May 7, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] A[redacted] M[redacted] - On Motion for Reconsideration

The Board of Appellate Review on November 7, 1985 granted the Department of State's motion for recsnsideration of the Board's decision, rendered June 21, 1985, on the appeal of [redacted] In that decision the Board reversed the Department's determination that M[redacted] expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application.

The applicable regulations provide that if the Board grants a motion for reconsideration, it shall review the record, and then affirm, modify or reverse its original decision. 22 CFR 7.9. Having carefully re-examined the record in this case, the Board affirms its original decision.

I

A brief restatement of the main facts is in order. M[redacted] went to Canada in 1975 to live and work. He was naturalized as a Canadian citizen on September 28, 1981. Six months later, apparently on his own initiative, he communicated with the United States Consulate General at Winnepeg to clarify his citizenship status.

On March 31, 1982 he completed a form for determining United States citizenship, answering one question as follows:

> 13. Did you know that by performing the act described in item 7 /naturalization in a foreign state7 you might lose U.S. citizenship?....
>
> Yes - United States does not permit dual citizenship.

On June 17, 1982, in completing a second questionnaire concerning his intent in obtaining Canadian citizenship, he answered two questions as follows:

> 6. Did you ever consult any U.S. official concerning the effect _____ (insert act(s) of expatriation performed) divesting of American (U.S.) citizenship in order to obtain Canadian

citizenship?
might have on your U.S. citizenship? If so, please set forth to the best of your recollection, with as much detail as possible, the substance of that consultation. If nut, please explain the reasons you did not do so.

Yes - a U.S. Embassy official from Winnipeg (while in Regina - by telephone) all of which led to the current application. We [M[redacted] and his wife] were advised we could reapply for American (U.S.) citizenship.

7. Did you make any attempt to avoid the performance of this act (these acts)? If so, describe all attempts in detail. If not, please explain the reasons why you did not do so.

We could not avoid it as it was necessary to obtain Canadian citizenship assuming you mean "act of expatriation" - the Canadian authorities do not allow citizenship without first divesting U.S. citizenship; so we are now reapplying to be U.S. citizens and becoming "Dual Citizens" (U.S. & Canada).

The underscored words were inserted by M[redacted].

The sole issue for decision was whether on all the evidence [redacted] intended to relinquish his United States citizenship when he obtained naturalization in Canada.

II

The Department's argument that the Board overlooked and misapprehended points of law and fact in its original decision rests in the main on the Department's contention that the above-quoted words of appellant constitute an admission that he intended to relinquish United States citizenship when he obtained Canadian naturalization six moncns earlier. The uepartment points out. tn. under the Supreme Court's holding in Vance v. Terrazas, 444 U.S. 260 (1980), intent may be expressed in words or found as a fair inference from proven conduct; and that the Government bears the burden of proof by only a preponderance of the evidence. 444 U. at 267. Appellant's words, in the Department's opinion, are

sufficiently clear in their meaning to meet the evidentiary standard set by the Supreme Court; for the Board to insist that the words are not crystal clear, is, the Department seems to say, tantamount to applying an evidentiary standard that the Supreme Court categorically rejected -- clear, convincing and unequivocal evidence. 444 U.S. at 264.

We cannot quarrel with tne Department's statement of the applicable law. But we are not prepared to agree that in themselves appellant's words bespeak, more probably than not, a renunciatory intent. Tnere is, in our opinion, some reason *to* question wnetner M[redacted] was saying that he iritended in 1981 to abandon United States citizenship. Second, given certain doubts we have about his intended meaning, we believe that a comfortable decision cannot rest exclusively or even mainly on these particular words; the totality of the evidence, including his proven conduct, must also be scrutinized.

It is obvious that [redacted] knew obtaining naturalization in a foreign state is expatriative. Knowledge that naturalization is expatriative and intent that expatriation should result from performing that proscribed act are, however, different concepts. Proof of intent is a problem distinct from that of proving knowledge.

As Wigmore puts it: ..." since Intent may be conceived of apart from Knowledge, the mode of proving Intent is a problem distinct from that of proving Knowledge, even where the latter is also concurrently available." II Wigmore on Evidence, section 301, p. 193 3rd ed.

The court in Richards v. Secretary of State, 753 F. 2d 1413 (9th Cir. 1985) explained why knowledge alone that an act is expatriative is insufficient to warrant a finding of loss of citizenship.

> As we read Afroyim and Terrazas, a United States citizen effectively renounces his citizenship by performing an act that Congress has designated an expatriating act only if he means the act to constitute a renunciation of his United States citizenship. 6/ In the absence of such an intent, he does not lose his citizenship simply by performing an expatriating act even if he knows that Congress has designated the act as an expatriating act. By the same token, we do not think that knowledge of expatriation law on the part of the alleged expatriate is necessary for loss of citizenship to result. Thus, a person who performs an
>
> /6/ footnote ommitted/.

