DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

I THE MATTER OF: R[redacted] A[redacted] R[redacted]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, R[redacted] A[redacted] R[redacted], expatriated herself on September 30, 1975 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

There is a single issue for decision: whether appellant intended to relinquish her United States citizenship when she obtained naturalization in Canada. It is our conclusion that the Department has not carried its burden of proving by a preponderance of the evidence that appellant had the requisite intent to abandon her citizenship. Accordingly, we reverse the Department's determination of loss of appellant's nationality.

I

Appellant became a United States citizen by birth at [redacted]. She attend high school in the State of Washington. [redacted]8, she went to Canada for Bible training, the job market in the United States then being very slow, as she put it. In 1965 she married a Canadian citizen and began a life with him in Canada. She states that she worked in a bank for three years after her marriage, and from 1968 to 1972 was employed by a county government office. Four children were born to appellant between 1972 and 1978.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 C.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, . .

Appellant applied to be naturalized in Canada, and on September 30, **1975** was granted a certificate of Canadian citizenship. As part of the naturalization process, she took the prescribed oath of allegiance to Queen Elizabeth the Second. 2/

In the summer of **1983**, appellant's Canadian naturalization came to the attention of the United States Consulate General at Calgary, apparently on the initiative of appellant who states she went there to make "an innocent inquiry about the status of my children." 3/ On August **17, 1983** she completed a form for determining United States citizenship *and* returned it to the Consulate General. After the Canadian authorities had confirmed that appellant had been naturalized, she was invited to the Consulate General for an interview on November **25, 1983.** Before the interview she completed a form entitled "Loss of Nationality Questionnaire," and afterward, an application for registration as a United States citizen. Following the interview, appellant sent the Consulate General a letter with additional comments about "my application for continuance of my United States citizenship."

2/ The oath of allegiance prescribed by the Canadian Citizenship Act of **1946** reads as follows:

> **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.

3/ The Consulate General documented her *two* children born before her naturalization as United States citizens, and informed her that if she were found to be a United States citizen, the two children born after she became a Canadian citizen would be similarly documented.

On January 4, 1984 the Consulate General executed a certificate of loss of nationality in appellant's name. 4/ The certificate recited that appellant acquired American nationality by birth in the United States; that she obtained naturalization in Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on January 17, 1984, an action that constitutes an administrative determination of loss of nationality from which an appeal, if timely and properly filed, may be taken to the Board of Appellate Review. Appellant entered the appeal on December 27, 1984. Aithough conceding that she obtained naturalization voluntarily, appellant contends that it was not her intention to relinquish United States citizenship.

II

The statute prescribes that a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application. 5/ The courts have ruled, however, that nationality shall not be lost unless the proscribed act was validly and voluntarily performed, with the intention to relinquish United States citizenship. 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).

4/ 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 the title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shaii certify the facts upon which such belief is based to the Department of State, in writing, under requlations 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 tne certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shaii be directed to forward a copy of tne certificate to the person to whom it relates.

5/ Supra, note 1.

Appellant does not dispute that she applied for and obtained naturalization in Canada upon her own application, and did so voluntarily. The single issue for decision therefore is whether when she became a citizen of Canada it was her specific intent to relinquish her United States nationality.

The Supreme Court **has** held that loss of citizenship will not ensue from performance of a statutory expatriating act unless the trier of fact in the end concludes that the citizen not only voluntarily committed the expatriating act bur also i n k ~ ec~ ~ : relinquish his citizenship. Vance v. Terrazas, 444 U.S. at 261. It is the Government's burden to prove, by a preponderance of the evidence, that the citizen intended to surrender citizenship. Id. 268. Intent may be proved by a person's words or found as a fair inference from proven conduct. Id. at 260.

The intent the Government must prove is the citizen's intent at the time the expatriative act was performed. Terrazas v. Haig, 653 F. 2d 285, 287 (7th Cir. 1981).

The Department submits that Mrs. R[redacted]' voluntary naturalization in Canada is the "initial evidence of her intent to abandon United States citizenship." In support, it cites the 1969 opinion of the Attorney General. 42 Op. Atty. Gen. 397 (noted with approval by the Supreme Court in Terrazas, supra at 261) that voluntary performance of any of the acts specified in section 349(a) of the Immigration and Nationality Act may be highly persuasive of an intent to relinquish United States citizenship. Mrs. R[redacted]' intent at the relevant time is corroborated, the Department contends, by her subsequent behavior. The Department's submission continues.

