DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S[redacted] R[redacted] B[redacted]

This case comes before the Board of Appellate Review on the appeal of S[redacted] R[redacted] B[redacted] from an administrative determination of the Department of State, dated February 24, 1987, that he expatriated himself on January 16, 1979 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

The dispositive issue in this case is whether the Department has carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States nationality. For the reasons that follow, we conclude that the Department has failed to sustain its burden of proof and therefore reverse the Department's decision that he expatriated himself.

I

Appellant acquired the nationality of the United States by birth at [redacted], [redacted] According to statements he made in 1987 to the Consulate General at Vancouver, he graduated Phi Beta Kappa from the University of California, Berkeley in 1969 with a bachelor's degree in fine arts. In 1972 he entered Canada in tourist status holding a U.S. passport and

---

1/ In 1979, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), 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 (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".

subsequently applied for and was granted landed immigrant status. It appears that his first employment in Canada was as a laborer in mining operations north of Vancouver. Later he became a commercial fisherman. Under Canadian fishing regulations in effect prior to 1983, a landed immigrant might be granted a commercial fishing license for three consecutive years: thereafter, in order to qualify for a license, the applicant was required to prove he was a Canadian citizen, or that he had pending an active application for citizenship. It would appear that by around 1978 appellant had been granted three consecutive licenses.

On January 16, 1979 appellant became a Canadian citizen on his own application, in order, as he put it, to be able to continue employment as a commercial fisherman. The Board takes note that in 1979 applicants for naturalization were required to make the following oath of allegiance prior to the grant of a citizenship certificate:

> I, ..., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen, so help me God.

Appellant claims, however, that "I became a Canadian citizen without having to swear allegiance to the Crown." He reportedly told the magistrate who presided at his naturalization ceremony that he would not accept citizenship if it meant swearing allegiance to royalty. "The magistrate was quite congenial," [redacted] informed the Board, "and concurred with my request after I explained to him that I had been born in a free republic and, secondly, my father's family had been Quakers for over *300* years – having arrived in Pennsylvania in 1680 after decades of persecution for refusing to swear allegiance to the King." The Board takes note, nonetheless, that in 1986 the Canadian authorities confirmed to the Consulate General at Vancouver that appellant "was administered an oath of allegiance/citizenship on January 16, 1979." It might therefore be reasonable to surmise that he did not make an oath but rather "affirmed" allegiance to the Queen of Canada, with the same effect as an an oath.

Nearly seven years after appellant became a Canadian citizen his naturalization came by chance to the attention of the Consulate General at Vancouver. At the request of the Consulate General, appellant completed the prescribed form for determining United States citizenship

and was interviewed. On February 11, 1987, in compliance with the provisions of section 358 of tne Immigration and Nationality Act, a consular officer executed a certificate of loss of nationality in appellant's name. 2/ The officer certified that appellant acquired the nationality of the United States 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 Consulate General forwarded the certificate to the Department with a recommendation that it be approved.

The Department approved the certificate on February 24, 1987, an action that constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

The appeal was entered on May 7, 1987.

II

Section 349(a)(1) of the Immigration and Nationality Act 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

---

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.

nationality. 3/ It is not disputed that appellant duly acquired Canadian citizenship upon his own application and thus brought himself within the purview of the Act.

We therefore consider first the issue of voluntariness. Under law, a person who performs a statutory expatriating act is presumed to do so voluntarily but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntary. 4/

Appellant asserts that he became a Canadian citizen because of economic necessity. "I was a fisherman and needed Canadian citizenship to ply my trade." He has not, however, proved that he could satisfy his economic needs only by acquiring Canadian citizenship. His case rests on no more than conclusory statements that he was forced to become a Canadian. While we will accept that if he wanted to continue to fish for profit in Canadian waters he had to become a Canadian citizen, we cannot accept his intimation that only by engaging in commercial fishery

---

3/ Note 1 supra.

4/ 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 (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).

could he provide for himself. Evidently an educated man, he arguably had other employment options, either in Canada or the United States, but has not shown that he gave them any consideration.

On the scant facts presented, appellant clearly made a personal choice: to continue to be a commercial fisherman in preference to following a trade or profession that did not require him to acquire Canadian nationality. The opportunity to make a personal choice is the essence of voluntariness. Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (5th Cir. 1971): cert. denied, 404 U.S. 946 (1971).

We conclude, therefore, that appellant has not rebutted the presumption that he obtained Canadian naturalization voluntarily.

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, 444 U.S. 252, 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, by definition, more probative on the issue of a party's intent than evidence dating from a later time.

