December 14, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] L[redacted] D[redacted]

This is an appeal from an administrative determination the Department of State, dated May 23, 1986, holding t appellant, J[redacted] L[redacted] D[redacted], expatriated herself on June 1974 under the provisions of section 349(a)(1) of Immigration and Nationality Act by obtaining naturalization Canada upon her own application. 1/

The central issue for decision is whether appell intended to relinquish her United States nationality when became a Canadian citizen. For the reasons that follow, it our conclusion that the Department has not sustained its burd of proving by a preponderance of the evidence that appell intended to forefeit her United States citizenship. accordingly reverse the Department's holding of appellant expatriation.

I

Appellant became a United States citizen by birth [redacted] s where she grew up and was educated. 1966, after attending university for one year, she married American citizen. The couple lived in the United States unt 1968 when they moved to Canada. According to appellant, h husband had been denied conscientious objector status, a rather than respond to a draft call, decided to leave

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1/ When appellant obtained Canadian citizenship, secti 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 148 read in pertinent part as follows:

> Sec. 349. (a) From and after the effective date of this Act a person who is 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,.,.

Pub. L. 99-653, 100 Stat. 3655 (1986) amended subsectio (a) of section 349 by inserting "voluntarily performing any c the following acts with the intention of relinquishing Unite States nationality:" after "shall lose his nationality by".

the United States. In 1973 appellant applied for naturalization as a Canadian citizen. She was granted a certificate of Canadian citizenship on June 28, 1974 after making the following oath of allegiance, as prescribed by the Canadian Citizenship Act:

> 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.

Appellant states that her husband applied for and obtained Canadian citizenship at the same time she did; indeed, it is her position that she became a Canadian solely in deference to his wishes. After their naturalization the couple lived in various parts of British Columbia. They adopted two children in 1977 and 1980, respectively. Appellant and her husband were divorced in 1983.

It appears that early in 1986 appellant's naturalization in Canada came to the attention of the United States Consulate General in Vancouver, Precisely how this occurred is not disclosed by the record; possibly appellant inquired about her citizenship status at that time. In response to an inquiryby the Consulate General, the Canadian citizenship authorities in February 1986 confirmed that appellant had become a Candian citizen. In April the Consulate wrote to appellant to inform her that she might have expatriated herself by obtaining naturalization in Canada, She was asked to complete two questionnaires to determine her citizenship status and advised that she might discuss her case with a consular officer. She completed the forms on April 20th and returnedthem to the consulate. It does not appear that she was interviewed by a consular officer,

As required by law, a consular officer executed a certificate of loss of nationality in appellant's name on May 15, 1986. 2/ He certified that appellant acquired United

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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

States nationality by virtue of birth in the United Sta obtained naturalization in Canada upon her own application; thereby expatriated herself under the provisions of sec 349(a)(1) of the Immigration and Nationality Act. The off forwarded the certificate to the Department under cover c memorandum in which he set forth a number of factors that in judgment warranted the Deprtment's approving the certific The Department agreed with the consular officer's opinion, on May 23, 1986 approved the certificate, approval constitut an administrative determination of loss of nationality which a timely and properly filed appeal may be taken to Board of Appellate Review. Appellant filed a timely appeal se on April 28, 1987.

II

There is no dispute that appellant obtai naturalization in Canada upon her own application, and brought herself within the purview of section 349(a)(1) of Immigration and Nationality Act. Under the statute (text sup note 1) and the cases, nationality shall not be lost, howe unless the citizen performed the statutory expatriating voluntarily with the intention of relinquishing United Sta citizenship. Vance V. Terrazas, 444 U.S. 252 (1980); Afroyim Rusk, 387 U.S. 253 (1967).

We turn first to the issue of voluntariness. In law is presumed that a citizen who performs a statutory expatriat act does so voluntarily; the presumption may be rebutt however, upon a showing by a preponderance of the evidence tha

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2/ Cont'd.