> ...She naturalized because she believed that she would live the rest of her life in Canada, 3/ and indeed, her entire orientation has been to Canada. Since her naturalization, she has voted in most Canadian elections, owns farmland jointly with her husband in Canada, and files Canadian Income Tax forms.
>
> In contrast, she has never been documented as a U.S. citizen, has never registered at the Consulate, and has never consulted with the Consulate about the possible consequences of her Canadian naturalization near the time of the act. She has not voted in U.S. elections,

> filed U.S. tax returns, nor asserted rights of citizenship. She has never documented her children as U.S. citizens, /see, however, supra, note 27 and when she has-traveled to the United States, she has identified herself at the border as a Canadian citizen. /See, however, infra, note 67.
>
> in short she has acted in all matters as a Canadian citizen, has not exercised. any rights of a United States citizen, nor has she acted in any way to indicate that she has retained her allegiance to the United States.
>
> Now the situation has changed and the appellant wishes to return to the United States to care for her aging parents. Where a citizen committed an expatriating act with the intent to relinquish citizenship, a subsequent change of heart or change in circumstances cannot be used to negate the original intention and thereby revive the citizenship or erase the act of expatriation. 3/ /Footnote omitted/.

There is no evidence that would shed light on appellant's intent dating from the time of her naturalization except the act itself and the oath of allegiance she swore to Queen Elizabeth the Second. That evidence, however, is insufficient to dispose of the issue of appellant's intent to relinquish or retain her United States citizenship. Although naturalization in a foreign state may be highly persuasive evidence of an intent to relinquish United States citizenship, it not conclusive evidence thereof. Vance v. Terrazas, supra.

> '...we are confident that it would be inconsistent with Afroyim to treat the expatriating acts specified in sec. 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. "Of course," any of the specified acts "may he highly persuasive evidence in the particular case of a purpose to abandon citizenship." Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J., concurring). But the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating

> act prescribed in the statute, but also intended to relinquish his citizenship. 444 U.S. at 261.

Swearing an oath of allegiance to a foreign sovereign or state that contains no renunciation of previous allegiance leaves ambiguous the intent of the utterer. Richards v. Secretary of State, CV80-4150, memorandum opinion at 5, C.D. Cal. 1982.

We must therefore focus our inquiry into appellant's intent on her conducr after naturaiiza-cion.

As the Department points out, Mrs. R[redacted] conducted herself in many respects as a Canadian, and did not do certain things which if done would have demonstrated an intent to retain United States citizenship. The pertinent question, however, is whether the inference of intent to relinquish citizenship the Department draws from such conduct is fairer than any other that might reasoncbly be drawn therefrom. In our opinion, it would be just as reasonable to infer that appellant had no such specific intent.

Acting as a Canadian citizen is not in itself inconsistent with a will and purpose to retain United States citizenship. Appellant married a Canadian citizen and decided to make a life in the country where her husband earned his living. Living and remaining outside the United States were in appellant's case dictated by legitimate reasons - family obligations and commitments. By 1975 when she became a Canadian citizen two children had been born and she and her husband foresaw no change in their permanent residence. In those circumstances, it is hardly strange that she would be oriented to Canada, and there might or might not be a nexus between appellant's Canadianism and an intent to relinquish United States citizenship. Her own characterization of her situation seems apt: "It is one thing to blend into a culture and certainly a very different thing to willfully defy, sever allegiance and patriotism to the country you love."

For an American citizen to live in a foreign state for eight years after becoming a citizen of that state without apparently having any communication with United States authorities or exercising the rights and duties of United States citizenship raises a legitimate question about whether he or she intended to remain a United States citizen. Appellant contends that her conduct should not be interpreted as expressing an intent to relinquish her United States citizenship. She did not, she argues in effect, do the things that would have made clear her intent to remain a United States citizen not because she had transferred her allegiance to Canada but because:

> ...I was never employed in the States, nor am I aware, even to this date, whether income earned in Canada is taxable by any country outside of Canada. I do not know what the U.S. Laws read concerning this either.
>
> I do believe that the voting age has Seen lowered since 1965 and I would assume that all circumstances remaining the same, there would still be a lot of 18, 19, and 20 year-olds present within the borders of the 3.5. that have not documented their citizenship or even are aware of the advantage of doing so.
>
> I was not required to obtain a U.S. passport to gain entrance to Canada or I would have done so.
>
> I did not even know where the U.S. Consulate was let alone register with it, I obtained my landed Immigrant Status through one of the American Offices in the States not Canada.

