February 9, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: Z[redacted] H[redacted]

This is an appeal from an administratrve determination of the Department of State, dated May 28, 1986, that appellant, Z[redacted] H[redacted] expatriated himself on February 19, 1979 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application. 1/

The issues presented by the appeal are: whether appellant voluntarily obtained naturalization in Australia with the intention of relinquishing his United States nationality. For the reasons that follow, it is our conclusion that appellant became an Australian citizen of his own free will and intended to transfer his allegiance from the United States to Australia. Accordingly, the Department's determination of loss of appellant's United States citizenship is affirmed.

I

By virtue of his birth at New York City on June 10, 1927 appellant acquired United States nationality. 2/ He enlisted in the United States Navy and was honorably- discharged in December 1946 after serving for a year and a half. In 1955 he received a Fulbright grant study in Japan. He returned to the

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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, read in pertinent part 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, ...

Pub. L. 99-653, 100 Stat. 3655 (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/ Appellant was born [redacted] He apparently changed his name to Z[redacted] H[redacted] while living in Israel from 1968 to 1975.

United States in 1956 and became a university lecturer. In 1968 he went to Israel where he held a position as lecturer at the University of Tel Aviv. He married an Israeli citizen by whom he had a daughter in 1971 whose birth he registered at the United States Embassy in Tel Aviv. Appellant states that he acquired Israeli citizenship under the provisions of the Law of Return and was conscripted into the Israeli Defense Forces during the Yom Kippur war.

In 1975 appellant obtained a passport from the United States Embassy at Tel Aviv (valid for five years) and travelled with his wife and daughter to Australia as an immigrant. 3/ He assumed a position as senior lecturer at the University of New England in New South Wales. His wife obtained a university post in Canberra 500 miles away. Allegedly to keep his family together, appellant obtained a position in Canberra with the Commonwealth Schools Commission, a statutory authority of the Australian government. A prerequisite to holding that position was Australian citizenship. Appellant accordingly decided to apply for naturalization in Australia. On February 19, 1979 he was granted a certificate of Australian citizenship, after making the following affirmation of allegiance in the manner prescribed by the Australian Citizenship Act of 1948, as amended, at a ceremony presided over by the mayor of the community in which he lived:

> I, A.B., renouncing all other allegiance, solemnly and sincerely promise and declare 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 Australia and fulfil my duties as an Australian citizen.

Appellant's minor daughter was included in appellant's certificate of Australian citizenship.

Appellant's naturalization came to the attention of United States authorities in the spring of 1986 when he applied at the Embassy in Canberra for a non-immigrant visa to travel to the United States. On March 5, 1986 appellant completed a form

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3/ In his application for a passport he acknowledged that he had served in the Israeli armed forces. Nonetheless, the Embassy determined that he had not performed an expatriative act and therefore he was eligible to receive a passport with full validity. See his application which bears this notation: "Served by conscription without intent to transfer allegiance. Opinion dated 2-2-72."

titled "Information for Determining U.S. Citizenship." Thereafter a consular officer executed a certificate of loss of nationality in appellant's name. 4/ The officer certified that appellant acquired United States nationality by birth therein; that he obtained naturalization in Australia upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. In forwarding the certificate to the Department, the Embassy reported simply that:

> Herewith Loss of Nationality Case for [redacted], who was naturalized as an Australian on February 19, 1979. Subject applied for NIV to visit U.S. at which time he completed questionnaire [sic] 'Information for Determining U.S. Citizenship'. Case is herewith forwarded to you for action.

