DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D[redacted] A[redacted] B[redacted]

This is an appeal by D[redacted] A[redacted] B[redacted] from an administrative determination of the Department of State, dated December 5, 1986, that she expatriated herself on June 26, 1986, under the provisions of 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/

For the reasons given below, we conclude that appellant has rebutted the statutory presumption that she renounced her citizenship voluntarily. Since she has succeeded in doing so, there can be no expatriation. Accordingly, the Department's determination of loss of appellant's nationality is reversed.

I

D[redacted] A[redacted] B[redacted] acquired the nationality of the [redacted] virtue of her birth at [redacted] on [redacted]. She lived in the Uni[redacted]l December 1983 when she went to Israel where she joined the Hebrew Israelite Community ("Black Hebrews") in their sehtlement at Dimona. She married a member of the Community. Reportedly they have one child.

1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads as follows:

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationalihy by voluntarily performing any of the following acts with the intention of relinquishing United States nationality -
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> . . .
>
> (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;. ..

Appellant stated in her initial submission that she was told to renounce her United States citizenship (presumably by someone in authority in the Community) "because it was said to be best for my future life in Israel. My husband was also a great influence in my decision."

The record shows that on June 26, 1986 appellant went to the United States Embassy at Tel Aviv where she renounced her United States citizenship. She stated in her reply to the Department's brief that she went to the Embassy with three other members of the Community in the company of one of its officials. Her reply continued: "The appointment at the Embassy that day was prearranged and we were coached by the officials before we even left Dimona." Before making the oath of renunciation, appellant was asked to read and did read a statement of understanding, and having done so, affirmed that she had read it and understood its contents. In the statement appellant declared that she was voluntarily exercising her right to renounce her nationality, "without any force, compulsion or undue influence;" that having renounced, she would become an alien with respect to the United States; and that the extremely serious and irrevocable nature of renunciation had been explained to her by the consular officer, and that she understood the consequences.

Appellant also executed an affidavit which the Department has developed for use in the cases of formal renunciation of nationality by Black Hebrews. 2/ The affidavit posed a number of questions to the prospective renunciant. The first question read: "Have you retained an attorney to represent you in this matter of renunciation? If not, why not? Do you want additional time to consult with an attorney, friends or family advisors?" To each part of that question appellant answered "no, I have not, I have no need for one. **No** I do not need any additional time to seek consul /sic/." The second question read: "Is your decision to renounce based: (a) on the fact that the GOI /Government of Israel/ is considering deporting you?; (b) on your present

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2/ In 1973 a number of Black Hebrews indicated **to** the Embassy that they wished to renounce their United States nationality. The Department accordingly sent instructions on September 26, 1973 to the Embassy to govern the processing of formal renunciation by Black Hebrews. The instructions read in pertinent part as follows:

> In view of the circumstances involved, Embassy must make certain that renunciation be volun-

financial condition?; (c) on personal or family problems and/or living conditions. (d) on influence, force and/or coercion that is being brought upon you by any person or persons?" Appellant answered "no" to all four parts of the second question.

Appellant then made the oath of renunciation, swearing, rather than affirming as she did in the case of the statement of understanding and the special affidavit, that she absolutely and entirely renounced her United States nationality, "together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining."

After the proceedings were concluded, the consular officer executed a certificate of loss of nationality (CLN) in appellant's name, as prescribed by law. 3/ The certificate

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2/ (Cont'd.)

> tary and not performed under duress, coercion or influence. Request Black Hebrews who wish to renounce to answer following questions in supplemental affidavit:
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> ...

(There followed the questions summarized in the text above.)

> If Consul believes that the renunciant may have any reservations, do not repeat do not administer the oath of renunciation, but send to the Department for decision all documents and a memorandum of conversation in the event of refusal to sign affidavits.
>
> If no reservations are apparent, administer the oath of renunciation and send all documents to the Department.

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

recited that appellant acquired the nationality of the United States by virtue of her birth therein; that she made a formal renunciation of United States nationality; and thereby expatriated herself under the provisions of section 349(a)(5) of the Immigration and Nationality Act. The Embassy forwarded the certificate and supporting documents to the Department under cover of a memorandum which stated simply:

> Enclosed for the Department's approval is a Certificate of Loss of Nationality which was executed by the Embassy in the case of Ms. D[redacted] A[redacted] B[redacted] a Black Hebrew who made a formal renunciation of her U.S. nationality on June 26, 1986.
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> The certificate is accompanied by an Oath of Renunciation, a statement of understanding and an additional Affidavit as requested in reftel.
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> Ms. [redacted] U.S. passport is also enclosed.

The Department approved the certificate on December 5, 1986, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review, pursuant to 22 CFR 7.3(a).

