October 22, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E[redacted] J[redacted] P[redacted]

This is an appeal to the Board of Appellate Review f an administrative determination of the Department of St holding that appellant, E[redacted] J[redacted] P[redacted], expatriated hims on November 23, 1978 under the provisions of section 349(a) of the Immigration and Nationality Act by obtair naturalization in Canada upon his own application. 1/

The appeal presents two issues: whether appell voluntarily obtained naturalization with the intention relinquishing United States nationality. For the reasons t follow, we conclude that he obtained naturalization voluntaril but that the Department has not carried its burden of provinç a preponderance of the evidence that appellant intended relinquish his United States nationality when he became citizen of Canada. The Department's holding of loss appellant's nationality is accordingly reversed.

I

Appellan[redacted]e his birth at [redacted] attended high school and college in South Dakota. From 197C 1973 he was a graduate student at the University of Washinç where he also taught speech and english. He states that af completing graduate work he tried to find employment a: teacher in the United States; he sent out, he claims, more tha

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

> Sec. 349. (a) From and after the effective date of Act a person who is a national of the United St whether by birth or naturalization, shall lose nationality by --
>
> (1) obtaining naturalization in a for state upon his own application,...

PL 99-653, approved November 14, 1986, 100 Stat. 36 amended subsection (a) of section 349 by inserting "voluntar performing any of the following acts with the intention relinquishing United States nationality:" after "shall lose nationality by".

200 job applications but received no offers. The only position he could obtain was one in Alberta, Canada. For this reason he left the United States in September 1974 and moved with his wife to Canada. He became a landed immigrant a year later. In 1975 a daughter was born to appellant and his wife. Appellant registered her birth as a United States citizen at the State Department Office in Seattle, and at the same time obtained a United States passport. Two more daughters were born in 1976 and 1983.

On a date not given in the record, appellant applied to be naturalized in Canada. He was so moved, he alleges, because the superintendant of the Alberta School Division had informed him that the only way he might convert his temporary teaching certificate to a permanent one was by becoming a Canadian citizen; Canadian citizenship was essential if he wished to be assured of long-term employment in the Alberta school system.

A certificate of Canadian citizenship was granted to appellant on November 23, 1978 after he made the following oath of allegiance:

> 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.

In July 1985 appellant wrote to the United States Consulate General ("the Consulate") at Calgary to obtain clarification of his citizenship status in light of his naturalization. An official of the Consulate General replied to appellant, informing him that he might have lost his United States citizenship by obtaining naturalization in a foreign state. Appellant was asked to complete questionnaires which elicited information to facilitate an official determination in his case, especially whether he intended to relinquish United States nationality when he became a Canadian citizen. The Consulate invited him to discuss his case with a consular officer, if he wished to do so. In October 1985 appellant completed and returned the questionnaires and volunteered additional information about the facts and circumstances surrounding his naturalization. Later he completed, for information purposes, an application for registration as a United States citizen. After receiving confirmation from the Canadian authorities that appellant had obtained naturalization, a consular officer asked appellant to visit the Embassy for an interview which took place early in April 1986.

After interviewing appellant, the consular officer on May 7th sent a balanced, detailed memorandum on the case to the Department, requesting the Department's advice whether appellant might be documented as a united States citizen.

The following are the salient points in the cons
officer's report:

> Mr. Plihal and his wife have all of their relat
> in the U.S. His wife 'is still an Amer
> citizen'. He has investments in the U.S. and
> be paying 'income tax' during the 1985 tax yea
> property that he inherited in the U.S.
> registered his oldest daughter, Michelle Rae, I
> October 22, 1974 in McLennan, Alberta, as a
> citizen with INS Seattle. He had not regist
> his other two daughters, Katia Dawn, born Nove
> 20, 1976, in McLennan, Alberta, and Emily Ju
> Olga, born April 20, 1983, McLennan, Alberta
> this office or as far as we know with any ot
> office of the U.S. government.. ..
>
> Mr. Plihal states that when he travelled into
> U.S. the passport was used to enter the U.S. Af
> his naturalization, if documentation was requir
> Mr. Plihal states that he showed his Canad
> citizenship card....
>
> It would seem that until he had a conversation w
> another teacher in June 1984, Mr. Plihal
> believed he had lost his U.S. citizenship.
> feels, however, this does not necessarily den
> that he intended to relinquish his U.S. citizensh
>
> ...
>
> He cites as evidence that he did not intend
> relinquish his U.S. citizenhip, the fact that
> repaid a student loan he obtained from the U
> Federal government and the fact that he registe
> with Selective Service in South Dakota in 1964...
>
> Mr. Plihal has never voted in the U.S. and does!
> remember too clearly but he thinks he voted it
> Canadian Provincial election in 1980,....
>
> On the one hand it would appear that Mr. Plihal
> satisfied to be a citizen of Canada until he fou
> out that he might be able to have U.S. citizensh
> as well. On the other hand this may indicate th
> he did not intend to relinquish his U.
> citizenship, rather that he thought he lost it
> operation of law even if he did not want to.
> request State Department advice as to whether
> may document Mr. Plihal as a citizen of the U.S.