The Department approved the certificate on May 28, 1986, approval being an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. In a telegram to the Embassy the Department spelled out the considerations that in its view supported a conclusion that appellant expatriated himself:

> ...Mr. [redacted] has claimed economic duress and did not sign the statement of voluntary relinquishment of U.S. citizenship. The courts have generally ruled that

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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.

economic duress short of a demonstrable threat to one's economic survival is not a sufficient compelling factor to render involuntary the performance of an expatriating act. Thus, Mr. H[redacted] claim that he obtained Australian Citizenship to obtain employment in Australia unavailable to aliens (and because of inability to obtain work in Israel or the United States) cannot be considered duress; his naturalization is a free choice he made among various courses of action. We do not believe he has overcome the presumption of 349(c) that his action was voluntary. With respect to his intent the Dept believes that the evidence provided in this case supports that he intended to relinquish U.S. citizenship and we have made a finding of loss of nationality under section 349(a)(1) INA and therefore approved his certificate of loss of nationality.

2. The following additional factors support a finding of intent to relinquish U.S. citizenship:

-- Naturalization in a foreign state is, by itself, probative evidence of an intent to relinquish citizenship;

-- Mr. [redacted] as part of the naturalization ceremony, voluntarily took an oath renouncing all other allegiance;

-- Mr. [redacted] relinquished his U.S. passport to the Australian authorities in connection with this naturalization;

-- Mr. [redacted] never inquired prior to, or shortly after, obtaining naturalization at the Embassy about the possible consequences of acquiring Australian citizenship. In fact seven years lapsed before the question of citizenship arose and only in connection with his application for NIV to the U.S.;

-- Mr. [redacted] admitted that he was aware he could lose his U.S. citizenship by his naturalization; we note that for a recent trip to the U.S. he

did not seek U.S. citizenship documentation but represented himself as an Australian when he applied for a visa.

Appellant entered an appeal pro se from the Department's determination within the time prescribed by the applicable limitation.

II

Section 349(a)(1) of the Immigration and Nationality Act prescribes that a United States citizen shall lose his citizenship by voluntarily obtaining naturalization in a foreign state with the intention of relinquishing his nationality. 5/ Appellant acknowledges that he obtained naturalization in Australia upon his own application. He thus brought himself within the purview of the Act.

The first issue we must address therefore is whether appellant performed the expatriative act voluntarily. Section 349(c) of the Act prescribes a legal presumption that one who performs a statutory expatriating act does so voluntarily. The actor may, however, rebut the presumption upon a showing by a preponderance of the evidence that he did not act voluntarily. 6/

5/. 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 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.

Appellant states that he went to Australia because he could not secure a tenured teaching position in Israel; nor could he find an "appropriate" appointment in the United States. In Australia he obtained a position in a university in New South Wales; his wife found a position in a university 500 miles away in Canberra. In attempting to rebut the legal presumption that his naturalization was voluntary, appellant argued in his reply to the Department's brief that:

> ...My situation in Australia separated from my wife and unable to find work outside unskilled low level clerical work or unskilled manual work was such as to justify me adopting the view that I should ameliorate the situation of myself and my family by accepting an Australian government post....I respectfully submit there is a level of personal and economic deprivation when a person is unable to secure employment at a level reasonably related to socio-economic background.

He took exception to the Department's assertion in its brief that he had not shown that no jobs were available in Australia to non-citizens. "I say," he observed, "that this is a gross simplification of a stressful and emotional situation when normal family life is divided as a result of employment problems enountered by a foreigner in a strange country."

In a statutory declaration accompanying his reply to the Department's brief, appellant averred that he tried "very hard to find a job whereby I could live with my family," and not take employment that required him to obtain Australian citizenship. Only when "all my efforts were unsuccessful did I realize that Australian Government employment was my only possibility of keeping my family together." He had tried in vain to find employment in his specialty of education in universities in the United States. He and his wife sought positions touether in every university in Australia and New Zealand without favorable result. "After two and one-half years of trying to find positions in the same university or college," he concluded, "I came to the realization that the only possibility I had of preventing disintegration of my family was to seek a position in

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6/ Cont'd.

The Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655 (1986), repealed section 349(b) but did not redesignate section 349(c), or amend it to take account of the repeal of section 349(b).

Canberra (where my wife worked) in the Australian public service which would require my applying for Australian citizenship. Before I did this I tried to find a job in 70 or 80 institutions to no avail."

