February 12, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: A[redacted] G[redacted] K[redacted]

This is an appeal from an administrative determination of the Department of State holding that appellant, A[redacted] G[redacted] K[redacted] expatriated himself on January 13, 1971 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

For the reasons set forth below, we have concluded that [redacted] voluntarily obtained naturalization in Canada with the intention of relinquishing his United States nationality. Accordingly, we affirm the Department's determination to that effect.

I

[redacted] was born at [redacted] on [redacted] 2/ Appellant gives the following account of his early years:

> ...We fled [redacted] [redacted] at the start of world war 2. I was only a child then so I cannot recall all the countries and exact dates. My parents are now deceased. But I do know that during the war we resided in New York where I attended school for 2 years. We also lived in London, England for 6 mo towards the end of the war. Then in Italy for 4 years immediately following the war. We subsequently returned to the U.S. in 1949 I believe.

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 Nov. 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".

2/ The Deparment's records, including the certificate of loss of nationality that was approved in his name, show his birth year as 1934. Documents [redacted] has submitted give his birth date as 1936. In the circumstances, we will accept that he was born in 1936.

[redacted] was naturalized before the United States District Court for the District of Columbia on May 10, 1955. On the same day he obtained a United States passport. He states he received his education in Washington, D.C. and in Cleveland, Ohio. He also state that he served in the United States Marine Corps and was honorably discharged. [redacted] married a Canadian citizen around 1965 and in that year moved to Canada. Four children were born of the marriage in 1967, 1969, 1972, 1977. Allegedly because keeping his position as a high school teacher depended on his becoming a Canadian citizen, [redacted] applied for naturalization. On January 13, 1971 he was granted a certificate of Canadian citizenship after making the following declaration and oath of allegiance:

> I hereby renounce all allegiance and fidelity to any sovereign or state of whom or which I may at this time be a subject or citizen.
>
> 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/

In the autumn of 1985 [redacted] communicated with the United States Consulate General (the Consulate) at Toronto in order, as he puts it, "to be able to reclaim my U.S. citizenship. I wish to retain my U.S. citizenship. I wish to have dual citizenship." In September 1985 he completed a questionnaire in which he gave data about himself and stated that he had obtained naturalization in Canada. Further, he acknowledged that he had made an oath of allegiance in connection with his naturalization, explaining that: "I gave up my U.S. cit. reluctantly - but had to because of my job as a high school teacher." He also stated that he became aware that he might have a claim to United States citizenship through a friend "who is in the same situation. The law has changed since I became a Can citizen. I was very proud to be an American."

After the Consulate obtained confirmation of [redacted] naturalization from the Canadian citizenship authorities, a consular officer

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3/ There is no copy in the record of the declaration and oath of allegiance to which [redacted] subscribed. It is , however, a matter of public record that in 1971 applicants for naturalization in Canada were required to swear the oath quoted above and to renounce previo allegiance. Furthermore, [redacted] concedes that he made the renunciato declaration cited above. Section 19(b)(1) of the Canadian citizensh regulations which prescribed the renunciatory declaration was declared ultra vires, by the Federal court of Canada on April 3, 19

wrote to him in December 1985 to inform him that he might have lost his United States citizenship by obtaining foreign naturalization. He was asked to complete another form, titled "Information for Determining U.S. Citizenship," and offered an opportunity to discuss his case with the consular officer. In the form he completed in December he gave essentially the same information about why he had obtained naturalization as he had done in the form he completed in September 1985. There is no indication in the record whether [redacted] was interviewed by a consular officer. On January 31, 1986 a consular officer executed a certificate of loss of nationality. 4/ The officer certified that [redacted] became a United States citizen through naturalization; that he obtained naturalization in Canada upon his own application; and concluded that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. In recommending that the Department approve the certificate, the consular officer commented on his case as follows:

> ...Mr. [redacted] failed to inquire prior to or at the time of his Canadian naturalization as to what effect it would have on his American nationality. Furthermore, it appears from his statements that he was well aware that acquisition of Canadian citizenship would result in the possible loss of his United States nationality.
>
> In examining Mr. [redacted] entire course of conduct during his prolonged residence in Canada, it is noted that he failed to register his United States citizenship or seek documentation as an American citizen with any U.S. Consulate or Embassy office.

4/ 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.