In late May the Department replied to the Consulate's inquiry. After reviewing the facts in the case, the Department stated, it had concluded that the evidence of intent to relinquish citizenship and not to relinquish citizenship was fairly evenly "distributed." "The case swings on one issue," the Department stated. "He has stated that he used his PPT to identify himself up to the time of his naturalization and then his Canadian ID card. This item makes the preponderance of the evidence indicate an intent to relinquish his U.S. citizenship."

The Department instructed the Consulate to execute a certificate of loss of nationality in appellant's name. This a consular official did on July 11, 1986. 2/ The official certified that appellant acquired United States-nationality by birth therein; that he obtained naturalization in Canada upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on August 6, 1986, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. Appellant entered the appeal pro se on August 31, 1986.

II

It is not disputed that appellant obtained naturalization in Canada upon his own application and thus brought himself within the purview of the statute. But nationality shall not be lost by performance of a statutory expatriating act unless the act was performed voluntarily with the intention of relinquishing United States nationality. Section 349(a)(1) of the Immigration and Nationality Act (note 1, supra); Vance v. Terrazas, 444 U.S. 252 (1980); and 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.

In law it is presumed that one who does a stat expatriating act does so voluntarily, but the presumption m rebutted upon a showing by a preponderance of the evidence the act was involuntary. 3/

Appellant contends that he did not obtain naturaliz voluntarily; economic pressures left him no alternative, bases a case of economic duress on the foll considerations. In 1978 he had a wife and two small chi who were dependent on him. He was employed by the Fa Consolidated School Board, but held only a temporary teac certificate. His superintendant advised him, [redacted] infc the Board,

> ...that I could not be guaranteed conti employment if I did not take out citizenship. pointed out the the [sic] makeup of our sc board was so volatile that he couldn't assur that I would continue to have a job if I di secure a permanent teaching certificate. permanent teaching certificate in Alberta c only be given to citizens of Canada. So, what I to do? I was being given an ultimatum, ei secure your Permanent teaching certificate or employment would be in jeopardy.

He claimed that the prospects of finding a teac position in the United States at that time were bleak. sources indicated that the job market for teachers in the st had not improved [presumably over 1974 when he says he went Canada because he could not find a teaching position in United States]." His only choice, appellant concluded, "was take out this citizenship or be without a visible means support."

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

> (c) Whenever the loss of United States nationality put in issue in any action or proceeding commenced on or af the enactment of this subsection under, or by virtue of, provisions of this or any other Act, the burden shall be u the person or party claiming that such loss occurred, establish such claim by a preponderance of the evidence. Exc as otherwise provided in subsection (b), any person who comm or performs, or who has committed or performed, any act expatriation under the provisions of this or any other Act sh be presumed to have done so voluntarily, but such presumpt may be rebutted upon a showing, by a preponderance of evidence, that the act or acts committed or performed were done voluntariiy.

The Immigration and Nationality Act Amendments of 19 PL 99-653, 100 Stat. 3655 (1986), repealed section 349(b) did not redesignate section 349(c), or amend it to refl repeal of section 349(b).

It is settled that an expatriative act is deemed voluntary if the citizen had the capacity to make a free choice in performance of that act. We must therefore inquire whether, as appellant argues, circumstances beyond his control deprived him of freedom of choice, thus making his naturalization in Canada involuntary.

The general rule as to duress was laid down as follows in Doreau v. Marshall, 170 F.2d 721, 724 (3rd Cir. 1948):

> If by reason of extraordinary ,circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is not 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.

