DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: H[redacted] H[redacted]

This case is before the Board of Appellate Review on the appeal of H[redacted] H[redacted] from an administrative determination of the Department of State that he expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Korea upon his own application. 1

For the reasons given below, we conclude that appellant voluntarily reacquired his birthright Korean citizenship with the intention of relinquishing the United States nationality which he acquired by virtue of naturalization. Accordingly, the Board affirms the Department's decision that appellant expatriated himself.

I

Appellant H[redacted] H[redacted] was born in [redacted] on [redacted] of Korean citizen parents, and thus acquired Korean citizenship. From 1944 to 1968 he lived and studied in Korea, obtaining B.A. and M.A. (physics) degrees. He moved to the United States in 1968 and studied at the University of Connecticut which awarded him a Ph.D. (mechanical engineering) in 1970. Thereafter he was employed by Fairchild Space Company of Maryland where he worked until 1978 when he was engaged by MRJ, Inc. of Virginia, a space consultancy firm.

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

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality --
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> (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; ...

Appellant was naturalized as a United States citizen in 1977, as were his wife and two children; a third child is a native-born United States citizen. As a consequence of naturalization, he lost his Korean nationality.

Late in 1983, the Korean Ministry of Science and Technology offered appellant the presidency of the newly established Korean Aerospace Research Institute (KARI). He took up the position in January 1990. 2 Appellant's family continued to live in the United States.

"During the first six months of my service as the president Of the Korea Aerospace Reasearch Institute (KARI)," appellant stated to the Board, "I was requested on several occasions by the Korea Ministry of Science and Technology to apply for Reinstatement of Korean citizenship. Because of my family situation in the U.S., I refused their request each time." He amplified the foregoing by stating that in March 1990 he was appointed a standing member of the Korea Aerospace Industry Promotion Committtee (KAIPC). A standing memoer, he explained, is required to be a Korean citizen.

> ...and I could not attend the meeting of the KAIPC because I was a U.S. citizen at the time. The president of the Korea Institute of Metals and Machinery (KIMM), which is the head organization of KARI, reported the problem of my U.S. citizenship to the Korea Ministry of Science and Technology (KMST) and I was requested to make application for Korean naturalization. My refusal Drought to the attention of some KARI employees. They complained of my not attending KAIPC meeting and claimed that my U.S. citizenship was not the best interest of KARI. In May 1990 I received an ultimatum from the president of KIMM either I apply for the Korean naturalization or resign the position of president of KARI.

In June 1990, appellant applied to the Minister of Justice for reinstatment of his birthright citizenship. The Minister granted appellant's request for reinstatement, effective September 18, 1990, with the proviso that within six

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2. Appellant attributed his appointment to feasibility studies he had directed in 1984 and 1989 for Korean domestic broadcasting and communications satellite programs. He states that he also had discussed in the Korean media the importance of research and development for space science and technology in Korea.

months from the date of reinstatement he relinquish his United States citizenship and submit proof thereof to the Minister.

Appellant visited the United States Embassy at Seoul in November 1990 to effect relinquishment of his United States nationality. 3 He was interviewd by a consular officer, and as requested, executed a form titled "Information to Determine United States Citizenship" in which he signed the following statement:

STATEMENT OF VOLUNTARY RELINQUISHMENT OF U.S. NATIONALITY

I, H[redacted] H[redacted], performed the act of expatriation indicated in item 7a /was naturalized as a citizen of a foreign-state7 voluntarily and with the intention of relin-quishing my U.S. nationality.

He also executed a sworn statement which reads as follows:

I, H[redacted] H[redacted], born on [redacted] take a [redacted] (KTA) which requires the citizen- the Republic of Korea by regulation of KTA. Therefore, I denounce my citizenship of the United States of America, voluntarily to become a Korean citizenship /sie7 and to take this position.