The appeal was entered on January 20, 1989.

II

The time limit on appeal to the Board of Appellate Review is one year after the State Department approves a

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3/ (Cont'd.)

> 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.

CLN. 4/ An appeal filed after that time shall be denied unless—the Board determines for good cause shown that the appeal could not have been taken within the time allowed. 5/ The Department on December 5, 1986 approved the CLN that was executed in this case. The appeal was filed on January 20, 1989, one year and one month after the time allowed for appeal. Since timely filing is mandatory and jurisdictional, United States v. Robinson, 361 U.S. 220 (1961), the issue posed is whether the Board may entertain this appeal. Whether we may do so, turns on whether appellant has shown good cause why she could not appeal within the one-year period.

"Good cause" is a term of art whose meaning is well settled. It means a substantial reason, one that affords a legally sufficient excuse. Black's Law Dictionary, 5th ed. (1979). It is generally accepted that in order to meet the standard of good cause, a litigant must show that failure to file an appeal or brief in timely fashion was the result of some event beyond his immediate control and which to some extent was unforeseeable.

Appellant states that she did not appeal within the time allowed because she was not aware that there was an appeal process until shortly before she filed the appeal. In her reply to the Department's brief, she stated that "my renunciation papers were held by the authorities of the Black Hebrew Comm. past the time limit of the appeal period. How is it that such important documents could be handled so carelessly? To be handed over to someone else without my knowledge or signature?"

4/ Section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), reads as follows:

> A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this Chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval of the Department of the certificate of loss of nationality or a certificate of expatriation.

5/ 22 CFR 7.5(a) provides in pertinent part that:

> An appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time.

Federal regulations prescribe that a person who has been held to have expatriated himself shall be informed in writing at the time the CLN is forwarded to him of the right of appeal to this Board within one year after approval of the CLN. 22 CFR 50.52. Information about the right of appeal, the time limit on appeal and appeal procedures is set forth on the reverse of the CLN.

In this case, the Department sent a copy of the approved CLN to the Embassy to foward to appellant on December 5, 1986. This the Embassy did on February 3, 1987 by sending a registered letter to appellant at the address of the Community in Dimona. There is no indication in the record that appellant received the letter at that time. We have little doubt that the authorities of the Community intercepted the letter and withheld it from appellant until something led her to demand it of them. Intercepting the mail addressed to members is not unusual, as the Embassy at Tel Aviv confirmed in response to an inquiry of the Board in connection with the appeal of another Black Hebrew who claimed that he had not received a CLN from the Embassy until long after it had been sent to him at Dimona.

The Embassy stated:

> Since the Hebrew Israelite members lead a communal life under the authoritative leadership of Ben-Ami Carter, with one central postal address in Dimona, it is most likely that: the mail is intercepted and in certain cases withheld from the addressees. 6/

Federal regulations prescribe that a person who is the subject of a CLN shall be given prompt notice of the right to take an appeal within one year after approval of the CLN. In this case, although notice of the right was promptly sent to appellant, we will accept that she probably did not receive it because of the meddlesome third parties. In cases where an appellant who has made a formal renunciation of United States nationality alleges that he or she never received a copy of the approved CLN and notice of the right of appeal, the Board has often taken the position that even if it could be established that such documents never reached appellant, he or she had a duty, given unambiguous character of the act of formal renunciation and his or her evident awareness that citizenship

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6/ Telegram from the U.S. Embassy, Tel Aviv, to the Department, No. 13577, Sept. **22,** 1989.

has been terminated, to make timely inquiry about possible recourse, and that failure to do so warranted the conclusion that no good cause had been shown why the appeal could not have been timely filed. The circumstances in the instant case are quite different from those in the type of case posited above which usually involved a very substantial delay in taking an appeal, typically 10 years or more. Here, the delay was, beyond reasonable doubt, attributable to a cause beyond appellant's control. She has shown good faith by filing an appeal within a very short time after obtaining access to the documents which she should have been given at least a year earlier. This being so and since the delay is obviously de minimis and not prejudicial to the Department of State, we find that appellant has shown good cause for not filing within the time allowed. The appeal is timely. Accordingly, we proceed to consider the merits of the case.

III

Section 349(a)(5) of the Immigration and Nationality Act provides that a national of the United States shall lose his nationality by voluntarily making a formal renunciation of United States nationality before a consular officer of the United States in the manner prescribed by the Secretary of State with the intention of relinquishing nationality.

The record makes clear that appellant's formal renunciation of United States nationality was accomplished in accordance with law and in the form prescribed by the Secretary of State. Thus, the first issue to be addressed is whether appellant voluntarily made a formal renunciation of her United States nationality.