> 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.

the act was involuntary. 3/ Appellant thus bears the burden of proving that her naturalization was not an act of her own free will.

In her opening statement, appellant took the position that she became naturalized because of her marriage; "I did what I did because I thought my marriage required it." In that sense, she maintains, she had no choice but to accede to her husband's wishes. In her reply to the Department's brief, appellant formulated her contention that her act was involuntary as follows:

> I believe the Department is correct within its legal definitions that 'circumstances were not so compelling as to amount to duress in its legal sense' in the instance of my naturalization in Canada. My ex-husband did not physically beat me into submission. But I would argue with the Department when they state: 'Ms. [redacted] made a personal choice.'

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

> 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, Pub. L. 99-653, 100 Stat. 3655 (1986), repealed subsection (b) but did not redesignate subsection (c) or amend it to delete reference to subsection (b).

> I have already stated in my brief the influence of society in forming my beliefs as to the proper role of a wife in supporting her husband in all decisions. Obviously, this is an outdated attitude; societies, and not just individuals, change. I sense the Department has not taken that fact into consideration.
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> In my brief I did not dwell on the traumatic aspects of the decision to evade the draft from my point of view. But, perhaps, it is relevant here. In following my husband I felt cut off from everything I had known: friends, family, as well as country. There was truly only my husband. Psychologists have long pointed to the need to belong as a fundamental human condition. Whether such a situation constitutes legal duresss is a case that I suspect could well be made by someone versed in the law. Since I am not, however, I still feel quite strongly that I did not make a 'personal choice' in this matter. It was a matter of survival, if in a psychological sense, and it was the only option available to me.

In essence, appellant claims that marital devotion cau her to do an act that she would otherwise not have done.

The duress of marital and familial devotion has been h to excuse performance of a statutory expatriating act. But standard the courts apply to determine whether legal dur existed is a stern one. In Doreau v. Marshall, 170 F.2d 7 723 (3rd Cir. 1948) an American woman, who was threatened w internment during the German occupation of France, obtai French naturalization to protect herself and her unborn ch from what she feared could be fatal consequences. In revers the lower court, the Third Circuit said:

> If by reason of extraordinary circumstances, 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.

170 F.2d at 724.

In a case analogous to Doreau, Schioler v. United State 75 F.Supp. 353 (N.D. Ill. 1948), the court found that plainti who obtained Danish citizenship during the German occupation protect herself and her family, had not acted voluntarily.

A naturalized United States citizen who returned to and remained in her birthplace to care for a bed-ridden mother, did not forfeit her citizenship under the statute then applicable to naturalized citizens, because the reason that forced her to stay in Canada - filial duty - was, the court held, equatable to duress. Ryckman v. Acheson, 106 F.Supp. 739 (S.D. Tex. 1952).

In Mendelsohn v. Dulles, 207 F.2d 37 (D.C. Cir. 1953), plaintiff, a naturalized citizen, remained abroad, in excess of the time then allowed naturalized citizens, in order to care for his wife whose illness was so disabling as to prevent travel. The court held that he acted "under the coercion of marital devotion, which was just as compelling as physical restraint." 207 F.2d at 39.

Measuring appellant's claim that she became a Canadian citizen involuntarily against the norms of duress established by the cases cited above, we do not think that her circumstances can objectively be described as "extraordinary" in the sense postulated by Doreau v. Marshall, supra. Plainly, neither she nor her husband faced the stark conditions that menaced plaintiffs in Doreau or in the succeeding line of cases. Specifically, appellant's situation cannot be compared to that of petitioners in either Mendelsohn, supra, or Ryckman, supra, the leading cases on the duress of marital and filial devotion. The life and health of a loved one were not at stake in appellant's case. And she has not demonstrated that if she had resisted her husband's pressures the result would have been seriously detrimental to her.

We will accept that appellant perceived the pressures on her in 1974 to obtain naturalization to be quite real, and we respect her principled decision to be loyal to her husband. We are, however, constrained by settled case law to conclude that the pressures she felt were not, as a matter of law, sufficiently coercive to render her actions involuntary.