Following the interview and appellant's execution of the aforesaid papers, the consular officer who processed the case executed a certificate of loss of nationality (CLN) in appellant's name, as required by law. 4 Therein the officer certified that appellant acquired United States citizenship by virtue of naturalization; that he acquired the nationality of

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3. It appears that prior to visiting the United States Embassy appellant had resigned as president of KARI and accepted a position as executive vice president of the Satellite Business Group of the Korean Telecommunications Authority. The latter position also required that the incumbent hold Korean citizenship.

4. Section 358 of the INA, 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

Korea by voluntarily regaining the nationality of the Republic of Korea on September 18, 1990; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the INA. The Department approved the CLN on January 31, 1991, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review. Appellant noted a timely appeal in December 1991. The Board heard oral argument on March 26, 1992 at which appellant appeared pro se.

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Section 349(a)(1) of the INA provides that a citizen shall lose his citizenship by obtaining naturalization in a foreign state voluntarily with the intention of relinquishing his United States citizenship. There is no dispute that by reacquiring his birthright Korean citizenship appellant obtained naturalization within the meaning of section 349(a)(1) of the INA.

We address first the issue of whether appellant acted voluntarily when he applied for and obtained the citizenship of Korea. Section 349(b) of the Act prescribes a legal presumption that one who performs a statutory expatriating act does so voluntarily, but the actor may rebut the presumption upon a showing by a preponderance of the evidence that he did not voluntarily. 5

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4. (Cont'd.)

> 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.

5. Section 349(b), INA, 8 U.S.C. 1481(b), provides:

> (b) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment

Appellant maintains that he performed the expatriative act under duress. He had been given an "ultimatum" by the Minister of Science and Technology, he asserted, to apply for Korean citizenship or resign as president of KARI. "I was in my 50s, my ties with the U.S. aerospace industry had been severed, and I had family obligations," appellant stated at the hearing. 6 He therefore believed he had no viable alternative, no choice but to comply with the Minister's order.

Appellant indicates that he was reluctant to relinquish his United States citizenship. After he reacquired Korean citizenship, he began to search for a suitable position which would not entail forfeiture of his United States citizenship. "I didn't relinquish my U.S. citizenship until November, to make sure - I don't want to relinquish my U.S. citizenship, so I waited as much as I can and see." 7

He stated that he had talked to America companies doing business in Korea about a position, but "they think I would be extremely expensive for them, because they have to support housing and all that kind of stuff - usually higher than Korean citizen living in Korea." 8 As to finding employment in the United States, appellant said he did not make any special

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5. (Cont'd).

> 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. 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.

6. Transcript of Hearing in the Matter of Ha[redacted], March 26, 1992 (hereafter referred to as "TR), 9.

7. TR 36.

8. TR 35.

applications, but noted his old job (at MRJ, Inc.) was not available, and that job opportunities in the United States were not easy to find. However, he conceded: "Yes, if I came back here /to the United States/ and I spent some time, maybe quite possibly as U.S. citizen I find another job as consultant possibly,..."9 With respect to positions in Korean industry, appellant stated he "could not find any other job in Korea in order to do what I came for." 10

To prove that he acted under duress, appellant must establish that he did not act of his own free will; that he was under pressure from external sources beyond his control to do an act he would not otherwise have done. For duress connotes absence of opportunity to make a personal choice. Jolley v. INS, 441 F2d 1245 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971). The evidence offered by appellant falls short of an effective rebuttal to the presumption of voluntariness.

He asserts that he had no alternative to reacquiring Korean citizenship and thus forfeiting his United States citizenship. His own testimony repudiates that assertion. He admitted he did not make a diligent effort to explore job opportunities in the United States after he was informed that he would have to reacquire Korean citizenship if he wished to remain involved in Korean aerospace activity. Nor does it appear that he pursued job opportunities with American companies in Korea vigorously. Plainly, the overriding consideration in appellant's mind was to remain involved in Korean aerospace efforts and so accomplish his dream of helping Korea enter the space age. He also evidently hoped to be able to do so without losing his American citizenship. Thus, he created a situation where he had to make a choice: perform an expatriative act in order to pursue a lifelong ambition, or find alternative employment and preserve his United States citizenship. He chose the former course of action because he wished to see to completion of a task he had set for himself. While the decision appellant faced was possibly painful (given his conflicting loyalties and interests), it nonetheless was

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9. TR 38.

