June 30, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: I Y A

This is an appeal from an administrative determination of the Department of State that appellant, I Y A expatriated herself on August 27, 1986 under t e pr ions section 349(a)(5) of the Immigration and Nationality Act by making a formal renunciation of her United States nationality before a consular officer of the United States at Tel Aviv, Israel. 1/

In this case the Department failed to comply with the regulations regarding submission of the case record and its brief within the time prescribed, 22 CFR 7.5(c) and (d), and as further enlarged by the Board, 22 CFR 7.11. 2/ Thus,

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1/ When appellant renounced her nationality, section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), read as follows:

> Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
>
> . . .
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

The Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653 (approved Nov. 14, 1986), 100 Stat. 3655, 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/ 22 CFR 7.5(c) provides that upon written request of the Board the Department shall transmit to the Board within 45 days the record on which the Department's decision in the case was based.

constructively, the Department has not carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States citizenship. Accordingly, we reverse the Department's holding that appellant expatriated herself.

I

An officer of the United States Embassy at [redacted] executed a certificate of loss of nationality in appellant's name on August 27, 1986, in compliance with the provisions of section 358 of the Immigration and Nationality Act. 3/ The officer certified that appellant [redacted] that she resided in the United States from birth to 1976; that she made a formal renunciation of United States nationality at Tel Aviv on August 27, 1986; and thereby expatriated herself under the provisions of section 349(a)(5) of the Immigration and

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2/ Cont'd.

22 CFR 7.5(d) provides that the Department shall file a brief within 60 days after receipt of a copy of appellant's brief.

22 CFR 7.11 provides that the Board may for good cause shown enlarge the time prescribed by 22 CFR, Part 7 for the taking of any action.

3/ 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.

Nationality Act. The Department of State approved the certificate on December 5, 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 November 22, 1987.

II

Appellant stated that at the time of her renunciation she was a member of the Hebrew Israelite Community (Black Hebrews), having been a member since the age of 21. "I was reared into the knowledge, doctrines, and teachings of the community €or 11 years," she stated. "Though I was an adult I still was knowledgeable only from the realm and perspectives of the community for the past 11 years." According to appellant, Ben Ami Carter, "the ultimate supreme being" of the Community, decided that members should renounce their United States nationality, purportedly to frustrate Israeli actions of rounding up community members because they were working without permits. "No one can defy him," appellant wrote the Board, "or they suffer the consequences." Appellant and, she states, three other members of the Community renounced their nationality on August 27, 1986. A community leader was present who instructed them how to act at the Embassy.

She conceded to the Board that she indicated to the consular officer who administered the oath of renunciation that she was acting voluntarily, "but something inside was saying "Yes" [that is, that she was being forced to renounce]; but I could not state my mind because a leader from the Community was stationed outside the office." Nor, allegedly, did she act knowingly and intelligently. "I did not understand that I was performing an irrevocable act of such great seriousness and magnitude." (Her emphasis.)

III

The Board forwarded appellant's submissions to the representatives of the Department on January 21, 1988, requesting that, in accordance with the applicable federal regulations (22 CFR 7.5(c) and (d); see note 2 supra), the Department file its brief and the record upon which it made its decision of appellant's expatriation within 60 days, or by March 22, 1988.

On March 18, 1988, the office representing the Department on the appeal sent the following memorandum to the Board:

> The Department has found it necessary to contact another bureau within the Department in reference to some unanswered questions regarding Ms. [redacted] loss of

> citizenship. Therefore, we would appreciate an extension of time for filing the Department's brief.

To the foregoing memorandum, the Board on March 21, 198 replied in pertinent part as follows:

> The Board of Appellate Review will grant the Department an extension of time to file its brief on the above-captioned citizenship appeal. [See note 2 supra.] The Board does not, however, believe it fair to appellant to grant an open-ended extension. ...
>
> ...In this case, we are agreeable to extending the time for filing to April 5th. Please make every effort to complete consultation with another bureau within that time. If, for an unforeseen reason, there should be a problem in completing consultations, please advise the Board of the reasons and request a further extension of time.

The Department did not make its filing on April 5, 1988. On April 26th, the Board addressed a further memorandum to the Department:

> The Board of Appellate Review would appreciate being informed, in writing, when consultation on this case with another bureau within the Department is likely to be completed.
>
> If delays are foreseen, please inform the Board what they are and request that time for filing the Department's brief be further enlarged to a specific date.

Since the Department did not reply to the Board's April 26th memorandum, the Board informed the Department by memorandum dated May 13, 1988 as follows:

> No sufficient cause having been shown *why* the Board should not proceed in this matter, the Board requests that the Department submit its brief on the appeal and the case record by close of business May 31, 1988.

The Department finally communicated with the Board on May 19, 1988, stating that: "The office being consulted on the

above-named case has assured [the office representing the Department on the appeal] that they will have something in writing on this case by the end of the week."