The courts have held that extraordinary economic circumstances may excuse performance of an expatriating act. See Stipa v. Dulles, 233 F.2d 551 (3rd Cir. 1956) and Insogna v. Dulles, 116 Supp. 473 (D.D.C. 1953). In Stipa v. Dulles, appellant expatriated himself by accepting employment in the Italian police. He argued that he was forced to take such employment because he could find no employment whatsoever in the economic chaos of post-war Italy. The court accepted that he faced "dire economic plight and inability to find employment," 233 F.2d at 556, noting that appellant's testimony was "amply buttressed" by common knowledge of the general economic plight of Italy after the war.

In Insogna v. Dulles, appellant obtained employment with an Italian government office during the war. The court was of the opinion that "the circumstances are such as to justify a finding that the plaintiff took the job to subsist. Self-preservation has long been recognized as the first law of nature." 116 F.Supp. at 475. 4/.

For a plea of economic duress to succeed as a defense against performance of an expatriating act, the courts also require that the citizen show he attempted to obtain employment that would not require him to place his United States

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4/ See also Noburo Kanbara v. Acheson, 103 F. Supp. 565 (S.D. Cal. 1952). Plaintiff acted involuntarily when he took expatriative employment to keep from starving. And Meiji Fujizawa v. Acheson, 85 F.Supp. 674 (S.D. Cal. 1949). Performing an expatriative act in order to get a job and earn a livelihood was involuntary because no employment would otherwise have been open to plaintiff.

citizenship in jeopardy. See Richards v. Secretary of St 752 F.2d 1413, 1419 (9th Cir. 1985).

Applying the foregoing judicial criteria to appelli case, we are of the view that he has not proved his case economic necessity forced him to become a Canadian citizen. circumstances in which he found himself around 1978 ca objectively be described as "extraordinary." In the Boz experience, a good many American citizens, who moved to Ca and entered the teaching profession because of pers preference, have found themselves faced with the requiremen obtaining Canadian citizenship in order to become tenured pu school teachers, that is, to be assured of retaining t positions.

On the facts presented, it does not appear that appel would have been threatened with inability to subsist had he acquired Canadian citizenship. We will accept that superintendant warned him that retaining his position woul uncertain unless he acquired Canadian citizenship. But essential question is whether he and his family would have destitute had he not become naturalized. He has submittec evidence that they would have been. While the Board t notice that in the mid-1970's non-Canadian citizens teachin public schools were often vulnerable to dismissal, we are satisfied that if appellant had not obtained naturalizatior could not have provided for himself and his family. He sugg that he informed himself about teaching openings in the Un States and concluded that the picture on the American side the border in 1978 was not bright. But appellant's case weakened because he has not shown he tried with reasona diligence to find some kind of non-teaching employment, eit in the United States or Canada, that would not require him place his United States citizenship at risk. We appreciate t he would not wish to leave his chosen field and that seek different work to provide for himself and his family might h been demoralizing. But given the priceless right involved, does not seem excessively stern to demand that one should mak concerted effort to find ways to meet one's family's needs t would not jeopardize United States citizenship. We can accept that if faced with the facts in this case, the cou would find appellant's defense of economic duress persuasi As we read the cases, the courts demand that one who does expatriative act prove he was literally driven as a matter last resort to find a solution to his problems in expatriative act.

In brief, appellant has not shown that naturalization the only course open to him to ensure his and his famil needs. Thus he must be deemed to have had freedom of choi Where one has opportunity to make a personal choice there is duress. Jolley v. Immigration and Naturalization Service, F.2d 1245 (5th Cir. 1971), cert. den'd, 404 U.S. 946 (1971). Accordingly, we conclude that appellant's naturalizaation Canada was an act of his own free will.

III

Even though we have concluded that appellant voluntarily obtained naturalization in Canada, "the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship," Vance v. Terrazas, supra, at 270 (1980). Under the statute, 5/ the government bears the burden of proving intent and must do so by a preponderance of the evidence. Id. 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 party's intent at the time the expatriating act was done. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). Evidence contemporary with the proscribed act is, of course, the most probative of the issue of a party's intent.