In law, it is presumed that one who performs a statutory expatriative act does so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was not voluntary. 1/

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

> (b) 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 thah such loss occurred, to establish such claim by a preponderance of the evidence. Any person who

Under the applicable evidentiary rule it is appellant's burden to prove no more than that the existence of the contested fact - her claim that her renunciation was involuntary - is more probable than its non-existence. See McCormick on Evidence, 3rd Ed., section 339. 8/

Appellant maintains that she renounced her United States citizenship against her will. That her renunciation of United States citizenship was not an act of free will. It was done under the pressure of the leadership of the Black Hebrew Communiity.

In her initial submission, appellant formulated her case as follows:

> As a member of the Black Hebrew Community in Israel and also being a woman I have a sort of second class status. When one is in that position you do as you are told. I was told to renounce my citizenship because it was said to be best for my future life in Israel. My husband was also a great influence in my decision.

7/ (Cont'd.)

> 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.

8/ Section 339 reads in part as follows:

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

> On the day that I renounced my citizenship I was with a group of people. Over and over again I was asked was I sure if that was what I wanted to do. I wasn't sure if that was what I wanted at the time but that was the purpose of me going to the Embassy that day. That was my mission so I did it.

She elaborated on the foregoing in her reply to the Department's brief:

> /T/he appointment at the Embassy that day was prearranged and we were coached by the officials before we even left Dimona. Regardless of what I was asked at the Embassy or any explanation given that day, I was compelled to give the answers stated. I only did so because of the threat of reprisals from the Black Hebrew Comm. Also the authorities of the Black Hebrew Comm. kept stressing that deportation which would result in the separation of my family was also a threat. I didn't want to see our family broken up.
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> The renunciation of U.S. citizenship in mass, on the part of the Black Hebrew Community was a political protest. They did not consider each individual member's rights and what was involved....

In judging appellant's claim of duress, we are mindful of several well-established legal principles. "The right of citizenship, being an important civil one, can only be waived as the result of free and intelligent choice." Inouye et al. v. Clark, et al., 73 F. Supp. 1000, 1004 (S.D. Cal. 1947), reversed on procedural grounds, Clark, Atty. Gen. et al. v. Inouye et af., 175 F.2d 740 (9th Cir. 1949). A voluntary act is one "proceeding from one's own choice or full consent unimpelled by another's influence. To determine whether an act is voluntary, the trier of fact must examine all relevant facts and circumstances which might cause the actor to depart from the exercise of free choice and respond to compulsion from others." Kasumi Nakashima v. Acheson, 98 F.Supp. 11, 12 (S.D. Cal. 1951). Similarly, Akio Kuwahara v. Acheson, 96 F.Supp. 38, 43 (S.D. Cal 1951): "The trier of fact must consider all evidence relating to the mental condition of the actor to determine whether his act was 'unimpelled by another's influence.'"

In examining appellant's claim we are also guided by the injunction of Justice Frankfurter in Nishikawa v. Dulles, 365 U.S. 129, 140 (1958) (concurring opinion).

> Where a person who has been declared expatriated contests that declaration on grounds of duress, the evidence in support of this claim must be sympathetically scrutinized. This is so both because of the extreme gravity of being denationalized and because of the subtle, psychologic factors that bear on duress.

The means of interfering with one's freedom of choice is not limited to force or threat of force. Fear of loss of an important right or privilege "can be more coercive than fear of physical violence." Kasumi Nakashima v. Acheson, supra, at 13. In Kasumi Nakashima the court held that the plaintiff, a dual national of the United States and Japan, did not expatriate herself by voting in a political election in Japan.

> It is apparent from her testimony that the real effect of the occupation authorities' campaign and the conversations of her neighbors was to inculcate in her a fear that she would acquire a reputation of uncooperativeness and thereby endanger her opportunity to return to the United States by inviting the wrath of the authorities.

Id.

Similarly, Takano v. Dulles, 116 F.Supp. 307, (D. Hawaii 1953); and Hatsuye Ouye v. Acheson, 91 F.Supp. 129 (D. Hawaii 1950.)

Pressure in the guise of moral persuasion by persons in a position of authority over the actor to perform the act of formal renunciation may raise a serious doubt whether the renunciation was free of the "taint of incompetency." See Tadayasu Abo et al., v. Clark et al., 77 F. Supp. 806 (N.D. Cal. 1948.) There parental pressure by alien parents on citizen children to renounce their United States citizenship in order to prevent family break-up and avoid draft induction was held to render involuntary formal renunciation of United States citizenship. In Tadayasu Abo, the court noted that the parties agreed that a combination of a number of factors led to the execution of the renunciations at the notorious Tule Lake camp, including threats and deplorable camp conditions. What

disagreement there was, the court observed, concerned which factors were primary, and which subordinate, as to the effect and impact upon the plaintiffs. The court was of the view that: "such factors, singly or in combination, cast the taint of incompetency upon any act of renunciation made under their influence by Americans interned without Constitutional sanction, as were plaintiffs." 77 F. Supp. at 808. (Emphasis added.)

