January 23, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: T[redacted] S[redacted]

This case is before the Board of Appellate Review on the appeal of T[redacted] S[redacted] from an administrative determination of the Department of State that he expatriated himself on September 17, 1984, under the provisions of Section 349(a)(5) of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a consular officer of the United States at Vienna, Austria. 1/

We uphold the Department's determination that appellant expatriated himself on the grounds that he has failed to prove he renounced his United States nationality involuntarily and that on all the evidence he plainly intended to divest himself of his American citizenship.

I

S[redacted] was born at [redacted]. In his submissions, he states he was a political prisoner in Hungary from 1949 to 1956; that he left Hungary in 1956 and went to Austria; and later immigrated to the United States. He became a United States citizen by naturalization on November 20, 1962 at Brooklyn, New York.

1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), 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 --
>
> . . .
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

Appellant lived and worked in the United States until 1973. In that year he returned to Austria, having accepted a position (computer operator) with the Bank of America. The record does not disclose the terms and conditions of his employment with Bank of America. Appellant was accompanied to Austria by his wife Josephine whom he divorced in 1974. He was married again in 1976 to an Austrian national who is an employee of the Austrian Social Security System.

[redacted] worked only a few months for Bank of America. Thereafter he held positions with a succession of companies until 1982 when he was discharged by his last employer. Thereafter, he allegedly made hundreds of applications for work in both the public and private sector in Austria without success. He did, however find work on a temporary basis with Kodak Austria from September 1982 to June 1983. Thereafter he was unemployed.

Since lack of Austrian citizenship seemed to him to be an impediment to finding employment, appellant sought assurance in 1984 that Austrian citizenship would be granted to him if he were to apply for it. At that time he apparently held a temporary job with the Austrian Labor Organization, but permanent employment with that body required Austrian citizenship. On August 21, 1984 the Office of the Provincial Government of Vienna issued a certificate that stated in operative part as follows:

> Mr. Tibor [redacted] born June 23, 1931 at Kaposvar, Hungary, residing at Vienna, is hereby given the assurance of grant of Austrian citizenship under Section 20 of the 1965 Citizenship Law, Federal Law Gazette 240/1965, provided he furnishes within the period of two years proof of his relinquishment of U.S. citizenship....

In August 1984 [redacted] informed the United States Embassy at Vienna that he wanted to renounce his United States nationality. The Embassy sent him the standard statement of understanding of the consequences of renunciation for him to study.

[redacted] appeared at the Embassy on September 17, 1984, stating that he wished to go through with renunciation. The consular officer concerned states that on that day he again explained the seriousness and irrevocability of renunciation to appellant. Appellant signed a statement of understanding acknowledging that he wished to exercise his right to renounce his United States nationality; that he did so voluntarily; that the serious conse-

quences thereof had been explained to him by the consular officer; and that he thoroughly understood them. He then executed an oath of renunciation before the consular officer and two witnesses. He also submitted a personal statement explaining why he renounced his American nationality.

The statement reads as follows:

1. Since the 1st of August 1973 I am living, working, married to an Austrian National in Vienna, Austria.

2. Until June 1982, I was able to seek, get job opportunities. Since that time, no more possible. I was unemployed more than 11 months. Presently I have a temporary job with the OEGB. Austrian Labor Org. Data Processing Unit. This job or any other requires Austrian citizenship.

3. Since August 1973, I applied to the U.S. Agencies, U.N. Agencies for General Service Post but during the years without any explanation, grounds always were rejected. None gave me a chance.

4. The American owned Companies also did the same. All of them rejected the Job Applications.

5. I tried very hard, even to seek the help of the President of the U.S., the State Department, the Congress (to let introduce a personal exception, that I permitted to work here in General Service Posts) but it was forgotten, rejected.

6. The Austrians gave no jobs because of my citizenship and old age. (I am 54, and no way to get any job')

7. I have no Relatives only friends in the States.

8. My Mother is 71 years old, lives alone in nearby Hungary.

9. My wife is Austrian State Employee for the last 20 years, - we can't give up what we have here - because it is plainly, - suicide!

Therefore, to my modest personal oppinion, /sic/ I don't believe that this act of my side is RENOUNCIATION /sic/ OF U.S. CITIZENSHIP, - but a NECESSITY!

I give the above stated reasons, - it may be regretable /sic/ act, - but for me a last chance, - LIFE SAVING DECISION!

The Embassy consular officer executed a certificate of loss of nationality in appellant's name on September 17, 1984.[2] Therein he stated that appellant acquired United States nationality by naturalization; that he made a formal renunciation of his United States nationality; and thereby expatriated himself under the provisions of section 349(a)(5) of the Immigration and Nationality Act.