Here, the only evidence in the record before us of appellant's intent dating from the time he became a Canadian citizen is his naturalization in a foreign state and concomitant oath of allegiance. Such evidence is insufficient, to support a finding of intent to relinquish citizenship, for obtaining naturalization in a foreign state is not conclusive evidence of an intent to relinquish citizenship. See Vance v. Terrazas, *supra, at 261: "...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 be 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)." And an oath of allegiance that merely expresses affirmation of loyalty to the country where citizenship is sought but which does not include renunciation of other allegiance leaves "ambiguous the intent of the utterer regarding his present nationality." Richards v. Secretary of State, CV80-4150, memorandum opinion (C.D. Cal. 1982) at 5; aff'd 752 F.2d 1413 (9th Cir. 1985). Since the evidence contemporary with appellant's naturalization will not support a finding that appellant intended to relinquish United States nationality, we must examine his words and conduct after naturalization to determine whether they corroborate the evidence of intent inherent in his obtaining naturalization. See Terrazas v. Haig, supra, at 288:

5/ Section 349(c) of the Immigration and Nationality Act. Text supra, note 2.

> ...Of course, a party's specific intent relinquish his citizenship rarely will established by direct evidence. circumstantial evidence surrounding the commis of a voluntary act of expatriation may estab the requisite intent to relinquish citizenship.

4/ [Footnote omitted].

A person may behave in such a way or say such th after doing a particular act that the trier of fact may fa: infer from such conduct that he did the act in question wit specific will and purpose. This technique of evident: inquiry is, of course, well-established. Given the vital r: at issue, however, the technique must, in our opinion, employed discriminatingly. Wigmore, in discussing conduct evidence of guilt in criminal cases, puts the thought this v "But in the process of inferring the existence of that ir consciousness [a party's state of mind at the time the act done] from the outward conduct, there is ample room erroneous inferrence; and it is in this respect chiefly t caution becomes desirable and that judicial rulings upon speci kinds of conduct become necessary." II Wigmore on Eviden sec. 273(1), 3rd ed.

Starting from the premise that appellant's naturalizat in Canada is the initial evidence of his intent to relinqu citizenship, the Department contends that:

> ...An overall attitude and course of behavior of reflects an individual's disinterest and lack concern in his or her U.S. citizenship and perm an inference of an intent to relinquish U citizenship.
>
> ...It is the Department's position that Appellan intent can be clearly inferred from his behavior.

The Department particularizes its argument by stat that after naturalization appellant "used his Canad citizenship card when travelling, [although his U.S. passp was valid to 1980] and always made it a point to indicate tl

his wife was still a U.S. citizen thus making a clear and intentional distinction between his status and that of his wife."

First of all, the foregoing statements are misleading. Presumably they are drawn from the report the consular officer sent to the Department in May 1986; the officer in turn seems to have based his information on statements appellant made in the questionnaire he completed in October 1985. Therein appellant simply said:

> ...We've visited the USA several times since 1974 (probably 15 or *so).* We used our passport until 1978. After that time we didn't carry any papers. We were merely asked, at the boarder, where we resided. On at least <u>two</u> occasions I showed my Canadian citizenship card. <u>Once</u> I pointed out that my wife and children were Americans and had not become Canadians. [Emphasis added]

More importantly, we do not regard the foregoing statements as an unmistakable concession that appellant did not intend to be a United States citizen after naturalization. Not carrying "papers" after naturalization does not suggest a will and purpose to abandon citizenship. And using his Canadian citizenship card to identify himself on two occasions is hardly solid evidence of a prior renunciatory intent; it could simply have been convenient for him to show that card. "Once" pointing out that his wife was a United States citizen does not seem to us sufficient to support a conclusion that appellant was purposefully distancing his status from that of his wife.

The Department further notes that appellant did not register his second and third daughters as United States citizens after their births. Appellant concedes that he did not register these children after their births, but states that they were "formally registered" in 1986. That appellant did not register two of his children before 1986 has little relevance, however, to the issue of his intent in 1978. A person who performs an expatriating act may buttress allegations of intent to retain citizenship by registering children born abroad, but not doing *so* simply is not a reliable indicator of the person's specific intent when he did the expatriating act. In the Board's experience, many people see no special need to do *so* in a country like Canada, or find it inconvenient to travel to a consulate, or simply may not have given the matter any thought.

According to the Department, appellant's naturalization was carefully planned; he knew it might result in loss of his United States citizenship, yet he proceeded without first consulting United States authorities. In a word, the Department appears to argue that appellant was *so* indifferent to United States citizenship that the fairest inference to be drawn from his conduct is that in 1978 he intended to divest himself of United States citizenship.

