DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: W.C.C. -- In Loss of Nationality Proceedings

Decided by the Board March 15, 1988

Appellant acquired United States citizenship by birth in the United States in [redacted]. Since her father was a Canadian citizen, she also acquired a right to become a "natural-born" Canadian citizen upon registration of her birth within two years of its occurrence. Appellant grew up and was educated in Canada. In order to avoid the high tuition charged of non-Canadian students at the University of Toronto, appellant was told she would have to give proof of Canadian citizenship. (She had no such proof since her father had not registered her birth within the allowable limitation.) Appellant therefore "late registered" her birth in 1970. She made no oath of allegiance or declaration of renunciation of previous allegiance. In 1984 she obtained documentation as a foreign student to do graduate work at an American university. When she applied for a United States passport a year later her naturalization in Canada came to light. A consular officer executed a certificate of loss of nationality pursuant to section 349(a)(1) of the Immigration and Nationality Act (naturalization in a foreign state) which the Department of State duly approved. A timely appeal was entered.

HELD: Appellant conceded that by registering her own birth she had obtained naturalization in a foreign state. She further conceded that she had acted voluntarily. Accordingly, the sole issue for the Board to determine was whether appellant intended to relinquish her United States nationality when she obtained Canadian citizenship. It was the Board's view that the Department of State had not carried its burden of proof that she had a renunciatory intent.

The principal considerations that led the Board to its conclusion were: Her naturalization was not accompanied by an oath or declaration of renunciation of previous nationality. She had plausible reasons to assume from an early age that she was a Canadian citizen and that in registering her own birth she was simply confirming that fact. She made a credible case that she believed she was a dual national of the United States and Canada, but thought that to perfect her United States citizenship she was required to take some particular steps, including coming to this country to live, something she was not in a position to do for a number of years. Although she documented herself as a foreign student to come to the United States in 1984, that factor could not be considered adverse because the consulate concerned, knowing that she had been born

in the United States, failed to pursue the issue of her citizenship status, but instead documented her as a Canadian citizen.

The Board reversed the Department's holding that appellant expatriated herself.

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This is an appeal from an administrative determination of the Department of State, dated May 7, 1986, that appellant, W C C , expatriated herself on February 5, 1970 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

The sole issue the Board is required to decide is whether the Department of State has proved by a preponderance of the evidence that appellant intended to relinquish her United States nationality when she became a Canadian citizen. For the reasons set forth below, it is our conclusion that the Department has not sustained its burden of proof. We will therefore reverse the Department's determination of loss of appellant's United States nationality.

I

Appellant acquired United States nationality by virtue of birth at Tampa, Florida on December 17, 1948. As her father was a Canadian citizen, she also acquired an inchoate right to become a "natural born" Canadian citizen upon registry of her birth within two years of its occurrence or within such extended

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1/ In 1970 when appellant obtained Canadian citizenship, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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 --
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> (1) obtaining naturalization in a foreign state upon his own application,...

Pub. L. 99-653, 100 Stat. 3655 (Nov. 14, 1986), 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".

period as the competent minister might authorize. 2/ Nine months after her birth, appellant's parents took her to Canada where she grew up and was educated. In 1967 she entered York University, earning her tuition by working and obtaining a government loan. She was not, she has stated, required to submit proof of Canadian citizenship to qualify for the government loan. 3/ In 1970 appellant graduated from York University with a B.A. degree. In the winter before graduation, appellant applied to enter the University of Toronto to obtain a degree in education. She states that that university insisted that she produce documentary evidence that she was a Canadian citizen in order to qualify for the tuition exemption available to Canadian citizens. 4/ She states that the university directed her to the Department of Immigration office in Toronto where on February 5, 1970 she registered her birth abroad to a Canadian citizen father and received a card indicating that

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2/ Section 5(1)(b) of the Canadian Citizenship Act of 1946 provided that:

> 5. (1) A person born after the 31st day of December, 1946, is a natural-born Canadian citizen,
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> (a) if he is born in Canada or on a Canadian ship; or
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> (b) if he is born outside of Canada elsewhere than on a Canadian ship, and
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> (i) his father, or in the case of a child born out of wedlock, his mother, at the time of that person's birth, is a Canadian citizen, and
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> (ii) the fact of his birth is registered, in accordance with the regulations, within two years after its occurrence or within such extended period as the Minister may authorize in special cases.

