March 4, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE XATTER OF: S[redacted] B[redacted] K[redacted]

This is an appeal from an administrative determination of the Department of State holding that appellant, S[redacted] B[redacted] K[redacted], expatriated herself on March 6, 1979 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in France upon her own application. 1/

For the reasons set forth below, it is our conclusion that the Department has not carried its burden of proving that Mrs. [redacted] intended to relinquish her United States citizenship when she reacquired the French nationality of her birth. Accordingly, we will reverse the Department's determination of loss of her nationality.

I

Mrs. [redacted] born at [redacted] on [redacted] She married [redacted] a lieute in t Army, in 1945, and the following year moved with him to the United States. She was naturalized before the United States District Court for the Eastern District of Wisconsin on June 3, 1948. under French law she automatically lost her French nationality by obtaining foreign naturalization. After appellant's marriage was terminated by divorce in December 1965, she returned to France, "I had a very hard time to find a job," she states. "I was 44 years old. I found one after a long time.," She renewed her United states passport at the Embassy in 1966, 1968 and again in 1975. Mrs. [redacted] states that by 1979 her job was in danger because as a foreigner

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1/ Prior to November 14, 1986, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read as follows:

> 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, . . .

The Immigration and Nationality Act Amendments of 1986, PL 99-653, approved November 14, 1986, amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

she was vulnerable to dismissal. Accordingly, allegedly to protect her employment, on March 6, 1979 she executed a declaration before a judge of the Tribunal d'Instance of the 8th Arrondissement of Paris stating that she wished to have her French nationality restored. She became a French citizen again as from March 6, 19[illegible].

In November 1985 Mrs. [redacted] naturalization came to the attention of the United States authorities in Paris. According to the records of the citizenship section of the Embassy,

> ...Subject was referred to our office by the Embassy's Social Security Office for a determination of her citizenship status in connection with her SS checks. She told Social Sec. she believed she automatically lost her U.S. citizenship when she voluntarily re-acquired French nationality. af [presumably initials of employee making entry on record]. She will return with completed questionnaire & document showing acquisition of French nationality by declaration in order to develop her citizenship case under 349(a)(1) INA.

A few days later Mrs. [redacted] returned to the Embassy with the completed citizenship questionnaire. In it she stated that she was unaware she could jeopardize her U.S. citizenship when she requested French nationality. She explained that she found a job as an interpreter in 1973 and worked as a U.S. citizen until 1978 at which time she said she was informed that she would not be able to keep her job if she were not a French citizen. She was interviewed by a consular officer and, for information purposes, completed an application for a passport/registration. At this point the consular officer submitted Mrs. [redacted] case to the Department for a decision. In reporting her case on December 18, 1985, the consular officer stated that:

> Mrs. [redacted] has her entire family in France. She said she has retained social ties to the U.S. She has neither voted in U.S. elections nor filed U.S. income tax returns since she departed the U.S. Due to the conflict in statements made by Mrs. K[redacted] orally to an Embassy employee, and those made by her subsequently in writing, it appears to the officer that she was in fact well aware of the risk posed to her American citizenship when she requested French nationality in 1978. However, the fact that Mrs. [redacted] worked in France as an American for 5 years prior to becoming French, and requested this nationality only when it appeared that she

would lose her job if she remained a foreigner is a strong indication that it was not her intent to relinquish her American citizenship by becoming reintegrated as a French citizen.

In the consular officer's opinion the preponderance of evidence of record in this case is insufficient to support a holding that Mrs. K[redacted] intended to relinquish her claim to U.S. citizenship when she requested French nationality.

A Certificate of Loss of Nationality has not been prepared at post. The Department's decision is requested.

The Department disagreed with the consular officer, and sent the Embassy the following instructions on February 4, 1986:

1. Department has reviewed the facts in the case of [redacted] and feels that it could sustain a finding of loss of nationality based on the preponderance of the evidence.

2. Mrs. [redacted] realized that she lost her claim to French citizenship when she naturalized in the United States, It can-be assumed that she should have realized she would lose her claim to U.S. nationality when she reacquired French citizenship.

3, Although she did not become naturalized in France until she felt she would lose her job, she did not contact U.S. consular officials to determine the effect of such naturalization on her U.S. citizenship. Therefore, Department feels she gave no consideration to the status of her U.S. citizenship.

4. Further, she only contacted post about her citizenship status after she was referred there by the Embassy's social security office.

5. The registration application under ref memo is disapproved. Post is requested to complete CLN in her name for forwarding to Department.

A consular officer accordingly executed a certificate of loss of nationality in Mrs. [redacted] name on February 7, 1986. 2/ Therein the officer certified that Mrs. [redacted] acquired United States nationality by naturalization; that she acquired French nationality upon her own application; and concluded that she thereby expatriated herself under the provisions of section 349(a)(1) Of the Immigration and Nationality Act. The Department approved the certificate on February 27, 1986, an act that constitutes an administrative determination of loss of nationality from which a properly filed and timely appeal may be taken to the Board of Appellate Review. Mrs. [redacted] entered the appeal ~~pro se~~ on August 14, 1986.

