April 28, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S[redacted] J[redacted] M[redacted]

S[redacted] J[redacted] M[redacted] appeals an administrati determina n of he De nt of State, dated November 1 1986, that she expatriated herself on September 11, 1972 obtaining naturalization in Canada upon her own application. 1

For the reasons that follow, we conclude that t Department has failed to carry its burden of proving by preponderance of the evidence that appellant intended relinquish her United States citizenship when she obtain Canadian citizenship. Accordingly, the Department determination of loss of her United States citizenship reversed.

I

Appellant, Ms. M[redacted], acquired the national y of t United States by virtue of her birth at [redacted] acquired the nationality of the United Kingdom birt Appellant lived in the United States until 1951 when her paren took her to England. There she lived for ten years. In 19 she returned with her family to the United States and attended secondary school in New York City. The family went back to t United Kingdom in 1963. In 1966 they moved to Canad Appellant became a permanent resident and entered Mcgill

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1/ In 1972 section 349(a)(1) of the Immigration and Nationali Act, 8 U.S.C. 1481(a)(1), read as follows:

Section 349. (a) From and after the effective date of th Act a person who is a national of the United States whether birth or naturalization, shall lose his nationality by --

. . .

(1) obtaining naturalization in a foreign state upon his own application,...

Pub. L. 99-653 (Nov. 14, 1986), 100 Stat. 3655, amend subsection (a) of section 349 by inserting "voluntari performing any of the following acts with the intention relinquishing United States nationality:" after "shall lose h nationality by;".

University. She graduated in 1970 with a degree in international finance. Previously, in May 1968 she obtained a United States passport from the Consulate General at Montreal, valid until 1973.

After receiving a master degree in economics from Laval University in 1971, appellant started a career in the field of international finance. Around May 1972, after working for the Bank of Canada for a year, she sought "other employment which would provide me with greater scope for advancement." Since the Federal Government, the principal employer of economists, was accepting applications from Canadian citizens only, appellant on August 16, 1972 applied at a municipal court house in Ottawa for a certificate of Canadian citizenship under the provisions of section 10(2) of the Canadian Citizenship Act of 1946. That section provided that the competent minister might grant a certificate of citizenship to any person who was a British subject and who satisfied the Minister that he or she possessed the requisite statutory qualification for citizenship. 2/ Under the Canadian Citizenship Act of 1946 and the applicable Citizenship Regulations, applicants for a certificate of Canadian Citizenship who were also British subjects were required to make only a simple oath of allegiance to Queen Elizabeth the Second, Queen of Canada. (At the time appellant obtained Canadian citizenship, applicants for naturalization, who were not British subjects or citizens of certain Commonwealth countries were required to make a declaration of renunciation of all other allegiance as well as an oath of allegiance to the Queen of Canada. 3/) The Board takes note that the oath of allegiance appellant was required to swear on August 16, 1972 read as follows:

2/ Section 10(2) of the Canadian Citizenship Act of 1946, as amended, C 15, read in pertinent part as follows:

> (2) Notwitstanding the provisions of subsection (1) [concerning the grant of citizenship to a person who is not a Canadian citizen] the Minister may, in his discretion, grant a certificate of citizenship to any person wno is a British subject and who makes the Minister a declaration that he desires such certificate and who satisfies the Minister that he possesses the qualifications prescribed by paragraphs (b), (c), (d), (e), (f) and (g) of subsection (1); ...

3/ On April 3, 1973 the Federal Court of Canada declared ultra vires the section of the regulations that prescribed the taking of a renunciatory declaration. Ulin v. The Queen, 35 D.L.R. 3rd 738 (1973).

> 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.

A certificate of Canadian citizenship was granted to appellan on September 11, 1972. She was then nearly 22 years old.

Appellant states that in the end she did not obtai employment with the Federal Government, but instead entered th private sector. She obtained a Canadian passport which she use to travel abroad after her United States passport expired i 1973.

Twelve years later, in 1985, 'when I was established ar settled as an international banker," appellant decided to appl for a United States passport. It appears that upon making passport application at the United States Consulate General i Toronto, the fact that she had obtained Canadian citizenshi became known to American authorities. At the request of th Consulate General, she completed a form to facilitate determination of her citizenship status. Thereafter, c September 30, 1986, an officer of the Consulate General execute a certificate of loss of nationality in the name of Susan Joe [redacted] as required by law. 4/ Therein the officer certifie that appellant acquired United States nationality by birt therein; that she acquired the nationality of Canada upon he own application and thereby expatriated herself under th provisions of section 349(a)(1) of the Immigration ar Nationality Act. The Department approved the certificate on

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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 certi-

November 12, 1986, approval constituting an administrative determination of loss of nationality from which a timely filed appeal may be taken to the Board of Appellate Review. Acting pro se, appellant entered an appeal on October 16, 1987.