The contemporary evidence uearing on the issue of whether appellant renounced her citizenship voluntarily consists of two documents (1) the statement of understanding in which appellant averred that she was acting voluntarily and (2) the supplemental affidavit in which she declared that no influence, force or coercion had been brought upon her. As we have seen, the Embassy, in reporting appellant's renunciation to the Department, did not comment on tne circumstances surrounding it or offer any observations about appellant's demeanor or apparent state of mind. The documents while entitled to substantial evidential value, are not dispositive of the issue of voluntariness; to determine that issue we must scrutinize all the relevant facts and circumstances.

Although there is no direct evidence to confirm appellant's contention that she was ordered by the Community leadership to renounce her citizenship, circumstantial evidence leaves little doubt that she acted in response to the instructions of the Community leadersnip. The Board takes note that since 1973 the Community has directed many members to renounce their citizenship. Approximately 360 have done so since 1973, of which 275 between 1985 and 1988. Those who have appealed loss of their nationality to the Board have given such consistent accounts of the pressure brought upon them as to lend credibility to this appellant's contention. 9/ Nor is there any question that appellant and the others who renounced when she did were escorted to the Embassy by a Community official who listened to the preliminary briefing about renunciation given the renunciants by the local employee of the Embassy. 10/ The presence of the community official, in our opinion, injects an obvious coercive element into the case.

9/ See Matter of M.E.G., decided February 13, 1986; Matter of I.Y.A., June 30, 1988; Matter of M.A.I., June 30, 1983; Matter of S.J.P., June 30, 1989; Matter of L.P.C., July 5, 1989; Matter of T.A.H., January 23, 1990; Matter of M.J.S., February 2, 1990; Matter of V.P.A., Februry 22, 1990; Matter of G.J.P., March 22, 1990; Matter of M.T.B., May 15, 1990, Matter of N.R.S., June 25, 1990; and Matter of A.G.P. June 28, 1990.

10/ See telegram to the Department from the Embassy, No. 14505, October 12, 1988, describing the Embassy's general procedures in such cases:

The backdrop against which appellant renounced her United States citizenship is of paramount relevance to the issue of whether her renunciation probably was or was not a voluntary act. It is not easy to assess precisely how palpable was appellant's fear about the possible consequences if she were to defy the instructions of the Community leaders, but given what is known of the Community's authoritarian character, insistence on obedience and the capacity of its leader Ben Ami Carter to inspire fear, it is not speculative to surmise that appellant's concerns were genuine. Note the following report the Embassy made to the Department in 1988 in Matter of M.J.S., (Note 9 supra)

> Though there is little doubt that Mr. S (who renounced his citizenship in December 1986) was interviewed separately and privately (out of the presence of the other renunciants and the Community escort) at the actual taking of the oath of renunciation, the dominating influence of the leader Ben Ami Carter is well documented. Carter's charismatic flair may be waning but his authority and influence over the Black Hebrew Community remains.

A relatively young woman (she was 27 years old in 1986), with a child and a husband who apparently did not kry to discourage her from renouncing (he renounced his citizenship the month before she did), appellant plainly was in a position of weakness relative to the Community. "Feebleness on one side and overpowering strengkh on the obher imply duress. Yuichi Inouye v. Clark, 73 F. Supp. at 1003.

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10 (Cont'd.)

> One of Mr. Ben Ami Carter's [Community leader] 'Lieutenants' has escorted prospective renunciants (not exceeding four persons at one time) to the Embassy. He has remained with them in the CITSVCS interior waiting room until every one is interviewed separately, and has then escorted them out of the Embassy after the renunciation procedure is over. He is never present during the renunciation procedure.

Examination of all the relevant facts and circumstances leaves us in doubt whether appellant renounced United States nationality as a result of free and intelligent choice. Rather, we consider that her renunciation was tainted; it resulted from the compulsion of others. As such it cannot be considered voluntary.

We thus conclude that appellant has rebutted the presumption that she renounced her United States citizenship voluntarily. Accordingly, since she has succeeded in proving that her act was not voluntary, there can be no expatriation. Vance v. Terrazas, 444 U.S. 252, 270 (1980).

IV

The Department's determination that appellant expatriated herself is hereby reversed.

Alan G. James, Chairman

Edward G. Misey, Member

Howard Meyers, Member