In this case the only evidence bearing on appellant's intent at the relevant time is the fact that he obtained naturalization in Canada and made an oath (or affirmation) 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

---

5/ Section 349(c) of the Immigration and Nationality Act. Text supra note 4.

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 (D.C. Cal. 1982) at **5;** aff'd 752 F.2d **1413** (9th Cir. 1985).

Since the evidence contemporary with appellant's naturalization obviously will not support a finding that appe1lant 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:

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

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

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

The Department cites the following factors as specific evidence that appellant intended to relinquish his United States nationality: he held two Canadian passports and travelled solely as a Canadian after naturalization: he identified himself as a Canadian upon crossing the U.S.-Canadian border: he never voted in the United States but voted in Canada: he stopped filing U.S. income taxes after settling in Canada: in 1986 he inquired about how he could "reinstate" himself as a United States citizen: before obtaining Canadian citizenship he did not consult U.S. officials about the implications of naturalization for his United States citizenship; he is an educated man and must be assumed to be cognizant of the implications of his actions.

A person may, of course, act in such a way or say such things after doing a particular act that the trier of fact may properly infer from such conduct and words that the person did the act in question with a specific will and purpose. Thus, some acts done and some words spoken subsequent to performance of a statutory expatriating act may establish that the expatriative act was done with the intention of transferring allegiance from the United States to a foreign state.

Here, the Department's case rests on inferences drawn from circumstantial evidence. In this respect appellant's case is hardly distinguishable from a substantial number of cases previously appealed to the Board. We have taken the position in such cases that in order to be probative on the issue of intent to relinquish citizenship, the person's words and conduct must be reasonably free from ambiguity. A "preponderance of the evidence", as is well-known, means evidence which as a whole shows that the fact sought to be proved is more probable than not. See Black's Law Dictionary, 5th Ed. Thus, in loss of nationality proceedings, evidence that can reasonably be interpreted to signify either a will and purpose to relinquish citizenship or no particular will and purpose at all would not support a finding of intent to relinquish citizenship. It would seem incontestable that unless the import of a persons words and conduct is reasonably clear -- unless there are words or acts expressly derogatory of allegiance to the United States -- there is too much scope for erroneous interpretation of the specific intent of the actor to warrant a finding of intent to surrender American citizenship.

Given the Supreme Court's pronouncements on the worth of United States citizenship, can it be doubted that the trier of fact must be reticent about drawing adverse inferences from evidence that is susceptible of being interpreted as signaling either an intent to relinquish

citizenship or no specific intent? The oft-quoted declaration of the Supreme Court in Nishikawa v. Dulles, 356 U.S. 129, 134 (1958) is invariably apposite in cases like the one now before the Board: "[T]he consequences of denationalization are...drastic....This Court has said that in a denaturalization case, 'instituted...for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen.' Schneiderman v. United States, 320 U.S. 118, 122."

We will grant that appellant's sense of obligation about the rights and duties of United States citizenship seems underdeveloped. But what does it prove about his intent in 1979 that he has not voted in United States elections since going to Canada or filed U.S. income tax returns? Nearly half the eligible American electorate does not vote in general elections. Countless U.S. citizens living abroad seem to be unaware that they are obligated to file income tax returns even if they do not (as presumably appellant here did not) have sufficient income to pay a tax.

That appellant stated he wanted to be "reinstated" as a United States citizen proves little. If he used the term after he got the Consulate General's uniform loss of nationality letter (and the record is unclear when exactly he used it), he might quite naturally have meant to say simply that he wanted to get his citizenship back. It is also unconvincing to assert that he should have consulted United States authorities before he applied for and obtained naturalization. People are careless or thoughtless, even about important matters. That he did not research the implications of obtaining foreign naturalization before proceeding might be imprudent, but people do not always act prudently.

The remaining evidence consist of his use of Canadian passports to travel abroad and identifying himself at the United States/Canada border as a Canadian citizen. Was doing these things a matter of convenience or a calculated gesture to demonstrate that he no longer considered himself a United States citizen because he had intended to relinquish citizenship in 1979? Who can say with any degree of assurance?

In short, it would be as reasonable to infer from appellant's words and conduct after his naturalization that he was careless, indifferent or opportunistic as it would be to infer that in 1979 he intended to divest himself of United States citizenship. Taken as a whole, the evidence before us does not show convincingly that

appellant intended to relinquish his United States nationality.

The Department has not persuaded us that appellant more probably than not intended to divest himself of United States citizenship when he acquired the nationality of Canada.

IV

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

Alan G. James, Chairman

Warren E. Hewitt, Member

Gerald A. Rosen, Member