II

There is no dispute that Mrs. [redacted] acquisition of French nationality by declaration constituted naturalization in a foreign state upon her own application. She thus brought herself within the purview of the statute.

It was settled long before amendment of section 349(a)(1) of the Immigration and Nationality Act (supra, note 1), however, that loss of nationality will not result from performance of a statutory expatriating act unless the act was voluntary and performed with the intention of relinquishing United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

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

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 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

Under 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 involuntary. 3/

Mrs. K[redacted] states that she reacquired her French nationality because, as an alien in France, she was in danger of losing her job. She thus argues that she was compelled by economic necessity to obtain French nationality. Duress, of course, voids a statutory expatriating act. Doreau v. Marshall, 170 F.2d 721 (3rd Cir. 1948). To excuse performance of an expatriative act, however, the citizen must demonstrate that the circumstances confronting him were extraordinary.

> If by reason of extraordinary circumstances amounting to true duress, [the court said in Doreau, supra, at 724] an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking, There is no authentic abandonment of his own nationality, His act, if it can be called his act, is involuntary, He cannot be truly said to be manifesting an intention of renouncing his country,

Where it is alleged that economic exigencies forced one to perform an expatriative act, the well-established rule is that the citizen must show that his ability to subsist would have been endangered but for the economic protection resulting from doing the proscribed act,

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3/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), reads as follows:

(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 Immigration and Nationality Act Amendments of 1986, PL 99-653 (Nov. 14, 1986) repealed section 349(b) but did not redesignate section 349(c).

See Stipa v. Dulles, 233 F.2d 551 (3rd Cir. 1956) and Insogna v. Dulles, 116 F. Supp. 473 (D.D.C. 1953). In those cases, petitioners alleged that their expatriative conduct was compelled literally by the instinct for self-preservation in the economic chaos of war-time and post-war Italy. In both cases, the courts found that the petitioners accepted proscribed employment in a foreign government in order to subsist, if not to survive. Stipa and Insogna, although decided thirty years ago, remain valid, in our view, for the proposition that extreme economic hardship must be proved in order to excuse performance of an act that puts one's United States citizenship at risk.

Mrs. [redacted] has not proved that she acted involuntarily. There is no evidence that she was, as she suggests, threatened by the prospect of serious deprivation; she has submitted no evidence to support her claim that she would have lost her position had she not acquired French citizenship. Nor has she shown, as she must do, that she tried to find adequately renumerative employment that would not have endangered her United states citizenship. See Richards v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985). 4/

Duress implies absence of choice. On the facts presented here, Mrs. [redacted] clearly did have a choice: to protect the job she currently held by acquiring French nationality or make a serious effort to find other employment for which French nationality was not a prerequisite. So, as a matter of law, we believe she was free to make an election, and did so. Where one has the opportunity to make a personal choice there is no duress, Jolley v. Immigration and Naturalization Service, 441 F.2d 1241, 1245 (5th Cir. 1971). See also Prieto v. United States, 298 F.2d 12 (5th Cir. 1961): Where one has the opportunity to make a choice, the mere difficulty of the choice does not constitute duress.

4/ There the court said:

> .,.Moreover, it does not appear that, upon becoming aware that he [Plaintiff Richards] 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. Nor does it appear, based on his past employment history in Canada, that such an attempt would have been futile.

752 F.2d at 1419.

We conclude that Mrs. K[redacted] has not rebutted the presumption that she acquired French nationality voluntarily,

III

Even though we have concluded that appellant voluntarily obtained naturalization in France, "the question remains whether on all the evidence the Government has satisifed its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship." Vance v. Terrazas, supra, at 270. Under the statute, 5/ the Government bears the burden of proving a person's intent and must do so by a preponderance of the evidence, 444 U.S. at 267. Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The intent the Government must prove is the person's intent at the time the expatriating act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir, 1981).

The only evidence of record of Mrs. [redacted] intent that is contemporaneous with her naturalization is the fact that she obtained naturalization in France. Naturalization, like the other enumerated statutory expatriating acts, may be highly persuasive, but is not conclusive, evidence of an. intent to relinquish United States citizenship. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 365 U.S. 129, 139 (1958) (Black, Jr. Consurring). Since the direct contemporary evidence in this case is plainly insufficient without more to support. a conclusion that Mrs. [redacted] either intended to relinquish or retain her United States nationality, we must examine the evidence of her other words and conduct to determine what it reveals about that crucial issue. As the Seventh Circuit suggested in Terrazas v. Haig, supra, a party's words and conduct at times other than the crucial moment may shed light on the party's state of mind when the expatriative act was done. 653 F.2d at 288.

Apart from the fact that she obtained French natio[redacted]y is there any reasonably explicit evidence there that Mrs. [redacted] knowingly and intelligently transferred her allegiance from the United States to France in 1979? We think there is none.