II

The statute provides that a national of the United States shall lose his United States nationality by obtaining naturalization in a foreign state voluntarily with the intention of relinquishing United States nationality. 5/ There is no dispute that appellant duly acquired Canadian citizenship upon her own application, and thus brought herself within the purview of the statute.

We consider first the issue of voluntariness. Under law, a person who performs a statutory expatriating act is presumed to act voluntarily but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntary. 6/

In the citizenship questionnaire appellant executed in September 1986 she wrote that:

> The act was voluntary to the extent that I walked alone to the court house and followed

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4/ Cont'd.

> ficate 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.

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

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

> the required procedure. It was not voluntary to the extent that all potential new employers require Canadian citizenship before my application could be considered.

In her submissions in support of the appeal, however, appell. did not argue that she acted involuntarily. Since she has undertaken to rebut the legal presumption that she act voluntarily, we must conclude that she obtained Canad citizenship of her own free will.

III

Even though we have determined that appellant obtair naturalization voluntarily, the question remains whether on a the evidence the Department has carried its burden of proving a preponderance of the evidence that appellant intended relinquish United States nationality. Vance v. Terrazas, 4 U.S. 252, 270 (1980).

Under the statute, 7/ the burden is placed on t Government to prove an intent-to relinquish citizenship; this must do by a preponderance of the evidence. Id. at 267. Inte may be expressed in words or found as a fair inference fr proven conduct. Id. at 260. The intent the Government mu prove is the party's intent at the time the expatriating act w performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981)

6/ Cont'd.

> 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 (nov. 14, 1986), 100 Stat. 3655, repealed subsection (b) of section 349, but did not redesignate subsection (c) or amend it to delete reference to subsection (b).

7/ Section 349(c) of the Immigration and Nationality Act, Text supra note 6.

The Department submits that the facts do not support appellant's contention that when she obtained Canadian citizenship she did not intend to relinquish her United States nationality. Appellant's intent to reinquish her United States nationality is evidenced initially by the fact that she obtained naturalization upon her own application and made an oath of allegiance to foreign sovereign, the Department asserts. The intent to be imputed to appellant at the crucial time finds confirmation, in the Department's view, in her subsequent course of conduct, which, when viewed in its entirety, "is susceptive only or' one inference." Her behavior is not that of a person who wishes to keep United States citizenship, continues the Department's brief, noting specific conduct that indicates appellant's renunciatory intent:

> She has failed to maintain registration as a U.S. citizen and has never acted or represented herself as a U.S. citizen. She contends that she did not think she had a problem because her father had not lost his British citizenship when he naturalized as a Canadian. She naturalized without verifying the ramification of such an action, exhibiting disinterest and unconcern for her status as a U.S. citizen. She has traveled to third countries and returned through the United States using her Canadian passport. When her U.S. passport expired in 1973, even though she continued to travel, she did not reapply for a passport.

The only evidence in the record presented to the Board bearing on appellant's intent at the time she obtained Canadian naturalization is the fact that she performed the proscribed act and swore a concomitant oath of allegiance to Queen Elizabeth the Second. It is settled that naturalization, like the other enumerated statutory expatriating acts, may be highly persuasive, but is not conclusive, evidence of an intent to relinquish United States citizenship. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J. concurring.) Making an oath of allegiance to a foreign sovereign or state may provide substantial evidence of intent to relinquish citizenship but alone is insufficient to prove renunciation. King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972). An oath of allegiance that contains only an express affirmation of loyalty to the country whose citizenship is being sought, however, leaves "ambiguous the intent of the utterer regarding his present nationaiity." Richards v. Secretary of State, CV80-4150 (memorandum opinion, C.D.Cal 1980) at 5.

Plainly, the direct evidence here will not support finding that appellant intended to relinquish her United Stat citizenship when she became a Canadian citizen. Since dirt evidence rarely will establish a person's intent to relinqui citizenship, circumstantial evidence surrounding performance the expatriating act must be examined to determine whether nay establish the requisite intent. Terrazas V. Haig, supra, 288. In the Department's view, the circumstantial evidence "susceptive of only one inference," that Ms. [redacted] intenc to relinquish United States nationality.