We do not argue that such an inference is unsustainak but we do contend that such an inference is not the only that might fairly be drawn from appellant's evident casualr toward his United States citizenship. If he was so preoccug with securing tenure in the school system and saw acquisitior Canadian citizenship as his priority objective, he might h given little thought to the effect of naturalization upon United States nationality.

On balance, an intent to relinquish United Sta nationality is neither compelled nor the most plausi inference to be drawn from appellant's post-naturalizat conduct. A will and purpose alien to intent to relinqu citizenship, or no will and purpose at all, 'could rationa explain why appellant acted as he did after he became a Canad citizen.

Intent may also be expressed in a persons's words as w as found as a fair inference from proven conduct. Vance Terrazas, supra, at 260. In the case before us, appellant stated that he assumed that by obtaining naturalization he without more forfeited his United States citizenship. As he it in his initial submission to the Board:

> ..., after 1978 I throught I had lost citizenship in America. My frame of mind, howev was based upon my assumption that any act allegiance to any foreign country, regardless circumstances, constituted grounds expatriation. Not until recently (the summer 1985 when I commenced action to determine citizenship status) did I realize that be: coerced into citizenship because of employme factors did not represent grounds for expatriat: according to some judicial minds. 6/

The Department suggested, but did not fully develop t argument, that appellant's assumption that naturalization in foreign state automatically terminated United States citizensk and his acceptance of the consequences of that assumption f seven years evidence a prior intent to relinquish United Stat citizenship.

We do not regard the above statement of appellant's probative of the issue of his intent in 1978.

6/ In submissions to the Consulate when it was investigati his case, appellant made statements essentially similar to t one quoted above, although with somewhat less precision.

From the outset, appellant denied that he intended to relinquish his United States nationality in 1978. In the letter he wrote to the Consulate in July 1985, which initiated loss of nationality proceedings there, he stated that he had "no intention of abrogating my citizenship status with the United States." He reiterated that contention in the course of proceedings at the Consulate, and in his letter to the Board dated August 31, 1986. Note that in the latter communication, appellant stated emphatically that: "...I did not declare my Canadian citizenship because of a desire to change allegiance or because I chose to disavow my loyalty to the United States."

How interpret appellant's admission that he assumed he ceased to be a United States citizen simply because he acquired Canadian citizenship? Obviously, appellant is saying nothing so bald as: "I intended to relinquish my United States citizenship and did so." Rather, he seems to be saying that he assumed acquisition of foreign nationality automatically terminated United States nationality, no matter what the circumstances; and that he reluctantly accommodated himself to loss of United States citizenship, conducting himself thereafter solely as a Canadian citizen until he at last learned that United States citizenship is never lost automatically.

If the foregoing is what appellant is telling us, and we believe it to be a plausible interpretation, we cannot conclude that a prior renunciatory will and purpose to terminate United States citizenship is revealed by words he wrote seven years after his naturalization. It is not conceptually inconsistent for a person to assume that he might have lost United States citizenship without necessarily willing that result. Moreover, we believe that appellant's express denials that it never was his intention to sever his allegiance to the United States must be accorded fair weight.

In sum, appellant's is a rather nicely balanced case, as the Department conceded when it informed the Consulate that it had approved the certificate of loss of his nationality. However, as we survey the record, the proof the Department proffers of appellant's intent to relinquish citizenship is less than reasonably solid, and we believe that in this proceeding the facts and the law must be construed in favor of appellant. Nishikawa v. Dulles, supra, at 134, citing Schneiderman v. United States, 320 U.S. 112, 122 (1943).

So we conclude that the Department has not established by a preponderance of the evidence that appellant intended to relinquish his United States nationality when he obtained naturalization in Canada upon his own application.

IV

Upon consideration of the foregoing, we hereby reve the Department's determination that appellant expatria himself when he obtained naturalizaation in Canada upon his application.

Alan G. James, Chairman

Warren E. Hewitt, Member

Dissenting Opinion

I concur fully in the opinion of the majority in so far as it relates to the issue of the voluntariness of Mr. [redacted] action in taking out Canadian citizenship in 1978. However, I must dissent with respect to the majority's conclusion that the Department of State has not met the burden of proof placed upon it regarding the intent required to sustain a finding of loss of United States nationality. For the reasons set forth below, I find that the Department has shown that the preponderance of the relevant evidence indicates that at the time of his naturalization Mr. [redacted] intended to relinquish his United States citizenship.