From 1965 when she returned to France until 1979 when she re-acquired French nationality Mrs. [redacted] indisputably conducted herself as a United States citizen. Recall that she renewed her United States passport three times, The fact that she did not

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5/ Section 349(c) of the Immigration and Nationality Act. Text supra, note 3.

seek French nationality until she had lived in France for thirteen years suggests that her intent in 1979 was simply, as she has stated, to protect her employment, not to abandon United States citizenship. 6/ Our belief that she did not intend to relinquish United States citizenship in 1979 is strengthened by the fact that she did not at that time renounce United States citizenship; indeed, she did not even make an oath of allegiance. As we understand it, acquisition of French nationality by declaration is a simple, routine procedure devoid of ceremony - in contrast to naturalization in the United States. It seems to us therefore that, contrary to the Department's contention, Mrs. [redacted] very possibly might have thought that naturalization by declaration posed no threat to her United States citizenship.

After naturalization Mrs. [redacted] did not, as far as we can tell from the record, document herself with, or travel on, a French passport. In brief, did not perform any act or make any statements expressly evidencing an intent to abandon her United States citizenship.

We are unable to accord her acts of omission after naturalization decisive probative weight, as the Department argues we ought to do. She does not deny that she did not renew her United States passport when it expired in 1980; that she has not filed United States income tax returns or voted in United States elections after naturalization; and that she did not consult the Embassy about her citizenship status until five years after naturalization. As indicia of an intent to abandon United States citizenship, however, these acts of omission are of dubious

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6/ Here, it seems to us, the motivation behind the expatriative act is relevant. Of course, we recognize that in Richards v. Secretary of State, supra, the court stated:

> ...the cases make it abundantly clear that a person's free choice to renounce United States citizenship is effective whatever the motivation. Whether it is done in order to make more money, to advance a career or other relationship, to gain someone's hand in marriage, or to participate in the political process in the country to which he has moved, a United States citizen's free choice to renounce his citizenship results in the loss of that citizenship.

752 F.2d at 1421.

But in Richards, the plaintiff expressly renounced all previous allegiance when he made an oath of allegiance. In Mrs. [redacted] case she made no such renunciatory declaration.

value. Even though they might arguably show a pattern of rejection of allegiance to the United States, they are, it seems to us, explainable on grounds other than intent to transfer allegiance. Appellant addressed the Department's arguments on this score in her reply to the Department's brief; although factually inaccurate in part, her statement strikes us as a perfectly reasonable explanation of why she did not do the things she ought to have done

> My passport...was valid until July 24, 1980! [she wrote] When you are an American citizen resident in France, you cannot vote in the United states - unless you own property - I did not - haw can have [sic] filed US income tax returns!! I had no property in the U.S. and no income!! What could I declare - I registered once in the Embassy in 1965 - I was never told I should register several times. [The emphasis is Mrs. [redacted]

Finally, the Department submits that statements Mrs. [redacted] made in 1985 make it evident that she was aware of the risk naturalization posed for her United States citizenship, Quoting from the record, the Department stated that at that time she indicated to a local employee dealing with social security matters that she was unsure of her nationality status, but that she believed she might have lost her United States nationality:

> ,..Due to her statements made to the Embassy employee, [the Department stated in its brief] and despite her subsequent conflicting statements [in the citizenship questionnaire she wrote "no, I never thought I would lose my U.S. citizenship,"] it is evident that she was well aware of the risk her actions posed to her U.S. citizenship. Yet she never inquired at the Embassy or gave any indication other than her intent to relinquish U.S. citizenship.

We do not consider that the statement Mrs. [redacted] purportedly made to a local employee to be of any probative value. For one thing, what she allegedly said to him is hearsay; nothing in the record before us indicates that the employee made a written record of their talk on which the consular officer drew to make the entry on the nationality and passport card relating to Mrs. [redacted] Furthermore, she asserted emphatically in her reply to the Department's brief that she never told the local employee she thought she might have lost her nationality; "I always said I have to know if I am still an American citizen." In any event, even if Mrs. K[redacted] had thought she might have lost her United States

nationality, what does that prove about her intent? Surely, no more than that she feared she might have done, but did not necessarily have the design and purpose to abandon it.

Surveying the entire record, we share the view of the consul officer who interviewed Mrs. K[redacted] that the evidence of an intent on her part to relinquish United States nationality is extremely thin. 7/ We therefore conclude that the Department has not carried its burden of proving by a preponderance of the evidence that Mrs. K[redacted] intended to abandon her United States nationality when she reacquired the nationality of France.

IV

Upon consideration of the foregoing, it is our conclusion that the Department's administrative determination that Mrs. K[redacted] expatriated herself by obtaining naturalization in France should be and hereby is reversed.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Howard Meyers, Member

7/ We note that in a recent appeal, scarcely distinguishable on the facts from Mrs. K[redacted]'s case, Matter of J.E.P., the Department initially used the same argumentation in overruling the recommendation of the consular officer that the certificate of loss of nationality not be approved. After the appeal had been filed in Matter of J.E.P., the Department upon further review concluded that it was unable to bear its burden of proof that Ms. P. intended to relinquish her United States nationality when she, like Mrs. K[redacted], reacquired her French nationality of origin by declaration. Accordingly, the Department requested that the Board remand Ms. P's case for the purpose of vacating the certificate of loss of nationality. The Board granted the Department's request on October 23, 1986.