The Department approved the certificate on October 30, 1984, an action that constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. [redacted] initiated this appeal on July 2, 1985, contending his renunciation was coerced by desperate economic circumstances.

2/ 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 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.

II

Under the statute, a person who is a national of the United States shall lose his nationality by making a formal renunciation of United States nationality abroad before a consular officer of the United States in the form prescribed by the Secretary of State. 3/ Loss of nationality will not result, however, unless the act was performed validly, voluntarily and with the intention of relinquishing United States nationality. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967); Nishikawa v. Dulles, 356 U.S. 129 (1958); Perkins v. Elg, 307 U.S. 325 (1939).

There is no dispute that appellant duly made a formal renunciation of his United States nationality, and thus brought himself within the purview of the statute. The crucial issue to be determined thus is whether [redacted] acted of his own free will, or whether, as he contends, economic forces he could not shape forced him to perform this expatriative act.

3/ Supra, note 1.

In law, it is presumed that one who performs a statutory expatriating act does so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was not voluntary. 4/ Thus, to prevail, appellant must come forward with evidence sufficient to show that he acted against his fixed will and intent to do otherwise.

One who contends that he performed an expatriative act involuntarily must show that the circumstances under which the act was done were truly exceptional in character. The basic test of voluntariness was formulated in Doreau v. Marshall, 170 F. 2d 721 (3rd. Cir. 1948) as follows: "If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formality of citizenship of another country /petitioner in Doreau contended she acquired French citizenship during the German occupation of France to save her life and her unborn child's/ the sine qua non of expatriation is lacking." 170 F. 2d 724. Where one contends that economic hardship forced him to perform an expatriative act, the courts have required that the hardship complained of constitute a threat to the survival or subsistence of the petitioner or his family. Stipa v. Dulles, 233 F. 2d 551 (3rd Cir. 1956), and Insogna v. Dulles, 116 F. Supp. 473 (D.D.C. 1953).

4/ 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

In Stipa, petitioner performed an expatriating act (served in the police force of a foreign government) because he could find no work whatsoever and after World War II there was nothing for him to do in Italy. The court found that Stipa's testimony of his dire economic plight and inability to find employment was "amply buttressed by common knowledge of the economic chaos that engulfed Italy in the post war years," 233 F. 2d at 556.

In Insogna, the court concluded that the plaintiff performed an expatriative act involuntarily because of her need to subsist. "Self-preservation has long been recognized as the first law of nature," the court stated, adding "...common knowledge of the economic conditions and fears prevailing in a country at war /Italy/ lends credence to the plaintiff's testimony." 116 F. Supp. at 475.

So, to prevail, appellant must show that nothing less than dire necessity impelled him to renounce his United States nationality.

Stated briefly, appellant's case that he renounced United States nationality involuntarily rests on the following contentions:

-- that he made a bona fide, wide-ranging, tireless effort to find employment in Austria, but was unsuccessful primarily because he was not an Austrian citizen;

-- that he could not return to the United States because his wife was a long-time Austrian civil servant and it would have been "suicide to give up what we have here," and because he wanted to be near his sick mother who lived alone in Hungary.

For the reasons stated below it is our opinion that appellant has failed to prove that he was subjected to true duress.

He made what must be considered a free choice to leave the United States in 1973, giving up presumably steady employment, in order to accept a position in Austria. He was thus the agent of his later economic problems. Being a non-Austrian citizen, he would have been prudent to have anticipated that employment problems could arise if he quit or were discharged from his position with Bank of America, and decided to continue to work in Austria. But he elected to venture his economic future in Austria. Although the economic difficulties he later encountered in Austria were not of his own making, he had placed himself in an environment where, as it turned out, he could not cope with them. Had he not left America and gone to Austria, he would not have encountered problems finding work, at least not because he lacked the required citizenship.

We will accept, arguendo, that appellant could not find work in Austria, but we do not agree he had no choice but to resign himself to renouncing his United States citizenship. He argues that he could not return to the United States to find work. He does not, however, explain why he could not, save that he and his wife did not want to give up the security of her position in the Austrian Government, and that he wanted to be near his mother who was not apparently dependent on him for financial support and whom he apparently did not visit. Nor does he show that he had no economic opportunities in the United States. To sustain a defense of duress, appellant must at least show that he explored, without success, alternative courses of action that would not have jeopardized his citizenship. See Richards v. Secretary of State, 752 F. 2d 1413 (9th Cir. 1985). In finding that petitioner in Richards acted voluntarily, the court said: "Moreover, it does not appear that, upon becoming aware that he would have to renounce his United States citizenship in order to acquire Canadian citizenship, Richards made any attempt to obtain employment that would not require him to renounce his United States citizenship." 752 F. 2d at 1419.