> He maintained no formal ties with respect to the United States. He has not voted in any United States elections nor as [sic] he filed a United States tax return. In addition, he has used his Canadian identification when crossing the U.S./Canada border. In connection with his Canadian citizenship, Mr. [redacted] took the oath of renunciation of his former nationality. The preponderance of the evidence submitted does demonstrate through his voluntary acts a decision on the part of Mr. [redacted] to accept Canadian nationality while at the same time abandoning the privileges and obligations of United States nationality.

The Department approved the certificate on February 13, 1986, thus making 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 the appeal in March 1986

II

Under the statute, a national of the United States who voluntarily obtains naturalization in a foreign state with the intention of relinquishing United States nationality shall lose his nationality. 5/ It is undisputed that [redacted] obtained naturalization in Canada upon his own application, [redacted] so brought himself within the purview of the statute. Our first inquiry therefore must be whethe [redacted] acted voluntarily in becoming a Canadian citizen.

In law, it is presumed that one who performs a statutory expat ting act does so voluntarily, but the presumption may be rebutted u a showing by a preponderance of the evidence that the act was invol tary. 6/

5/ Section 349(a)(1) of the Immigration and Nationality Act, text supra, note 1

6/ 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 enactme of this or any other Act, the burden shall be upon the person or pa 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 committ or performed, any act of expatriation under the provisions of this any other Act shall be presumed to have done so voluntarily, but su presumption may be rebutted upon a showing, by a preponderance of t evidence that the act or acts committed or performed were not done voluntarily.

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

[redacted] alleges that he was required to become a Canadian citizen "in order to continue my teaching career." "I had to become Canadian," he also stated, "out of economic necessity and a desire to continue with my chosen career."

It has long been settled that if a party can prove duress, the expatriating act he performed is void. Doreau v. Marshall, 170 F.2d 721 (3rd Cir. 1948). For a defense of duress to prevail it must be shown that there existed "extraordinary circumstances amounting to a true duress" which "forced" a United States citizen to follow a course of action against his fixed will, intent, and efforts to act otherwise. Doreau v. Marshall, supra, at 724. If a party pleads that economic factors compelled him to perform an expatriative act, the courts have insisted that he show he was confronted with a situation that threatened his ability to subsist. Stipa v. Dulles, 233 F.2d 551 (3rd Cir. 1956); and Insogna v. Dulles, 116 F. Supp. 473 (D.D.C. 1953). In Insogna v. Dulles, the expatriating act was performed to obtain money necessary "in order to live." 116 F. Supp. at 475. In Stipa v. Dulles, the alleged expatriate faced "dire economic plight and inability to obtain employment. 233 F.2d at 556.

The record here does not support appellant's contention that his acquisition of Canadian citizenship was the result of pressure or coercion so extreme as to have left him no reasonable choice or alternative.

We will not dispute that [redacted] may have been required to obtain Canadian citizenship in order to continue his teaching career. We take notice that a number of Canadian provinces have or had laws prescribing that to be tenured teachers must hold Canadian citizenship. However, from what little he has adduced in support of his allegation of duress, it appears that [redacted] did not consider seeking alternate employment in the United States or Canada. He wished to continue in "my chosen career." [redacted] has indicated that he knew obtaining foreign naturalization was an expatriative act, but proceeded nevertheless.

From what appears of record, appellant made a free choice for personal reasons, career objectives, and economic advantage, and cannot be legally found to have acted under the compulsion of an overwhelming extrinsic force in acquiring Canadian citizenship. The opportunity to make a decision based upon personal choice is the essence of voluntariness. Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971). Possibly appellant was confronted with a choice between difficult alternatives; we do not know, for [redacted] has not elaborated on his circumstances in 1971. But in citizenship matters, as in other aspects of life, a person must choose between such alternatives and must accept the consequences of his voluntary choice. Appellant seems to have weighed his choices and, having exercised his choice, may not be relieved from the consequences following from it.

Under the provisions of section 349(c) of the Immigration and Nationality Act, appellant bears the burden of rebutting by a preponderance of the evidence the statutory presumption that his naturalization was voluntary. In our opinion, appellant has not met his burden of proof. We conclude, accordingly, that his acquisition of Canadian citizenship upon his own application was a voluntary act of expatriation.