3/ Transcript of Hearing in the Matter of W C C , the Board of Appellate Review, February 23, 1988 (hereafter referred to as "TR"), p. 10, 11.

4/ TR 13.

she had registered her birth abroad and was a Canadian citizen. 5/ That document was not in the record. There is in the record, however, a copy of a letter to appellant from the Citizenship Registration Branch, Office of the Secretary of State, Sydney, Nova Scotia, dated September 25, 1985. The letter reads in pertinent part as follows:

> I am unable to provide a certified copy of your previous applications as they have been microfiled, however, I can confirm that you were registered as a birth abroad on February 5, 1970 under paragraph 5(1)(b) of the Canadian Citizenship Act. No oath of allegiance was required. 6/

Appellant married a Canadian citizen in 1970. They were divorced in 1981. She is now married to a United States citizen.

Appellant received a B.Ed. degree from the University of Toronto in 1971 and thereafter held teaching appointments in Canada. During the academic year 1984-1985, appellant was enrolled as a foreign graduate student at Arizona State University which awarded her the degree of Master of Higher and Adult Education.

In December 1985 appellant applied for a United States passport at the United States Consulate General at Calgary. (She had never held one previously.) In connection therewith she completed a form titled "Information for Determining U.S. Citizenship." The fact that appellant had registered as a Canadian citizen in 1970 emerged at this time. In January 1986, the Consulate General wrote to appellant to inform her that she might have lost her United States citizenship, and to request that she submit information with respect to the issue of whether she intended to relinquish United States nationality "when you became a naturalized citizen of Canada." She was invited to discuss her case with a consular officer, and did so on January 30, 1986. The consular officer who interviewed appellant later reported to the Department that:

5/ TR 14.

6/ In 1978 appellant obtained a second certificate of Canadian citizenship after her wallet had been stolen. No oath of allegiance was required of appellant on that occasion.

> During the interview Ms. C informed us that she had used a Canadian passport to travel to Europe. She stated she 'was completely unaware that registering my birth abroad would jeopardize my rights to American citizenship. Since my father was a Canadian, I had rights to being a Canadian. Also, since I didn't have to take an Oath of Allegiance to Canada, I never felt I had given up my U.S. citizenship status.' In a contrasting statement however, Ms. C then went on to state 'I acquired a student visa to attend Arizona State University to get my Masters of Education from August 1984 to May 1985.' When asked why, if she considered herself a US citizen, she had applied for a student visa to attend university in the United States, she stated that at the time she was unaware of her status.

The consular officer believed that appellant was aware in 1970 that she would jeopardize her citizenship and that when she obtained a student visa to attend Arizona State University she no longer considered herself a United States citizen. His report concluded.

> ...It seems, therefore, that a conscious choice was made regarding her citizenship when she was over twenty-one. Her actions since her naturalization have been those of a citizen of Canada.
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> It appears that Ms. C intended to relinquish her United States citizenship in 1970 and that now, since the change in her lifestyle after her divorce in 1981, she has had second thoughts--preferring to move to the United States to reside and be close to her new friends.

The Consulate General on April 17, 1986, executed a certificate of loss of nationality as required by law. 7/

7/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

The Department approved the certificate on May 7, 1986, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. Appellant entered an appeal pro se on May 5, 1987, and later retained counsel. A full evidentiary hearing was held before the Board on February 23, 1988.

II

The Immigration and Nationality Act provides that a national of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state with the intention of relinquishing United States nationality. 8/

There is no dispute that appellant's act in 1970 of registering her birth abroad to a Canadian father constituted naturalization within the meaning of the Immigration and Nationality Act. 9/

7/ Cont'd.

> 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.

8/ Section 349(a)(1) of the INA. Supra note 1.

9/ Section 101(a)(23) of the INA, 8 U.S.C. 11101, defines "naturalization" as "the conferring of nationality of a state upon a person after birth, by any means whatsoever."