Appellant's central argument is that the duress of family devotion - his natural desire to keep his family together - deprived him of: freedom of choice, forcing him against his will to perform an expatriative act. A corollary argument is that he might have been able to unite his family without performing the proscribed act but only at an economic cost that he would have found unacceptable.

Duress connotes absence of choice, lack of viable alternatives due to factors beyond one's control. To prove duress, appellant must show that the circumstances that led him to perform an expatriative act were extraordinary and left him without freedom of choice. The general rule was stated in Doreau v. Marshall, 170 F.2d 721, 724 (3rd Cir. 1948):

> 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,

Where one pleads the duress of family devotion, the courts have made clear that only very unusual circumstances excuse performance of an expatriative act. See Ryckman v. Acheson, 106 F.Supp. 739 (S.D. Tex. 1952). There 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. See also Mendelsohn v. Dulles, 207 F.2d 37 (D.C. Cir. 1953), where the plaintiff, a naturalized citizen, remained abroad, in excess of the time then allowed naturalized citizens, 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.

Appellant posits a novel, and we think untenable thesis in arguing that his naturalization was involuntary because he could not find employment near his wife, and that because the only employment he allegedly could find was not commensurate with his training and experience, he was justified in performing an expatriative act.

We sympathize with appellant's natural wish to live a normal family life, and we appreciate that he would prefer not

to take menial employment in order to achieve family unification. We are not persuaded, however, that appellant's circumstances can be described as "extraordinary." Plainly, appellant and his family did not face the stark conditions that confronted the plaintiffs and their loved ones in Ryckman, supra and Mendelsohn, supra. He could have eschewed naturalization without running the risk of grave consequences to the life and health of his family. We find no authority to support appellant's contention that the circumstances he faced were "just as compelling as physical restraint."

His argument that he was justified in not taking employment beneath his capabilities is even weaker. Although he understandly would prefer teaching to doing a low-level clerical job, he implies clearly that work was available that would not have entailed risking his United States citizenship. So, as a matter of law, he must be deemed to have had a choice between risking his citizenship by taking employment of his preference, or not risking it by taking (perhaps only for a short time) a less gratifying and fulfilling job.

Basically, appellant was the author of his alleged dilemma. He decided to try his luck in Australia. No one forced him to go there; nor did any factor beyond his control place him in Australia. By his own account, he was there because he thought his career prospects were better than in Israel or the United States.

In our opinion appellant could hardly be described as a pawn of external forces. Objectively perceived, he had scope for choice. It is settled that where one has the opportunity to make a decision based on personal choice there is no duress. See Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (5th Cir. 1971).

We hold therefore that appellant has not rebutted the statutory presumption that he obtained naturalization in Australia voluntarily.

III

The statute 7/ provides, and the cases hold, that even though a citizen voluntarily, performs a statutory expatriating act, loss of citizenship will not result unless it be proved that the citizen intended to relinquish his United States nationality. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967). It is the government's burden to

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7/ Text supra note 1.

prove a party's intent, and it is to do so by a preponderance of the evidence. Vance v. Terrazas, Supra, 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 when the expatriating act was done, in appellant's case, his intent when he voluntarily obtained naturalization in Australia. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The Department submits that the fact appellant renounced "all other allegiance" while making an affirmation of allegiance to Queen Elizabeth the Second, Queen of Australia, is expressive of his true intent.

The only evidence presented to us bearing on appellant's intent that is contemporaneous with appellant's naturalization is the act itself and his affirmation of allegiance to Queen Elizabeth the Second which included renunciation of "all other allegiance." Obtaining naturalization in a foreign state may be highly persuasive evidence of an intent to relinquish United States citizenship, as the Supreme Court said in Vance v. Terrazas, supra:

> ...we are confident that it would be inconsistent with Afroyim [387 U.S. 253 (1967)] 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)....