The majority has correctly stated that the law requires that the government bear the burden of proving intent and must do so by a preponderance of the evidence. The majority has also correctly stated the rule laid down in Terrazas v. Haig, 653 F.2d 285 (7th Cir. 1981) that the intent the government must prove is the party's intent at the time of the expatriating act and that while later evidence may be instructive, evidence contemporary with the act is, of course, the most probative of the issue of a party's intent.

In this case the only contemporaneous evidence we have is the expatriating act itself, that is, the voluntary taking out of Canadian citizenship. Such evidence has been found by the courts to be "highly persuasive" but not necessarily conclusive. See Vance v. Terrazas, 444 U.S. 252, 261 (1980). In applying this rule to the case at hand it is particularly important to note that the court in Terrazas used the word "necessarily." While the majority has focused on the fact that the court recognized the possibility of rebutting the conclusiveness of the expatriating act, the majority seems to have overlooked the fact that the rule also admits of the possibility that the expatriating act itself may be conclusive. The majority states "[h]ere, the only evidence in the record before us of appellant's intent dating from the time he became a Canadian citizen is his naturalization in a foreign state with a concomitant oath of allegiance. Such evidence is insufficient, of course, to support a finding of intent to relinquish citizenship, for obtaining naturalization in a foreign state is not conclusive

evidence of an intent to relinquish citizenship." Majority Opinion, page 8. Not necessarily. The majority has fallen into the trap of the logical fallacy. Just because an expatriating act is not necessarily conclusive evidence of intent does not mean that it cannot ever be.

When there is a body of conflicting contemporaneous evidence, of which the expatriating act is but one item, it is appropriate to examine words and conduct after naturalization to determine whether they corroborate or mitigate the evidence of intent inherent in the expatriating act. A different case arises when there is no conflict in contemporary evidence. In such a case we must ask first whether reference to later evidence is required or even appropriate and what kind of evidence is relevant.

These do not appear to be the questions the majority has asked itself. Rather, proceeding from the unwarranted premise that if performance of an expatriating act is not in all cases sufficient to prove intent it is in no case sufficient, the majority proceeded to analyze Mr. Plihal's action during those years as if they had been taken by a person who maintained that he always considered himself a U.S. citizen. This completely ignores the fact that for six years following his naturalization Mr, Plihal assumed he was solely a Canadian. As a consequence the majority charged up the wrong alley, considering matters such as whether or not Mr. Plihal used a U.S. passport when traveling outside Canada and whether he registered the births of his children with the U.S. Embassy, Thereafter, the majority concluded that "on balance an intent to relinquish United States nationality is neither compelled or the most plausible inference to be drawn from appellant's post-naturalization conduct. A will and purpose alien to intent to relinquish citizenship, or no will and purpose at all, could rationally explain why appellant acted as he did after he became a Canadian citizen." Majority Opinion, page 11.

I submit that the majority has applied irrelevant evidence to the wrong legal question. Rather than looking to see whether, in the abstract, Mr. Plihal's actions, post-naturalization, indicate by something more than a "balance" an intent to relinquish U.S. citizenship, the majority should have looked at the record before it to determine whether any of Mr, Plihal's actions or words in the years following naturalization detract from, or militate against, the presumption that he intended to relinquish U.S. citizenship inherent in the expatriating act. Had the majority proceeded on this basis, it could not have escaped concluding that given the fact that

Mr. Plihal thought that he was not a U.S. citizen, it could hardly be expected that he would have spoken or acted in any way consistent with an intention to retain U.S. citizenship. His words and actions between 1978 and 1984, therefore, cannot tell us anything more than that which Mr. Plihal has maintained throughout this proceeding: that he did not believe he was a U.S. citizen. All the "evidence" Mr. Plihal has introduced relates to the economic strictures and the duress under which he felt himself in 1978. This evidence has a direct bearing on the issue of voluntariness but not on intent. Evidence of the stressful circumstances under which Mr. Plihal had to make a difficult decision, which the majority has found cannot support a finding of involuntariness, can hardly be found to demonstrate an intention not to do what he says he thought he was doing -- relinquishing U.S. citizenship.

