citizenship. As to the oath of allegiance taken by appellant, it bas been stated that the taking of such oath, while alone insufficient to prove a renunciation of United States citizenship, "provides substantial evidence of intent to renounce citizenship." King v. Rogers, 463 F. 2d **1188** (1972).

12/ TR at 6, 19, 22, 27, 30 and 57.

It is also evident from the record that appellant expressed no concern about his United States citizenship status until 1982 when he thought about the possibility of a second career as an engineer in the United States. Prior to and following his naturalization as a Canadian citizen in 1967, appellant sought no advice from U.S. consular officers in Canada or in England as to the effect naturalization would have on his United States citizenship. Until his visit to the Embassy at Ottawa in 1982, to inquire about his United States citizenship status, appellant did not visit any U.S. consular office. He did not seek registration as a United States citizen nor did he seek any documentation as an American. He traveled on a New Zealand passport prior to his naturalization and thereafter on a Canadian passport.

We also find relevant as bearing on the question of his intent to relinquish his United States citizenship, appellant's long and continuous service in the Canadian Navy from 1961 up until the present time. While military service in the armea forces of a foreign state, not engaged in hostilities against the United States, does not by itself necessarily manifest an intent to give up one's citizenship status, such service, nevertheless, under certain circumstances may constitute objective evidence of a person's intent to transfer allegiance or abandon his or her citizenship.

Here, appellant testified that he joined the Canadian forces as a New Zealand citizen and British subject to obtain university training and have a career in the Canadian Navy: and that, later in his career, when "it became very awkward being a New Zealand citizen in the Canadian forces," he acquired Canadian citizenship. 13/ He took the required military oath

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13/ TR at 22.

when he entered the Canadian Navy and served continuously until the present time, having reached the rank of Commander. He stated at the hearing that he is presently the Canadian National Deputy on a NATO project in the United States. We believe that appellant's long naval career and present high level position as Canadian National Deputy on a NATO Project indicate an attachment to Canada that is inconsistent with the retention of another citizenship status. In the above circumstances, it can scarcely be doubted that appellant's career in the Canadian Navy is in derogation of unqualified allegiance to the United States and manifests a transfer of allegiance from the United States to Canada.

In light of the Supreme Court decisions in Afroyim and Terrazas, it is a person's conduct at the time the expatriating act occurred that is to be looked at in determining his or her intent to relinquish citizenship. Appellant's belated self-serving statement made at the hearing, seventeen years after the event, that he "never did intend to renounce my U.S. citizenship when I took out Canadian", 14/ is contravened by his voluntarily applying for Canadian naturalization, by taking an oath of allegiance to Queen Elizabeth the Second, and by declaring his intent to faithfully observe the laws of Canada and fulfill his duties as a Canadian citizen. Furthermore, there is the fact of appellant's continuous service in the Canadian armed forces for the last twenty-three years and his indifference until 1982 toward his United States citizenship status.

14/ TR at 55,

T king int account th facts nd circumstances surrounding appellant's naturalization, and based upon a review of the evidence of record, we are persuaded that the record when considered in its entirety supports a finding of an intent to transfer or abandon allegiance to the United States. Appellant's conduct was clearly inconsistent with United States citizenship to the United States. In our judgment, the Department has satisfied its burden of proof by a preponderance of the evidence that appellant's naturalization was accompanied by the requisite intent to give up or abandon United States citizenship.

IV

On consideration of the foregoing, we conclude that appellant expatriated himself on November 16, 1967, by obtaining naturalization in Canada upon his own application, and, accordingly, affirm the Department's administrative determination of March 21, 1983, to that effect.

Edward G. Misey, Member

Edward G. Misey, Member

Warren E. Hewitt, Member

Concurring Opinion

I share the conclusion of my colleagues that the evidence of record supports the Department's determination that appellant intended to relinquish his United States citizenship when he obtained naturalization in Canada. I differ only in the emphasis I would place on some of that evidence.

As my associates point out, appellant's naturalization in Canada and his taking an oath of allegiance to the British Crowra may be highly persuasive evidence of an intent to terminate United States citizenship, but standing alone are insufficient to put the issue beyond reasonable doubt. The case clearly turns on whether appellant's other conduct supplies the necessary ingredient of intent. Some of it, in my opinion, does not.

I would discount the probative value of certain proven facts about appellant's conduct: that in 1959 he travelled to Canada from New Zealand on his father's New Zealand passport rather than using the United States passport issued to him in 1958; obtained naturalization without first seeking authoritative advice about its probable consequences for his United States citizenship; and did not for many years seek to clarify or assert a claim to his United States citizenship. In the main, these are acts of omission from which one might reasonably draw inferences other than an intent to relinquish United States citizenship. He might, for instance, have acted as he did because he was unknowledgeable about the applicable nationality law; or because he was too preoccupied to take precautions to document his claim to United States citizenship - not because his will and purpose were to give up that citizenship.

Serving for over twenty-one years in the Canadian Navy, however, is, in my view, affirmative expression of an intent to transfer his exclusive allegiance to Canada. Granted, this service, which continues to the present, was performed in the armed forces of an allied state, and, under the Attorney General's 1969 guidelines (42 Op. Atty. Gen. 397 (1969)) may not be highly persuasive evidence of an intent to relinquish citizenship. But the length of his navy career, his holding relatively senior commissioned rank, and his apparent disregard of the possible consequences for his United States citizenship by committing himself to a long career in foreign armed forces, strongly suggest that he did intend to relinquish United States citizenship. If

a supreme national emergency were to arise for the United States and appellant were called to serve in the United States armed forces (assuming his age did not exempt him), a grave conflict of allegiance would be presented. Could it be said with assurance that in such circumstances appellant would rally to the United States? I think it not unreasonable to presume that he probably would not.

In brief, I believe that some positive act must be performed (beyond performance of the proscribed act) before one can, with fair assurance, conclude that a party willed the loss of United States citizenship; acts of omission alone are too equivocal to support such a finding. But appellant's service in the Canadian Navy, on its face inconsistent with United States citizenship, is an unambiguous act that objectively evidences an intent to divest himself of United States citizenship.

Alan G. James, Chairman