Appellant did not do a number of things that a moc citizen of the United States living abroad might be expected do. But to infer from such non-feasance a renunciatory inte on appellant's part in 1972 is not, in our judgment, warranted. There is nothing demonstrably derogatory of allegiance to t United States in mere omissions - not doing things that, done, would affirmatively demonstrate an intention to reta citizenship, the expatriative act notwithstanding. It has be said that citkzenship is not a license that expires misbehavior; it is not lost every time a duty of citizenship shirked. Trop V. Dulles, 356 U.S. 86, 92, 93 (1958). There t Supreme Court held unconstitutional a provision of the statu prescribing that desertion from the armed forces would wc expatriation. Thus, to contend that omitting other le arduous, duties of citizenship after one performed expatriative act manifests an intent to relinquish citizensl is to state a proposition that is not self-evident. Sir people are not uniformly model citizens and fully attentive all the rights and duties of citizenship, it seems to us tl the Department makes no allowance for the reasonable possibil that appellant here did not do the things she ideally shou have done simply because she had other things on her mind; c not have much knowledge about citizenship matters; meant to something about asserting United States citizenship, k procrastinated.

In brief, we cannot accept that appellant's non-feasar of the duties and rights of citizenship shows that after s became a Canadian citizen she considered herself to be solely Canadian citizen, and therefore that, more probably than n she intended in 1972 to relinquish her United States citizensil

Appellant did some other things, however, that on thc face may not be consistent with United States citizenship. s used a Canadian passport on occasion when entering the Uni States from third countries. She also identified herself officials as a Canadian citizen when she crossed the Uni States-Canadian border. In evaluating how relevant thc actions are to the issue of appellant's intent in 1972, t essential inquiry is whether those actions should be disposit of the issue of intent, given the paucity of persuasive dir

evidence in this case and the absence of other acts that are manifestly derogation of United States citizenship. In a word, are the actions which are inconsistent with United States citizenship sufficiently substantial to warrant concluding that appellant intended in 1972 to surrender her United States nationality?

In this connection too appellant's actions could plausibly be explained on grounds other than that she intended in 1972 to relinquish her United States nationality. Appellant volunteered to the Consulate General at Toronto (citizenship questionnaire she completed in September 1986) she "sometimes" used her Canadian passport "since it was handy as I had been using it in other countries." We appreciate that it is required that a United States citizen use a United States not a foreign passport to enter the United States, but it cannot be excluded that appellant may not have known that fact and simply found it convenient to use her Canadian passport, having been negligent about renewing her United States one in 1973. Similarly, her explanation why she identified herself as a Canadian citizen on crossing the border between the United States and Canada is not implausible. In her reply brief she stated:

> The Department of State's brief makes reference to the fact that at border crossings I have used my certificate of Canadian Citizenship or my Ontario Driver's License as opposed to some identification to identify myself as a U.S. citizen. It would seem to follow from the Department of State's brief that I should identify myself as both Canadian and an American citizen. I have attempted this on some occasions but the border officers have stated they do not recognize the concept of dual citizenship and, as a result, I have chosen to facilitate my border crossings by providing them with my Canadian identification.

Self-serving or not, appellant's statement makes a credible point - identifying herself as a Canadian citizen to American officials in particular circunstances was more convenient than trying to represent that she considered herself a national of both the United States and Canada.

Finally, as appellant contends, she may truly have considered that she became a national of the United States and Canada after obtaining a certificate of Canadian citizenship. If she so regarded her status, use of Canadian documentation instead of United States documentation has a certain rational explanation.

The salient consideration with respect to appellan post-naturalizaation conduct is that it admits of more than plausible explanation. It could be construed as arising fro design wholly different from an intent to sever her allegia to the United States, or even from no particular design purpose. On a fair reading of the evidence we are unable conclude that appellant knowingly and intelligently waived forfeited her United States citizenship, as the cases make cle the government must prove she did. See Terrazas v. Haig, supr at 287; and United States v. Matheson, 532 F.2d 809, 814 (2 Cir. 1976), cert. denied 429 U.S. 823 (1976).

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

IV

Upon consideration of the foregoing, we hereby rever the Department's determination that appellant expatriate herself when she obtained naturalization in Canada upon her ov application.

Alan G. James, Chairman

Mary Elizabeth Hoinkes, Member

George Taft, Member