May 10, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: K[redacted] L[redacted] R[redacted]
On Motion for Reconsideration

The Board of Appellate Review on February 24, 1989 reversed a determination of the Department of State, dated April 7, 1988, that [redacted] expatriated himself on October 9, 1977 by obtaining naturalization in Israel upon his own application. 1/

Within the time allowed, the Department filed a motion for reconsideration of the Board's decision. 2/ The gravamen of the Department's motion is that the Board misapprehended points of law applicable to this case. Specifically, argued the Department, the Board applied a new standard of proof in determining whether the Department had met its burden of proving that appellant intended to relinquish United States nationality when he obtained naturalization in Israel. The Board erred, according to the Department, by looking for evidence of appellant's intent under the standard of "fair probability," which is a standard of proof inconsistent with that established by the courts.

1/ In 1977, 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,...

PL 99-653, approved November 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/ Section 7.10 of Title 22, Code of Federal Regulations, 22 CFR 7.10 (1988), provides that:

> The Board may entertain a motion for reconsideration of a Board's decision, if filed by either party. The motion shall state with particularity the grounds for the motion, including any

Counsel for appellant filed a timely memorandum in opposition to the Department's motion for reconsideration.

I

We do not accept the Department's contention that the Board did not adhere to the judicially sanctioned standard of proof to determine whether a citizen who performs a statutory expatriating act formed the necessary intent to relinquish United States citizenship.

In considering the issue of appellant's intent, the Board enunciated precisely the standard of proof of intent to relinquish citizenship laid down by the Supreme Court.

In its opinion the Board stated:

> Whether a citizen claimant intended to relinquish United States citizenship is an issue that the government must prove by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 263, 267 (1980). Intent may be expressed in words or found as a fair inference from proven conduct. Id.

2/ (cont'd.)

> facts or points of law which the filing party claims the Board has overlooked or misapprehended, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Board by the party filing the motion. Oral argument on the motion shall not be permitted. However, the party in opposition to the motion will be given opportunity to file a memorandum in opposition to the motion within 30 days of the date the Board forwards a copy of the motion to the party in opposition. If the motion to reconsider is granted, the Board shall review the record, and, upon such further reconsideration, shall affirm, modify, or reverse the original decision of the Board in the case.

> at 260. The intent the government must prove is the party's intent at the time he or she performed the expatriating act. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). Under the "preponderance of the evidence" rule, the Government must prove that a party more probably than not intended to relinquish United States nationality.

We would also note that:

> The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury [or the trier of fact] to find that the existence of the contested fact is more probable than its nonexistence. Thus the preponderance of evidence becomes the trier's belief in the preponderance of probability.

McCormick on Evidence (3rd ed.), section 339.

The Board used the term "fair probability" at the conclusion of its analysis of the issue of appellant's intent to relinquish United States citizenship, stating (at p. 14) that:

> On balance, the evidence does not establish with fair probability that appellant intended to relinquish his United States citizenship when he obtained naturalization in Israel upon his own application....

In using the term "fair probability," the Board did not suggest or intend that the Department was required in this case to meet a more stringent standard of proof than that laid down by the Supreme Court. By "fair probability", the Board simply meant it was reasonable to conclude that the evidence more probably than not did not preponderate in the government's favor. Nothing more should be read into the phrase. 3/

3/ Counsel for appellant observed in the memorandum in opposition that he filed on his client's behalf that in using the term "fair probability," the Board "was rather being generous to the Department."

II

In addition to arguing that the Board misapprehended the law applicable to appellant's case, the Department maintains that the Board overlooked or misapprehended points of fact. Specifically, the Department asserts:

> The Board's failure to give a proper evidentiary assessment of Mr. [redacted] behavior and surrounding circumstances at the time of his naturalization results in the Board's disregard of the appellant's wish to relinquish his citizenship. The Board is discounting the plain meaning of his actions. This in turn denies the legal effect of his choice.. ..

We do not agree.

The Board considered that some factors in the case showed that appellant probably lacked the requisite intent to relinquish citizenship and that some other factors raised material doubt about whether it was his specific intent to forfeit citizenship. Balancing all the elements in the case, the Board made a judgment that the Department had failed to meet its burden of proof.

III

Having examined carefully the Department's motion for reconsideration, we are of the view that the motion does not raise any facts or points of law that the Board overlooked or misapprehended in reaching its decision, or any new matters which would warrant reconsideration of the Board's decision of February 24, 1989.

Accordingly, the Department's motion for reconsideration is denied.

Alan G. James, Chairman

Frederick Smith, Jr., Member

George Taft, Member