As noted above, the majority has proceeded as if the presumption created by the expatriating act itself did not exist. while the burden is indeed upon the Department to show, by a preponderance of evidence, an intent to relinquish, such evidence necessarily includes the expatriating act which, as stated in Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) and repeated in the Attorney General's statement of interpretation of the decision in Afroyim v. Rusk, 387 U.S. 253 (1967), itself cited with approval in Vance v. Terrazas, 444 U.S. 253 (1967), may be highly persuasive. What is unusual, if not unique here, is that there is no other evidence, at least no evidence of the kind usually applicable to a finding of intent, which is relevant. As noted above, this should not come as any surprise, for in this case in which the appellant thought he was no longer a U.S. citizen once he had taken out Canadian citizenship, and his actions and words, logically enough, are consistent with that view of his status.

It is understandable that the majority may find the Department's arguments regarding intent somewhat abbreviated. What else could they be, however, in a case in which there is only one probative bit of contemporaneous evidence, and all other evidence is fundamentally colored by the very mental attitude at issue in the case.

The argument that Mr. Plihal advances, that he did not intend to relinquish U.S. citizenship because he was "coerced into (Canadian) citizenship because of employment

factors..." (See Mr. Plihal's letter of August 31, 1986) is not sustainable. The majority has found that Mr. Plihal's action was not the result of duress of such a nature as to eliminate his options: becoming a Canadian was not the only course open to Mr. Plihal. Having failed to carry his burden of proof and overcome the presumption of voluntariness the law imparts to expatriating acts, the majority and I agree that Mr. Plihal's act must be deemed voluntary.

But when the majority turns its attention to the issue of intent, the majority appears to have completely ignored the presumption inherent in the expatriating act and focused solely on the burden of proof which lies with the Department. The majority finds that it "cannot conclude that a prior renunciatory will and purpose to terminate United States citizenship is revealed by words he wrote seven years after his naturalization." See Majority Opinion, page 12. Not only is there nowhere in the law a requirement of a "renunciatory will and purpose" (Afroyim requires a finding of "intent to relinquish") but the issue is not whether these later words demonstrate the requisite intent but whether they mitigate the "not-necessarily-conclusive" evidence of intent inherent in the expatriating act. The majority further finds that "it is not conceptually inconsistent for a person to assume that he might have lost United States citizenship without necessarily willing that result." Majority Opinion, page 12, emphasis added. As the Department noted in its Brief at page 5, the argument that the effect of an action was not desired has been rejected by the courts. As the Department notes, in Richards v. Secretary of State, 752 F. 2d 1413 (9th Cir. 1985) the court said:

> We cannot accept a test under which the right to expatriation can be exercised effectively only if exercised eagerly. We know of no other context in which the law refuses to give effect to a decision made freely and knowingly simply because it was also made reluctantly ... If a citizen makes that choice and carries it out, the choice must be given effect. Richards at 1421-22.

The choice Mr. Plihal made was to become a Canadian, an expatriating act, on the assumption that it would cost him his United States citizenship. Whether OK not his assumption was legally correct is not relevant to the inference regarding his state of mind at the time. what is relevant is what his choice tells us about how he felt

about his United States citizenship. He was willing to relin uish it. He may not have will d the loss of his U.S. citizenship, but in the belief hat he would lose it he willingly performed the expatriating act. In this case, the fact that he accepted the consequence of loss of citizenship is the only evidence relevant to the question of intent other than the expatriating act itself. And it augments the inference to be drawn from the expatriating act itself.

The burden which the Department had to carry in this case was not very great. The body of relevant evidence was unusually small. The majority, like the Department at an earlier time, has given weight to evidence which is immaterial and/or irrelevant. The case does not turn on the use of a passport as the Department maintained at one time. The case does not depend upon whether "on balance" Mr. Plihal's actions after naturalization demonstrate a "prior renunciatory will and purpose." The case turns on the question of whether the preponderance of scant, relevant evidence indicates an intention to relinquish U.S. citizenship. The most probative evidence consists of the expatriating act, the naturalization. Its inference of intent to relinquish is only strengthened by the fact that Mr. Plihal assumed that he would indeed lose his U.S. citizenship and assumed that price. No other evidence relates to the question of intent. Such other evidence as there is relates to the question of voluntariness, and is unpersuasive.

I conclude that the Department has carried its burden of proof of intent to relinquish United States citizenship and I would uphold the finding of loss of U.S. nationality.

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