III

The remaining issue for decision is whether [redacted] intended to relinquish United States nationality when he obtained naturalization in Canada.

It is the Government's burden to prove by a preponderance of the evidence that appellant intended to relinquish his United States nationality. Vance v. Terrazas, 444 U.S. at 270. Intent may be proven 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 party's intent at the time the statutory expatriating act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

Naturalization, like the other enumerated statutory expatriating acts, may be highly persuasive evidence of an intent to relinquish United States citizenship, but it is not conclusive evidence of such intent. Vance v. Terrazas, supra, at 361, citing Nishikawa v. Dulles, 365 U.S. 129, 139 (1958) (Black, J. concurring.)

When [redacted] was granted Canadian citizenship he expressly renounced allegiance and loyalty to any state foreign to Canada. The courts are agreed that provided no other factors are present warranting a different result, voluntarily, knowingly and intelligently renouncing United States citizenship in the course of performing a statutory expatriating act, evidences an intent to relinquish United States citizenship. Terrazas v. Haig, supra. There the Court held that plaintiff manifested an intent to relinquish citizenship voluntarily, knowingly and understandingly applying for a certificate of Mexican nationality that contained an oath of allegiance to Mexico and the renunciation of United States citizenship, and by his conduct subsequent to performance of the expatriating act. See also Richards v. Secretary of State, 752 F.2d 1413, 1421 (9th Cir. 1985). The voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is "ordinarily sufficient to establish a specific intent to renounce United States citizenship." Similarly, Meretsky v. Department of State, et. al., Civil Action 85-1985, memorandum opinion (D.D.C. 1985).

The evidence here leaves little doubt that [redacted] obtained naturalization knowingly and intelligently. As noted above, [redacted] stated in forms he completed in 1985 and 1986 at the Consulate that he "gave up my U.S. cit[zenship] reluctantly, but had to...." Furthermore,

he was nearly 25 years of age when he obtained naturalization and, by his own statements, a university graduate. Plainly, his act could not be described as inadvertent.

[redacted] submits that his United States citizenship should be restored because:

> The oath of allegiance in becoming a Canadian citizen has been changed to exclude statement of renunciation. Obviously there was a need to do this - as I am sure there were people who took the oath with reservations - or because there was no other formula. Now that this change has been made - I feel it should include people like myself who really unconsciously had no intention of being disloyal to the U.S.

Plaintiff in Meretsky v. Department of State, supra, made a somewhat similar argument. There the court rejected Meretsky's contention, as we must do here.

> Plainly, plaintiff maintains [the Court stated] that Canada has eliminated the requirement that an individual take a renunciatory oath as a prerequisite to obtaining Canadian citizenship. According to plaintiff, the predecessor Canadian law has been held to be unconstitutional. 7/ Since Canadian law has changed, plaintiff maintains, he should not be deemed to have relinquished his United States citizenship based on Canadian law which is no longer valid. The Court disagrees. While Canada may well have modified its citizenship requirements, the modification is not relevant to the case at bar. The issue before the Court is whether plaintiff relinquished his United States citizenship in 1967. Thus, whether or not plaintiff would have been required to take the same renunciatory oath today has no bearing on the issue of his intent in 1967.

Finally, [redacted] submits that his error in not ascertaining before the event the facts about the consequences of naturalization for his United States citizenship "certainly cannot be construed that I had no desire to retain my U.S. citizenship." He continues:

7/ See supra, note 3.

> ...In those days it was not possible to retain U.S. citizenship while taking out Can. citizenship. Now it is possible - because it more accurately reflects on what happened when in fact I did take out Can. citizenship. I am now a little more knowledgeable and in the future would conduct myself otherwise.

We are not persuaded by [redacted] argument, which, in effect, is that the standard of measuring intent should be what he termed "inter conviction and belief." The cases leave no doubt that the trier of f must gauge intent by outward manifestations - words or proven conduct While we do not dispute K[redacted]'s conviction that in his heart he remain loyal to the United States we may not decide the issue of his intent mere professions of continuing loyalty.

Surveying the record we find no factors that lead us to doubt that as a matter of law [redacted] intended in 1971 to abandon his United States nationality. Accordingly, it is our conclusion that the Department has carried its burden of proof.

IV

Upon consideration of the foregoing, we hereby affirm the Department's determination that [redacted] expatriated himself.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member