> expatriating act with an intent to renounce his United States citizenship loses his United States citizenship whether or not he knew that the act was an expatriating act, and, indeed, whether or not he knew that expatriation was possible under United States law. 753 F. 2d at 1420, 1421.

Intent, therefore, has to be proved by evidence other than evidence of knowledge. In Richards, for example, the petitioner made an oath of allegiance upon obtaining naturalization in Canada that included an express renunciation of **all** other allegiance and fidelity. He also later stated to United States authorities that: "I didn't want to relinquish U.S. citizenship but as part of the Canadian citizenship requirements I did so." 753 F. 2d at 1422. Richards' statements coupled with his use of a Canadian passport to enter the United States, and registration at an American university as a foreign student supplied abundant evidence, in the court's judgment, of a renunciatory intent.

[redacted] made no such renunciatory oath, but six months after his naturalization wrote the words quoted above. A number **of** considerations leave us in doubt about the fair meaning to be ascribed to [redacted] words.

First, if his purpose was to state that he had had an intent in 1981 to relinquish citizenship, he could have so stated on the questionnaire he filled out in March **1982**. Item 9 on the form read **as** follows:

> You should be aware that under United States law a citizen who has performed any of the acts specified in item 7 with the intention of relinquishing United States citizenship may have thereby lost United States citizenship. If you voluntarily performed an act specified in item 7 with the intention **of** relinquishing United States citizenship, you may sign the statement below and return this form to us, and we will prepare the necessary forms to document your loss of U.S. citizenship. If you believe that expatriation has not occurred, either because the act you performed was not voluntary or because you did not intend to relinquish U.S. citizenship, you should **skip** to item 10, and complete the remainder of this form. /Emphasis supplied./

M[redacted] skipped **to** item 10 and completed the rest of the form, quite possibly meaning to indicate that he "did not intend **to** relinquish U.S. citizenship." Neither the consular officer who

recommended approval of the certificate of loss of nationality, nor the Department has addressed [redacted] non-completion of item 9.

Second, he was plainly wrong in stating that neither the United States nor Canada countenances dual nationality. He also betrayed a lack of comprehension of what he was probably told by a consular officer of whom he allegedly inquired about the effect of naturalization on his United States citizenship, understanding the consular officer to say that his citizenship would only be "suspended" and that he might "reapply" for it later.

So, we may ask, what was [redacted] trying to convey by answering as he did the key questions on the forms he completed? Is it merely that he knew naturalization is expatriative and that he was prepared to live with the consequences of his act? Or was he saying that he intended in 1981 to relinquish his citizenship, but only for a moment, and later wanted to reclaim it? The confusion evident in his statements prevents us from concluding that they are in themselves sufficient to support a finding of an earlier intent to relinquish citizenship.

For the words cited by the Department to have relevance to the issue of [redacted] intent they must be measured against all the evidence in his case, for the trier of fact must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and intended to relinquish citizenship. 42 Op. Atty. Gen. 397 (1969), explaining the impact of Afroyim v. Rusk, 387 U.S. 253 (1967), noted with approval in Vance v. Terrazas, 444 U.S. at 262.

So, even if [redacted] words were considered to suggest a prior intent to relinquish his citizenship, it would seem unfair to stop our analysis at that point.

Even in cases where a person has expressly renounced United States nationality before a foreign official in the course of becoming naturalized or swearing an oath of allegiance, the courts have examined all relevant factors to determine whether there might be any reason to conclude that the actor lacked the requisite intent. See Terrazas v. Haig, 653 F. 2d 285 (7th Cir. 1981) and Richards v. Secretary of State, supra.

[redacted] naturalization may be persuasive evidence of an intent to relinquish United States citizenship, but It is not,

conclusive evidence of such an intent. Vance v. Terrazas, 444 U.S. at 261. Other evidence must be adduced. His post-naturalization statements aside, which are not contemporaneous with his naturalization and in our view insufficiently probative to dispose of the issue of intent, the record shows no other words or actions that could reasonably Ire construed to express a renunciatory will and purpose. There is no evidence that he obtained and travelled on a Canadian passport, or that he held himself out exclusively as a Canadian citizen. He used a United States passport in 1977 in Canada which was presumably valid when he obtained Canadian citizenship. That he has lived in Canada for a number of years and admittedly voted there are not in themselves acts in derogation of United States citizenship