444 U.S. at 261.

Expressly renouncing "all other allegiance" adds great evidential weight to the fact that one has performed an expatriative act, and the case law is explicit about the legal consequences of doing so. A United States citizen who knowingly, intelligently and voluntarily performs a statutory expatriating act and simultaneously renounces United States citizenship demonstrates an intent to relinquish United States citizenship, provided there are no factors of sufficient weight to mandate a different result. Terrazas v. Haig, supra; Richards v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985); and Meretsky v. Department of State, et al., memorandum opinion, Civil Action 85-1985 (D.D.C. 1985); aff'd. sub nom. Meretsky v. Department of Justice, et al., memorandum opinion, No. 86-5184 (D.C. Cir. 1987).

The plaintiff in Terrazas v. Haig, supra, made a forma declaration of allegiance to Mexico and expressly renounced his United States citizenship. The Court of Appeals held that there was "abundant evidence" that the plaintiff knowinqly and intelligently performed the proscribed act with the intention of relinquishing United States nationality. He was 22 years old, well-educated and fluent in Spanish when he applied for a certificate of: Mexican nationality that contained an oath of allegiance to Mexico and a renunciation of United States citizenship. His subsequent conduct also cast doubt on his contention that he lacked the requisite intent to relinquish citizenship.

Richards v. Secretary of State, supra, involved the naturalization in Canada of a United States citizen who swore an oath of allegiance to Queen Elizabeth the Second and made a concomitant declaration renouncing "all allegiance and fidelity to any foreign sovereign or state." The Court of Appeals for the Ninth Circuit agreed with the district court that "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." 8/ 753 F.2d at 1421. The court of appeals'accepted that the plaintiff wished to become a Canadian citizen and would have liked also to remain a United States citizen, but because Canada required relinquishment of his other citizenship, he chose to renounce United States citizenship in order to obtain Canadian citizenship. Appellant argued that he lacked the requisite intent because he never desired to surrender his United States citizenship. Since he had no wish to become a Canadian citizen independent of a perceived need to advance his career, the necessary intent was lacking, he asserted. The Court of Appeals disagreed, saying that if a citizen freely and knowingly chooses to renounce his citizenship and carries out that decision, his choice must be given effect. In brief, a citizen's specific intent to cenounce his citizenship does not turn on motivation.

8/ We may assume that the court reasoned that since the petitioner renounced all allegiance to any foreign state, he was, in effect, declaring that he did not wish to be in a relationship of reciprocal rights and duties with any state except Canada. He therefore renounced his United States nationality for all intents and purposes.

In Meretsky v. Department of State, supra, the pla tiff made an oath of allegiance to Canada in which he renounce all allegiance and fidelity to any foreign sovereign or state. The district court reasoned that by making such a declaratic the pl ntiff renounced his United States citizenship. It said

> When plaintiff took the oath he was a citizen only of the United States and thus it is clear that he could only have renounced that citizenship. Plaintiff does not contend that he did not understand the words of the Canadian Oath of Allegiance. The Court, therefore, concludes that plaintiff's intent to relinquish his United States citizenship was established by his knowing and voluntary taking of an oath of allegiance to a foreign sovereign which included an explicit renunciation of his United States citizenship.

Memorandum opinion t 9.

The Court of Appeals accepte the district court's reasoning that Meretsky had expressly renounced his United States nationality. To his argument that he lacked the requisite intent to renounce his United States citizenship because he only became a Canadian citizen so that he might be admitted to the practice of law in Canada, t of Appeals adopted the reasoning of the 9th Circuit in Richards, supra: "a United States citizen's free choice to ren unce his citizenship results in loss of tha citizenship," regardless of motive. The oath plaintiff took, the court declared, renounced his United States citizenship "in no uncertain terms." 9/ Memo. op. at 5.