Plainly, appellant chose not to leave Austria, and did not as far as the record shows, even make soundings in the United States about employment opportunities. It would, of course, have been risky for him and his wife to leave Austria, where she had steady employment, and simply try their luck in the United States. But until or unless he shows that he made a genuine effort to find work in the United States, he cannot be heard to say he had no alternative to remaining in Austria. Thus, as a matter of law, he had an alternative to renouncing his United States citizenship, but made a deliberate choice not to explore that alternative. Where one has the opportunity to make a choice there is no duress. See Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245, 1250 (5th Cir. 1971).

We do not pretend that appellant was not in a difficult situation, but as Gordon & Rosenfield observe, Immigration Law & Practice, section 20.9(b) at 20-66 and 20-67 (1970):

> It is important to bear in mind, however, the distinction between a choice that is compelled or inadvertent and one that it freely made. Stated differently, this is a distinction between duress and motivation. Acts of expatriation, like all human conduct, may be the result of a variety of motivations, and sometimes involve difficult choices. But neither the motivation, nor the difficulty of the choice confronting the citizen, will make

his action involuntary, if he was free to choose between the alternatives facing him. 11/

11/ Jolley v. INS, 441 F. 2d 1245 (5th Cir. 1971), cert. den. 404 U.S. 946 (1971) (opposition to Vietnam War); Prieto v. U.S., N. 8 supra (family influences required difficult choice); Jubran v. U.S., N. 8 supra (same).

See also Doreau, supra; "...it is just as certain that the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress." 170 F. 2d at 724.

Finally, and most pertinent, is the fact that appellant was able to subsist before he renounced his United States citizenship, despite being unemployed. According to him, his wife was an employee of many years standing in the Austrian Social Security System. Thus, the family had one income which (appellant has not proved otherwise) enabled them to live. Inability to find gainful work is painful and demoralizing, and the Board sympathizes with appellant for the frustrations he obviously felt. But he cannot argue that he faced a dire economic plight simply because it was his wife not he who was the family's breadwinner.

Only the most exigent circumstances that leave the citizen no viable alternative to preserve his or his family's health, life or livelihood can render express abandonment of the precious right of United States citizenship involuntary.

In the case before us, appellant had legal alternatives to forfeiting his United States citizenship, indeed, had the means to subsist. He has failed to show otherwise.

It is therefore our conclusion that his formal renunciation of United States citizenship was an act of free will.

III

Finally, as the case law requires, we must determine whether [redacted] intended to relinquish his United States nationality when he made a formal renunciation. As the Supreme Court has held, if the citizen fails to prove that he performed a statutory expatriating act involuntarily, the question remains whether on

all the evidence, the Government has satisfied its burden of proving by a preponderance of the evidence that the expatriative act was performed with the necessary intent to relinquish citizenship. Vance v. Terrazas, 444 U.S. at 270. A person's intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260.

Formal renunciation of United States citizenship in the manner mandated by law and in the form prescribed by the Secretary of State is the most unequivocal of all statutory expatriating acts. "A voluntary oath of renunciation is a clear statement of desire to relinquish United States citizenship." Davis v. District Director, Immigration and Naturalization Service, 481 F. Supp. 1178, 1181 (D.D.C. 1979). Intent to abandon citizenship is inherent in the act. The words of his oath of renunciation shout out appellant's specific intent:

> I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

Our sole inquiry therefore is whether appellant knowingly and understandingly executed the oath of renunciation. The record leaves no doubt that he did so. He signed a statement in which he acknowledged that the serious consequences of renunciation had been explained to him by a consular officer and that he fully understood them. His personal statement of the reasons for his renunciation confirms that he acted intelligently, desiring to rid himself of United States nationality precisely to acquire that of Austria. A mature, evidently experienced man, appellant knew what he was doing. Here there was no inadvertence or mistake of law or fact.

In brief, appellant's voluntary forfeiture of his United States nationality was accomplished in due and proper form with full consciousness of the gravity of the act.

The Department has sustained its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States nationality when he formally renounced that nationality.

IV

On consideration of the foregoing, we conclude that appellant expatriated himself on September 17, 1984 by making a formal renun-

ciation of his United States citizenship before a consular officer of the United States in the form prescribed by the Secretary of State. Accordingly, we affirm the Department's administrative determination of October 30, 1984 to that effect,

Alan G. James, Chairman

J. Peter A. Bernhardt. Membe

Frederick Smith, Jr., Member