Does such conduct express an intent to relinquish United States citizenship, or was it the product of no calculated purpose, simply the consequence of not thinking about the rights and duties of United States citizenship? It may be ill-advised for one living in a foreign country, even a country as compatible with the United States as Canada, not to take steps to protect United States citizenship, especially when one has acquired the nationality of that country. But does her failure to take positive steps to demonstrate a claim to United States citizenship necessarily indicate an intent to relinquish United States citizenship? We think there is at least room for doubt that such an inference is the most reasonable one to be drawn from such conduct. To read into such conduct evidence that Mrs. R[redacted] intended in 1975 to relinquish her United States citizenship is to discount too heavily the possibility that she acted as she did out of ignorance, thoughtlessness, inertia, or even because she perceived no need in the friendly environment of Canada to do the things that the ideally prudent person would do to protect his citizenship.

Other factors also leave us in doubt that Mrs. Ruggles intended to renounce her United States citizenship. She did not renounce allegiance to the United States when she became a

Canadian citizen; she did not obtain a Canadian passport; and there is some question in our minds whether she held herself out as solely a Canadian citizen. 6/

We take the Department's point that appellant may have asserted a claim to United States citizenship eight years after she became a Canadian citizen because she had a change of heart and wished to recoup the citizenship she arguably had intentionally surrendered in 1975. Admittedly, appellant was quite candid when she explained to the Consulate General why she had raised the issue of her citizenship in 1983: "We would like to be able legally to reside close enough to them /her parents in the United States/ that we could help them." But we are not persuaded that an inference of intent to relinquish United States citizenship in 1975 is the only plausible one to be drawn from a long-delayed request to be documented as a United States citizen. It would be no less reasonable to infer that until 1983 appellant perceived no good reason to inquire into her citizenship status because until 1983 she and her husband had no plans to live any where but Canada. In this context, we find a certain pertinence in appellant's statement to the Board that she had understood she might

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6/ In the citizenship questionnaire appellant completed on August 17, 1983 she stated that she had visited the United States since obtaining naturalization. In response to a question about what documentation she used at the border to identify herself appellant stated "None has ever been requested or necessary. I was always been /~~sie~~/ asked by place of birth."

On the form appellant filled out in November 1983 when she was interviewed by a consular officer she wrote: "I was never asked to prove my citizenship status, except perhaps once and I used my landed immigrant card. (I was nor a citizen of Canada at the time.)" A notation was made below the foregoing statement to the effect that: "Identifies herself at the border as a Canadian citizen." Whether Mrs. R[redacted] made that statement to the consular officer during the interview or the latter reached that conclusion independently is not revealed by the record.

be the beneficiary of a preference immigrant visa upon the petition of her parents, but that to accept such a visa "seemed like an admission that I was accepting my Loss of Nationality without even contesting it."

Cases like the one now under consideration are unquestionably the most difficult that come before the Board. There is a paucity of hard evidence relevant to the intent of the appellant. No words expressing renunciation of United States citizenship have been uttered. No acts expressly derogatory of United States citizenship have been Gone. The appellant became a citizen of a foreign state and thereafter for a number of years remained passive with respect to the rights and duties of United States citizenship.

In this case the Department of State propounds a tenable theory that such passivity coupled with performance of a statutory expatriating act will support an inference of intentional abandonment of United States citizenship. However, the margin for disagreement among reasonable people in cases such as this one is wide. This is so, in our view, because the passivity of the appellant could be ascribed to factors that are totally divorced from any considerations bearing on citizenship; people do act thoughtlessly in their daily affairs without necessarily willing the consequences of their actions.