10. Id.

"the product; of personal choice and therefore voluntary. ll Jolley v. INS, 441 F.2d at 1250. Indeed, as we have seen, appellant expressly acknowledged and signed statements that he relinquished his United States citizenship voluntarily. **12**

Since appellant freely and purposefully selected one course of action over another, reacquisition of his Korean citizneship was voluntary.

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11. There is no doubt that appellant faced a genuine choice. He did not have to comply with the Korean law, rule or regulation prescribing that one who reacquires Korean citizenship shall relinquish any foreign nationality, unless, of course, he wished to gain career benefits and satisfaction. Moreover, since the stipulation that one relinquish any other nationality in order to work in Korean governmental or related activities is a condition duly imposed by a sovereign state, it cannot be considered legal duress.

12. At the hearing appellant explained why he indicated in hi5 statement that he had acted voluntarily.

> Before writing a separate statement I received an instruction from the secretary of the U.S. Consular Office in Seoul, that I must include the words, 'voluntary denounce the U.S. nationality,' otherwise my application would not be approved from the State Department. So I wrote the word 'voluntary' in my statement even though I was not really voluntary and did not have intention to relinquish U.S. nationality at the time. All I wanted was to get the job utilizing my knowledge and skill in Korea Aerospace Industry and accomplish my lifelong dream and return the indebtedness of my **20** years education in Korea by making some contributions to the Korean Aerospace programs. TR 8-9.

That **a** consular officer may have suggested to appellant that he acknowledge he acted voluntarily does not on the facts make his act any less voluntary. Note that he also signed a statement of voluntary relinquishment of citizenship in the form "Information to Determine U.S. Citizenship." It is fair to inferthat appellant wished to ensure that the Department of State would decide that he had expatriated himself in order that he might retain Korean citizenship and continue his work in Korean space enterprises.

Nor do we find that appellant's act was less than voluntary because he allegedly did not know before he returned

III

The other issue for the Board to decide is whether appellant intended to relinquish his United States citizenship when he reacquired Korean citizenship.

Unlike with the presumption of voluntariness, there is no presumption that appellant intended to relinquish his United States citizenship. Intent is an issue the government must prove by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 252, 267 (1980). It may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The intent to be proved is the party's intent at the time the expatriative act was done, in this case when appellant reacquired Korean citizenship. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The Department of State submits that there is abundant evidence that appellant intended to relinquish his United States citizenship. It relies primarily on the two statements he signed at the United States Embassy in November 1990 in which he attested that he voluntarily relinquished/"denounced" his American citizenship. Moreover, the Department points out that he has presented no evidence to negate or counterbalance the strong evidence that his purpose was to relinquish his United States citizenship. 13

= The expatriating acts specified in the statute are not the equivalent of or conclusive evidence of a citizen's intent

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12. (Cont'd).

to Korea and assumed the presidency of KARI that he would be required to reacquire Korean citizenship. He knew he had to be a United States citizen to work in a firm with U.S. government aerospace contracts. He should have assumed he might have to hold Korean citizenship in order to work in the Korean program; at least he had a responsibility to inform himself of such matters before going to Korea.