Appellant has expressly conceded, through counsel, that she acted voluntarily in registering her birth as a Canadian citizen. 10/ We are therefore called upon to decide only one issue: whether, as it must do, the Department of State has proved by a preponderance of the evidence that appellant intended to relinquish her United States citizenship when she became a Canadian citizen. Vance v. Terrazas, 444 U.S. 252 (1980). Under the statute, 11/ the burden is placed on the Government to prove an intent to relinquish citizenship; this it must do 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 performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The Department contends that there is little evidence of appellant's state of mind in 1970 except the fact that she took a step that constituted naturalization in a foreign state. The Department therefore relies on what it calls "negative evidence" to demonstrate that it was appellant's intent in 1970 to relinquish her United States nationality. 12/ Appellant never made the slightest move, stated counsel for the Department at the hearing, to inquire regarding her United States citizenship status. 13/ Years after she obtained Canadian citizenship she applied for a visa to enter the country where she was born, knowing perhaps that she was a United States citizen. 14/ She is a person who lived as a Canadian and

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10/ TR 43.

11/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481, provides in pertinent part that:

> 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.

12/ TR 40.

13/ TR 41.

14/ Id.

registered as a Canadian (in 1970) when necessary and took no steps to preserve her United States citizenship. 15/ The Department submitted that the proper inference to be drawn from the foregoing evidence is that appellant intended in 1970 to abandon her United States nationality.

As the Department has noted, the evidence of appellant's state of mind in 1970 dating from that time is scanty, consisting solely of the fact that she registered her birth abroad to a Canadian father and was granted a certificate of Canadian citizenship. Obtaining naturalization in a foreign state, like the other enumerated statutory expatriating acts, may be persuasive evidence of an intent to relinquish citizenship, but it is no more than that; it is not conclusive on the issue of intent. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J. concurring.)

The direct evidence in this case thus is plainly insufficient to support a finding that appellant intended to relinquish her United States citizenship when she became a Canadian citizen. Does circumstantial evidence, however, establish the requisite intent, as the Department contends? It is settled that a party's specific intent to relinquish citizenship rarely will be established by direct evidence, but circumstantial evidence may establish the requisite intent. Terrazas v. Haig, supra at 288. We must therefore scrutinize the circumstantial evidence which the Department presents to determine whether it is so expressive of a design to surrender United States citizenship that one may fairly and comfortably conclude appellant intended in 1970 to relinquish her United States nationality. Put slightly differently, we must make a determination of appellant's probable state of mind a number of years in the past by assessing her words and conduct in the years after naturalization.

Appellant asserts that she did not intend to relinquish her United States nationality in 1970 when she registered her birth abroad to a Canadian citizen father. She had been given no reason to believe prior to 1970 that she was not a Canadian citizen. Her parents had told her she was one. She matriculated at York University as a Canadian citizen and obtained a student loan from the Canadian government apparently on the strength of her claim to be a Canadian citizen; "They do not give loans to foreign students." 16/ So, when the University of Toronto told her that she would have to obtain documentation of her Canadian citizenship, she registered her

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15/ TR 45.

16/ TR 8, 11.

birth abroad to a Canadian citizen father in the belief that she simply "was getting a piece of paper to say what I had been -- and that was Canadian -- because my assumption was that I was always Canadian." 17/ In the circumstances, she submits, she had no cause to think that she was giving up or jeopardizing her United States citizenship, "because there was no oath of allegiance. There was nothing - nothing ever said to me: 'Do you realize you're giving up your American rights.'" 18/

Appellant's position that registering her birth in 1970 should not be regarded as manifesting an intent to relinquish her United States citizenship seems to us to be perfectly plausible. While, as a matter of law that act constituted naturalization in a foreign state, we have no reasonable doubt that appellant considered it simply a routine step to obtain documentation of a well-established fact. Lack of an oath of allegiance in what evidently was a very simple procedure adds weight to appellant's contentions.