It is, accordingly, our conclusion that appellant has not rebutted the statutory presumption that she obtained naturalization in Canada voluntarily.

- III -

Even though we have determined that appellant obtained naturalization voluntarily, the question remains whether on all the evidence the Department has carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish United States nationality. Vance v. Terrazas, supra, at 270.

Under the statute, 4/ the burden is placed on Government to prove an intent-to relinquish citizenship; this must do by a preponderance of the evidence. Id. at 267. Int may be expressed in words or found as a fair inference f proven conduct. Id. at 260. The intent the Government must prove is the party's intent at the time the expatriating act performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981

The Department submits that appellant's performing statutory expatriating act, in itself evidence of an intent relinquish citizenship, and her "overall behavior," which sh her lack of concern about United States citizenship, permit to infer that her will and purpose was to transfer allegiance from the United States to Canada. The Departn notes, in particular, that after naturalization appell identified herself as a Canadian; voted in Canada, but not United States elections; "never exhibited any behavior" indicate an intention to retain American citizenship; assumed naturalization would result in loss of her citizens yet proceeded "without verifying the ramifications...."

The only evidence in the record presented to the Bo that bears on appellant's intent at the time she obtai Canadian naturalization is the fact that she performed proscribed act and swore a concomitant oath of allegiance Queen Elizabeth the Second. Naturalization, like the ot enumerated statutory expatriating acts, may be hig persuasive, but is not conclusive, evidence of an intent relinquish United States citizenship. Vance v. Terrazas, sup at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (19 (Black, J. concurring.) Similarly, making an oath of allegian to a foreign sovereign or state while alone insufficient prove intent to relinquish citizenship, also provi substantial evidence of intent. King v. Rogers, 463 F.2d 11 1189 (9th Cir. 1972). An oath of allegiance that contains o an express affirmation of loyalty to the country wh citizenship is being sought, however, leaves "ambiguous intent of the utterer regarding his present nationality Richards v. Secretary of State, CF80-4150 (memorandum opini C.D.Cal 1980) at 5.

The direct evidence in this case thus is insufficient support a finding that appellant intended to relinquish United States citizenship when she became a Canadian citiz Does circumstantial evidence, however, establish the requis intent, as the Department submits it does? It is settled tha party's specific intent to relinquish citizenship rarely will established by direct evidence, but circumstantial evidence

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4/ Note 3, supra.

surrounding commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship. Terrazas V. Haig, supra, at 288. We must therefore scrutinize the circumstantial evidence which the Department presents to determine whether it is so expressive of a design to surrender United States citizenship that one may fairly and comfortably conclude appellant intended in 1974 to relinquish her United States nationality. Put slightly differently, we must make a determination of appellant's probable state of mind a number of years in the past by assessing her words and conduct after naturalization. The touchstone of this inquiry may be simply stated: is there a clear pattern in appellant's words and conduct that is more persuasively explained on grounds of an intent to relinquish citizenship than on other grounds?

First, we will consider appellant's words. In one of the citizenship questionnaires she completed on April 20, 1986, she stated in answer to a question whether she knew she might lose her citizenship by obtaining Canadian naturalization that: "I was uncertain, but assumed I would lose that citizenship because U.S. law does not condone dual citizenship." The Department maintains that since appellant assumed she might lose citizenship yet proceeded with naturalization without verifying its ramifications, she showed such unconcern for her citizenship as to warrant inferring an intent to divest herself of United States citizenship. To this argument appellant replied:

> As to the Department's contention that I intended to relinquish my U.S. citizenship upon perforinance of the act of expatriation, I would assert this to be blatantly untrue. What I knew for sure were two things: one, that there was a formal procedure for renouncing U.S. citizenship, and, two, that the U.S. did not permit dual citizenship. The latter is my explanation for 'assuming' I would lose my citizenship. Since the Department's case so strongly rests on my 'intent (being) clearly inferred from (my) behavior', I would suggest that my behavior in not renouncing my citizenship indicates a definite lack of intent.