The Board informed the Department on May 27th by memorandum that it would grant one final extension of time to make the required filing; the brief would now be due June 15, 1988. The Board added that it expected that the Department would "impress upon the other office concerned the importance of treating this matter as one of priority so that the June 15th filing deadline can be met."

The Department sent the Board a memorandum on May 26th which the Board received on May 31st. It read as follows:

> The information being sought from another office within the Department is essential in developing the Department's brief in the above-named case. It is necessary for the Department to consult with this office before it can fully develop its argument. Therefore, this office would appreciate an additional two week extension for fhe filing of the Department's brief.

There can be no doubt that both the Department and the Board understood that the Department's brief on the appeal would be due on June 15, 1988. As of the close of business June 29, 1988, the Department had neither filed its brief nor shown good cause why the Board should further enlarge the time for such filing.

Accordingly, we are of the view that the Department has had more than sufficient time to clarify any legal or factual matters it deems essential, and that to countenance any further delay would be unfair to appellant and detrimental to the integrity of the appellate process. Accordingly, exercising the discretion given to the Board by 22 CFR 7.2(a), we will, without more, decide the appeal. 4/

4/ Section 7.2(a) of Title 22, Code of Federal Regulations, 22 CFR 7.2(a), provides in part that:

> ...The Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it,

- IV -

It is not disputed that appellant duly made a formal renunciation of her United States nationality and thus brought herself within the purview of section 349(a)(5) of the Immigration and Nationality Act. 5/ Appellant contends, however, that she did not act voluntarily with the Intention of relinquishing United States nationality within the meaning of section 349(a)(5) of the Act.

Under section 349(c) of the statute, there is a legal presumption that one who performs a statutory expatriating act does so voluntarily but the presumption may be rebutted. 6/

Appellant maintains that she renounced her United States nationality involuntarily because she was .pressured to do so by the leadership of the Black Hebrew Community. She offers in support of this allegation declarations made by a Rabbi and an anthropologist, both United States citizens living in Israel. These declarations do not, however, constitute sufficient

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5/ See note 1 supra.

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

> (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.

Pub. L. 99-653 (approved Nov. 14, 1986), 100 Stat. 3655, repealed section 349(b) but did not redesignate section 349(c) or amend it to reflect repeal of section 349(b).

evidence that appellant acted involuntarily. The Rabbi's statement is confined to the issue whether appellant acted knowingly and intelligently when she made her renunciation. The anthropologist's declaration states that he did not know appellant when she made her renunciation. His evidence on the issue of voluntariness is based on what appellant told him.

Appellant's account of the pressure on her by the Community has the ring of plausibility, but she has not adduced sufficient evidence to overcome the presumption that she acted of her own free will. Her later statements contrast with her concession that she told the consular officer who presided at her renunciation that she was acting voluntarily. They contrast too with the statement of understanding she undoubtedly signed at the time to the effect that she was acting voluntarily.

On balance, we are not persuaded that appellant has established that she was forced to renounce her nationality.

V

It remains to be determined whether appellant intended to relinquish her United States nationality when she made a formal renunciation of that nationality.

The Supreme Court held in Afroyim v. Rusk, 387 U.S. 253 (1967) that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that right", and that Congress has no general power to take away an American's citizenship witout his assent.

In Vance v. Terrazas, 444 U.S. 252 (1980) the Court affirmed Afroyim, holding that to establish loss of citizenship, the government must prove an intent to relinquish citizenship. Intent may be proved by a person's words or found as a fair inference from proven conduct. In Terrazas, the Court made clear that under section 349(c) of the Immigration and Nationality Act it is the government's burden to establish by a preponderance of the evidence that the expatriative act was performed with the intention of relinquishing citizenship.7/ Thus, the Department must show by a preponderance of the evidence that appellant in the instant case intended to relinquish her United States nationality. It bears that burden without benefit of any presumption.

The Department obviously has not carried its burden of proof in this case. We deem the Department's failure to submit the case record and a brief within the time prescribed by the regulations and as enlarged by the Board a tacit election

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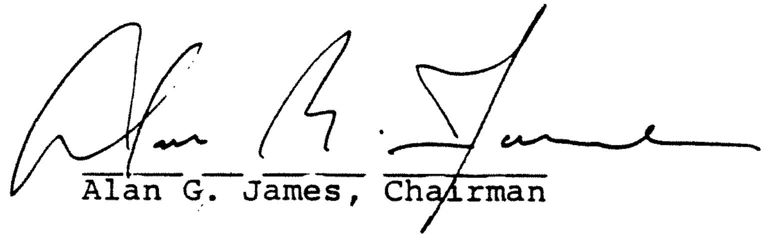
7/ See note 6 supra.

not to assume its statutory burden of proving that appellant intended to relinquish her United States nationality. Her allegation that she did not act knowingly and intelligently when she performed the expatriative act, and therefore lacked the requisite intent, stands unrefuted. It therefore follows that the Department has not carried its burden of proof.

VI

Upon consideration of the foregoing, we rever'se the Department's administrative determination that appellant expatriated herself.



Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member