9/ The Court of Appeals added the following footnote (number 3):

> C.F./ United States v. Matheson, 502 F.2d 809 (2d Cir.) (finding that an oath that did not explicitly renounce other citizenships did not demonstrate the specific intent required by section 1481(a)), cert. denied, 429 U.S. 823 (1976). In that case, the court also found a 'wealth . . . of evidence' indicating that despite the oath, the subject 'continually believed and represented that she was a citizen of the United States.' Id. at 812. The Second Circuit held that the language of that oath was consistent with the concept of dual nationality. The oath taken by Meretsky, on the

Although the evidence is compelling that appellant intended to relinquish his United States nationality, we must determime whether he acted knowingly and intelligently when he obtained naturalization and made an affirmation of allegiance to Queen Elizabeth the Second, renouncing all other allegiance. He was then 52 years of age, evidently well-educated and experienced. He acknowledged in the citizenship questionnaire he completed in March 1986 that he was aware he might lose his United States nationality if he became an Australian citizen, but decided that acquiring that citizenship was worth the risk. In these circumstances, it is clear that appellant's application for and acceptance of Australian citizenship was a deliberate, thought-out act.

Finally, we must determine whether there are any factors that would cast such doubt on appellant's specific intent as to warrant our concluding that more likely than not he did not intend to relinquish his United States nationality. Careful scrutiny of the evidence before us reveals none.

There is no evidence that before or after he became an Australian citizen appellant made any statement or took any action that manifested an intent to retain United States citizenship. At no time did he register himself or his daughter as a United States citizen. He did not apply to renew his United States passport after it expired in 1980. On the contrary, he obtained an Australian passport. In 1986, for the first time in the eleven years appellant had lived in Australia he communicated with the United States authorities - to obtain a non-immigrant visa in his Australian passport.

Appellant denies, however, that he became naturalized with the intention of relinquishing his United States nationality. The declaration of allegiance he made "did not necessarily exclude my maintenance of another allegiance. The concept of dual nationality is well established in international law and I am sufficiently informed about it to have been conscious at the time I was being naturalised that the law allowed scope for such arrangements." He dismisses the significance of the renunciatory statement he made upon being granted Australian citizenship with the following rationale.

8/ Cont'd.

other hand, explicitly renounced fidelity to any other aovernnents.

> ...I did not take an oath of renunciation. What is at issue here is an oath of allegiance which incorporated some words which had no express meaning to me other than that I would bear allegiance to Her Majesty Queen Elizabeth II and closely observe the laws of Australia and fulfill my duties as an Australian citizen. I was of the view that the renunciation element referred to anti-Australian attitudes of any kind. I have not regarded myself as having a counter allegiance to Australia.
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> I dispute that the meaning of the words which I swore when I became naturalised should be taken at their face value. The law and the authorities on my reading clearly indicate that the Department of State is bound to take into account the subjective factors such as I may establish by the preponderance of evidence. My situation was that 1 was in a friendly country and that it was not ever my intention to relinquish my US citizenship. The fact that I renounced all other allegiances per se meant that I renounced hny allegiance in my mind which would be counter or alien to that which I would hold in the federal system of Australia.

If, as he appears to do, appellant argues that the issue of his intent to relinquish United States nationality should be determined by what he says his state of mind was when he became an Australian citizen, his position has no support in law. It is settled that the intentions of the mind can only be fathomed by outward manifestations - a persons's words and proven conduct. What he says his state of mind was seven years earlier has no probative value, absent at least some contemporary proven words ok conduct expressing an intent to retain United States citizenship. Appellant gave what the Australian authorities were entitled to consider a binding undertaking to transfer his allegiance to Australia. The legal consequences of making such an affirmation were formulated as follows by the Court of Appeals in Richards v. Secretary of State, supra:

> Whenever a citizen has freely and knowingly chosen to renounce his United States citizenship, his desire to retain his citizenship

> has been outweighed by his reasons for performing an act inconsistent with that citizenship. If a citizen makes that choice and carries it out, the choice must be given effect."

752 F.2d at 1421-1422.

Surveying the totality of the evidence in this case, we are of the opinion that the Department has carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States nationality when he obtained naturalization in Australia upon his own application.

IV

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

Alan G. James, Chairman

Warren E. Hewitt, Member

Gerald A. Rosen, Member