13. The Department of State evidently did not consider that the instant case comes within the purview of the Department's new (April 1990) evidentiary standard to adjudicate putative loss of nationality cases. Under that standard, the Department presumes that one who obtains naturalization in a foreign state (or performs certain other statutory expatriative acts) intends to retain, not relinquish, citizenship. The presumption is considered inapplicable, however, where a citizen expressly indicates at the time of naturalization an intention to relinquish citizenship.

to relinquish citizenship, Vance v. Terrazas, 444 U.S. at 261. However, any one of those acts "may be highly persuasive evidence in the particular case of a purpose to abandon citizenship." Id. The voluntary action of this appellant in seeking restoration of his Korean citizenship thus strongly suggests an intention to divest himself of United States citizenship. And there are other factors adding weight to that highly persuasive evidence.

Two months after he was granted Korean citizenship, he voluntarily went to the United States Embassy in November 1990 for the express purpose of effectively divesting himself of United States citizenship so that he might continue to work in Korean aerospace endeavors. At the Embassy, he signed a statement he had drafted in which he noted that the Korean Telecommnications Authority required that he hold Korean citizenship and "/t/herefore, I denounce my citizenship of the United States,..." He also signed a statement of voluntary relinquishment of United States citizenship in the form "Information to Determine United States citizenship.'

In brief, he did all he could do (short of formal renunciation) to persuade the Department of State that he wished to surrender United States citizenship so as to be able to prove to the Ministry of Justice that he had complied with the proviso to retain his newly reacquired Korean citizenship.

Appellant stated at the hearing that "I really did not want to relinquish my U.S. citizenship voluntarily," [14] thus suggesting that although his words or overt conduct might indicate an intent to relinquish his United States citizenship, subjectively he never willed its loss. That, however, is not the standard to be applied, as the court said in Kahane v. Baker, Memorandum Op., Civil Action 88-3093 (D.D.C. 1991)

> Indeed, application of a subjective intent standard would mean intent could never be found. Instead, the proper focus to determine intent is to examine whether plaintiff exercised a 'conscious purpose.' If so then the requisite intent for expatriation purposes has been demonstrated. Particu-

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13. (Cont'd).

In the Board's view, the Department correctly determined that the presumption to retain citizenship was not applicable to this appellant's case.

14. TR 9.

larly illustrative of this point is the Ninth Circuit's Richard's case. /Richard v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985/ In Richards, the plaintiff renounced his United States citizenship in order to obtain employment with the Boy Scouts of Canada. The plaintiff argued that he did not intend to renounce his United States citizenship because he did not have a 'principled, abstract desire to sever allegiance to the United States.' The Court flatly rejected the subjective intent test proposed by the plaintiff:

> We cannot accept a test under which the right to expatriation can be exercised effectively only if exercised eagerly. We know of no other context in which the law refuses to give effect to a decision made freely and knowingly simply because it was also made reluctantly. Whenever a citizen has freely and knowingly chosen to renounce his United States citizenship, his desire to retain his citizenship has been outweighed by his reasons for performing an act inconsistent with that citizenship. If a citizen makes that choice and carries it out, the choice must be given effect.

752 F.2d at 1421-22 (emphasis supplied).

Memorandum Opinion at 23-24.

In the case before the Board, appellant acted with a conscious purpose - to forfeit United States citizenship so that he might retain his reacquired Korean citizenship and thus be able to pursue a cherished career goal.

We perceive no factors in the case which cast reasonable doubt on the inescapable conclusion that appellant's will and purpose was to divest himself of his United States citizenship. Furthermore, it is evident that appellant acted knowingly an intelligently when he reacquired Korean citizenship and initiated action to accomplish loss of his United States citizenship. As the consular officer who handled his case at the Embassy in November 1990 later attested: "Mr. H[redacted] H[redacted] at the time of his interview indicated no hesitation to proceeding with the formality of loss of his citizenship." (Statement of March 17, 1992.)

At the moment appellant recovered his Korean nationality all the evidence shows it was his will and purpose to divest himself of his United States nationality. The Department has carried its burden of proof.

IV

Upon consideration of the foregoing, it is our conclusion that the Department's determination that appellant expatriated himself by reacquiring his Korean nationality should be and hereby is affirmed.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Frederick Smith, Jr., Member