In our original opinion., we noted favorably Mc[redacted]'s consistent filing of United States income tas returns before and after naturalization as evidence of a continuing attachment to the United States.. The Department correctly points out that he had a legal obligation to file, and goes on to speculate that after naturalization [redacted] filed returns in order to build a case for non-abandonment of United States nationality. Two observations may appropriately be made with respect to the Department's statements, The Department's own guidelines state that regular filing of returns and payment of United States income taxes may be an indicator of intent to retain citizenship. Circular Airgram no. 1767, August 27, 1980, In countless cases where the citizen filed no United States income tax returns either before or after naturalization, the Department has maintained that non-performance of that obligation was one significant indicator of an intent to relinquish United States citizenship. Here, however, they dismiss as irrelevant [redacted] execution of this obligation of a U.S. citizen. Nor are we willing to accept that he filed returns after his naturalization because he calculated he could build a case for retention of his citizenship. We find no basis in the record to warrant such a conclusion. In brief, his consistent filing should be regarded as a positive factor, We note also that M[redacted] has family ties to the United States, a factor the Department's guidelines for determining intent make clear may also support a finding of lack of intent to relinquish citizenship.

Surveying the entire record, we question whether appellant had a specific intent to relinquish his United States citizenship. He became a Canadian citizen in September 1981. Six months later in March 1982 he made a candid disclosure to United States authorities about his naturalization. Of course, as the Department suggests, he might have concluded that he made a mistake in 1981, intending at that moment to abandon United States citizenship but then quickly decided to try to re-establish his United States citizenship, We

think, however, it is no less plausible that he was simply concerned he might have expatriated himself and decided he should endeavor to establish that he had not intended to do so. Moreover, had [redacted] as the Department maintains, consciously decided in March 1982 to try to re-establish his citizenship, is it plausible to assume he would have been ***so*** artless as ***to*** answer question **#13** in March 1982 and questions #6 and 7 in June 1982 in the manner he did? We think not. Rather, his statements, in our opinion, bespeak an overly candid individual.

Had [redacted] delayed for a number of years to clarify his citizenship status, there might be a stronger reason to infer an original intent to relinquish citizenship. The very brief interval between his naturalization and his airing the issue, however, injects an additional element of doubt about his specific intent at the critical moment. Nothing in the record indicates **that** a sudden change occurred in his fortunes that led him to calculate it would now be advantageious to recover his United States nationality; indeed, he seems to have conducted himself as he did prior to naturalization. If he intended to relinquish his United States citizenship, it is not improbable that he would have remained passive and contented himself with his newly gained Canadian citizensh

The evidence of [redacted] intent to relinquish citizenship thus seems to us to be finely balanced. He made no express renunciation of allegiance to the United. States when he obtained naturalization, but knew naturalization was expatriative, and unwisely proceeded in the face of that knowledge. Yet, his other conduct does not bespeak **a** renunciatory intent. Is it more or less probable that one who intended to relinquish citizenship would behave as he did? In determining intent, the trier of fact must balance the evidence and draw a firm conclusion from it. While one would wish for clear-cut evidence of intent to renounce or retain citizenship, one seldom finds it in cases like this one. Objective facts must be weighed to make a rational and comfortable decision. We must ask whether [redacted] knowingly and intelligently intended that his naturalization should lead to relinquishment of his United States citizenship. We are unable to conclude on all the evidence that he so intended. Facts do not assess themselves; the trier of fact must **do** so. As we assess the facts, they are at least in equilibrium.

III

Upon consideration of the foregoing, we hereby affirm the Board's decision of June 21, 1985 which reversed the Department's

determination that [redacted] expatriated himself when he obtainec naturalization in Canada.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

DISSENTING OPINION

I welcomed the Board's decision to grant the Department's motion for reconsideration of its decision rendered June 21, 1935 on the appeal of J[redacted] A[redacted]. I had hoped that the other two members of the Board would, after further reflection, see the error *of* their ways and agree with the Department's position that M[redacted] expatriate? himself under the provisions of Section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada on his own application.

Regretfully, the other two members of the Board have persisted in the error which I feel permeated their original opinion. Their latest opinion adds little enlightenment and in fact even further obfuscates the main issue in this case. This issue is that of [redacted]'s intent at the time he committed the expatriating act. I continue of the view that [redacted]'s intent is clearly ascertainable from his own words. My reasons for this view were fully stated in my original dissenting opinion, and there is no point in repeating them here. I would only add the comment that the inferences which the other two members of tie Board draw from [redacted]'s subsequent conduct which is asserted to balance out [redacted]'s words so that a state of equilibrium is reached, constitute a serious misconception *of* the totality *of* the evidence. The fundamental fact is that the record contains the words of M[redacted] which clearly establish his intent at the time of the expatriating act. Inferences to be drawn from subsequent conduct are necessarily highly subjective. I am satisfied that inferences to be drawn from [redacted]'s actions which are cited by the other two Board Members bear out the intent established by his words, rather than cast doubt upon it.

Warren E. Hewitt

Warren E. Hewitt, Member