"In each case," the Attorney General has stated, "the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact voluntarily relinquished his citizenship." 42 Op. Atty. Gen. 397, 401 (1969), noted with approval by the Supreme Court in Vance v. Terrazas, 444 U.S. at 262.

Having carefully reviewed all the evidence in this case, we are not satisfied that the Department of State has sustained its burden of proving by a preponderance of the evidence that Mrs. R[redacted] intended to relinquish her United States citizenship when she obtained naturalization in Canada upon her application.

III

Upon consideration of the foregoing, it is our conclusion that the Department's determination of loss of appellant's nationality should be and hereby is reversed.

Alan G. James, Chairman

George Taft, Member

Dissenting Opinion

Once again, this Board is required to decide a case on little evidence as to the appellant's intent at the time of performance of the act denominated expatriating by the statute. And, once again, the Board must decide a case in which the expatriating act was performed a number of years ago but has come to light, insofar as the Department of State is concerned, only recently when the appellant chose to inquire about U.S. citizenship.

Other than the act of naturalization and the accompanying oath of allegiance, there is no direct evidence of appellant's intent uating from 1975 when sne became a Canadian citizen. As the majority stated, while persuasive, such naturalization and oath are, of course, not conclusive. Nor, of course, are appellant's present assertions of her intent at that time. What we are left to examine is appellant's conduct before and since performance of the expatriative act. It seems to me that appellant's course of conduct is sufficient additional evidence of an intent to transfer allegiance or relinquish citizenship to sustain the Department's burden of proof.

In 1965, when she was 20 years old, appellant's circumstances changed; she married a Canadian citizen and, as the majority states, decided to make a life in the country where she had Seen studying and where her husband earned his living: By 1975, two children had been born to the couple. Appellant states that at that time she decided to become a Canadian citizen in order to vote and otherwise participate fully in the affairs of the country in which she seemed likely to spend the rest of her life -- an understandable, even laudable, motive. Now, circumstances have changed again. Appellant and her husband (whose parents are no longer living) find that they are in a position to leave Canada and move to the United States in order to be close to her parents to help them in their remaining years -- an understandable, even laudable, motive. And, appellant now states, she did not intend to relinquish U.S. citizenship when she became a Canadian citizen eight years earlier.

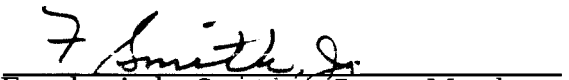
In its brief, the Department points to several factors it contends satisfy its burden of snowing by a preponderance of the evidence that appellant intended to relinquish or abandon her U.S. citizenship: in addition to ner naturalization and oath of allegiance, she has voted in most Canadian elections; she owns land jointly with her husband: and she has filed Canadian income tax returns. Moreover, she has not voted in U.S. eiections, not filed U.S. income

tax returns, not registered as a U.S. citizen, not documented her children as U.S. citizens, or otherwise asserted any rights of U.S. citizenship.

The majority apparently gives greater weight to some statements of appellant, to her maintenance of family ties in the United States and to some negative factors: she did not make a renunciatory oath upon Canadian naturalization, did not obtain a Canadian passport, and apparently did not identify herself as solely a Canadian citizen when crossing the U.S.-Canadian border. At least two of these three negative factors would not seem to be of much evidentiary value inasmuch as: 1) by the time of appellant's naturalization in 1975, the renunciatory oath requirement of Canadian law had been rescinded; and 2) it appears that upon crossing the border appellant was asked only to state her place of birth, not to describe her citizenship status. Moreover, it appears that appellant never needed a passport.

As the majority notes, the Board is called upon in this case, as in so many others, to make nice judgments on little or no contemporaneous evidence. In this case, plausible arguments can be made for either result. In my view, the more persuasive case is that in 1975, after ten years in Canada and with the prospect of living out her life there, appellant made a conscious, deliberate, and, from her perspective at that time, sensible choice to cast her lot with Canada; that she intended, on becoming a citizen of Canada, to transfer her allegiance to that country where she thought her future lay and to which her orientation had been for a number of years. Her course of conduct over the years since her naturalization fully support that conclusion.

Admittedly, evidence regarding appellant's intent, other than her naturalization and her taking of an oath of allegiance, is scant. But it seems to me that the preponderance of what evidence there is clearly sustains the finding of loss.



Frederick Smith, Jr., Member