Knowing or believing that a certain result will or may ensue from a particular action does not necessarily indicate that the actor intended the result, at least not in non-criminal cases. Knowledge does not connote intent. Knowledge is acquaintance with a fact or facts. Intent is the intending of an act, the purpose formed in one's mind. Proof of knowledge is thus a problem distinct from that of proving intent. 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 a concurrently available." II Wigmore on Evidence, section 1 p. 193, 3rd ed. Knowledge alone is thus insufficient to pr intent to relinquish citizenship, as the court made clear Richards v. Secretary of State, 753 F.2d 1413 (9th Cir. 1985):

> 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 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.
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> 6/ [Footnote omitted].

753 F.2d at 1420, 1421.

In Richards, the court concluded that the petitio meant his act of naturalization in Canada to constit relinquishment of citizenship because upon naturalization expressly renounced his United States citizenship.

As we have seen, appellant's admission that she assu naturalization would result in loss of her citizenship was m in a citizenship questionnaire she completed in April 19 In the same form there was an item headed "Statement Voluntary Relinquishment of United States Nationality." "If voluntarily performed [a statutory expatriating act] with intention of relinquishing United States citizenship," the f stated, "you may sign the statement below.... " Appellant not sign the statement. Since she filled out the the ent form with evident care, this implied denial of intent relinquish citizenship is entitled to fair evidential wei and, in our view, tends to minimize the probative value of 1 admission that she assumed she would lose United Sta nationality by becoming a citizen of a foreign state.

In brief, appellant may have been imprudent to obt naturalization without first ascertaining the consequences

her United States citizenship. We are unable, however, to ascribe to the fact that she proceeded in the face of a belief that she might expatriate herself anything more than lack of foresight or caution.

With respect to appellant's conduct after naturalization, we fail to see in it any reasonably clear expression of a design to transfer her allegiance from the United States to Canada. We cannot, for instance, give probative weight to the fact that she voted in Canada but not in the United States. Obviously, she was living in Canada and conceivably considered that her ballot in Canadian elections was more immediately relevant to her circumstances than voting in elections in the United States.

The other principal factor that the Department adduces to show appellant's intent in 1974 to relinquish her United States citizenship is her admission in a supplemental citizenship questionnaire she executed in April 1986 that: "I did not use any documents [to enter the United States]. prior to Canadian citizenship, I replied landed immigrant ; thereafter, Canadian." We do not know why she gave that answer to officials at the border. One plausible reason might be that since she assumed she lost United States nationality by becoming a Canadian citizen, she could logically identify herself only as a Canadian citizen. How much allowance should be made for the fact that at the particular border she crossed experience showed that she could cross more easily if she said she was Canadian and not enter into a lengthy explanation that she had become Canadian but was born in the United States? And we consider it not without significance that appellant states she never held a Canadian passport.

The salient fact about appellant's post-naturalization conduct is that it admits of more than one plausible explanation. It could fairly be construed as arising from a design wholly different from an intent to sever her allegiance to the United States, or even from no particular design or purpose. On a fair reading of the evidence, which is devoid of any act by appellant that is expressly derogatory of United States citizenship, save her naturalization, we are unable to conclude that appellant knowingly and intelligently waived or forfeited her United States citizenship, as the cases make clear the government must prove she did. See Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981); United States v. Matheson, 532 F.2d 809, 814 (2nd Cir. 1976), cert. denied 429 U.S. 823 (1976).

The evidence the Department has presented is, in our judgment, insufficient to support a finding that appellant intended to relinquish her United States citizenship when she obtained naturalization in Canada upon her own application. It follows therefore the Department has not carried its burden of proof.

IV

Upon consideration of the foregoing, the Departmen determination that appellant expatriated herself is her reversed.

Alan G. James, Chairman

Frederick Smith, Jr., Member

George Taft, Member