Had appellant been genuinely concerned about her United States citizenship, argues the Department, she would have taken some steps to verify and protect that status long before she did so, that is, before she met her future husband and decided she would henceforth like to live in the United States.

We are not persuaded, however, that the fact appellant took no concrete action before 1985 to assert a claim to United States citizenship constitute sufficient evidence that she intended in 1970 to relinquish her United States nationality.

At the hearing appellant testified that her parents had told her she had a right to be a United States citizen. Therefore she assumed that at some time in her life she could live in the United States, but "I would have to go through proper channels." 19/ She conceded, however, that she did not find out what she would have to do "to become American." 20/ For a number of years she was not purportedly in a position to live in the United States. Her roots were in Canada; she did not have the resources or the need to find out more about her American citizenship; nor did she have the credentials to teach

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17/ TR 16.

18/ TR 15.

19/ TR 9.

20/ Id.

in the United States. She acknowledged that the prospect of obtaining a degree in education from Arizona State University and of marriage to a United States citizen changed her perspective. After consulting an attorney in Phoenix in 1985 and being advised that she might have expatriated herself, appellant finally moved to assert a claim to United States citizenship by making application for a United States passport.

Knowing, as she evidently did from an early age, that she was a United Statess citizen as well as a citizen of Canada, appellant would have been prudent to seek official advice about her United States citizenship status before registering her birth as a Canadian, or at least within a reasonable time thereafter. We are unwilling, however, to construe her failure to do so as indicative of a will and purpose in 1970 to abandon United States citizenship. The reasons why she said she did nothing for many years to assert a claim to United States nationality are plausible. Let us not forget that appellant was taken to Canada as an infant, grew up and was educated there. In the circumstances, that she should not have asserted a claim to United States citizenship until fifteen years after legally obtaining Canadian citizenship hardly seems particularly noteworthy.

There remains to be examined the question whether the fact that appellant entered the United States in 1984 and studied at Arizona State University for the academic year 1984-1985 as a foreign student will support an inference that it was appellant's intention in 1970 to relinquish her United States nationality.

Appellant apparently applied to Arizona State University as a Canadian citizen. After the university had accepted appellant as a masters degree candidate, it informed her that she would have to obtain a form from a United States consulate (I-20) to be admitted to the United States and receive another form (I-94) at the border stating that she was permitted to enter and remain in the United States for purposes of study. Appellant wrote to the Consulate General at Calgary to obtain the necessary documentation. She indicated that she had been born in the United States, but did not indicate that she was a United States citizen. "I knew I was a Canadian....And I didn't think I had done anything to say I wasn't American; but again I didn't have a document, and I did not want to get to that border and be turned back." 21/ Continuing, appellant said that for

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21/ TR 18.

the "sake of expediency", because time was short, she had indicated that she was a Canadian citizen. The Board takes note that at no time did appellant conceal from the Consulate General the fact that she had been born in the United States; yet no one in the office said to her that she might have a claim to United States citizenship. Counsel for the Department conceded that this was possibly an error or omission on the part of a consular officer or employee.

A United States citizen who has obtained foreign naturalization and later documents him or herself as a foreign national in order to enter the United States may signal that he or she intended to relinquish United States nationality when the expatriating act was done. In the case before us, however, appellant's purpose in seeking documentation to enter the United States as an alien seems to have been simply to save time and not delay beginning her course of study. Expediency where the right of citizenship is involved is not to be encouraged. Nevertheless, in the circumstances of this case we are reluctant to ascribe much weight to appellant's action, especially when there is reason to believe that the Consulate General at Calgary could have insisted that appellant's apparent claim to United States citizenship be resolved before she was issued foreign student documentation.

At the hearing the Board addressed the following question to counsel for the Department:

> If there were no oath of any kind at the time that Ms. C at age 21 obtained the certificate of Canadian nationality -- and there is no information regarding how she regarded her American citizenship other than what she has testified to -- how does the Department indicate or demonstrate its view of Mrs. C 's intention to renounce, in fact, U.S. citizenship at that time -- which is the time in question? 22/

Counsel responded that there was sufficient "negative evidence" to permit one to infer a renunciatory intent. 23/ As we have pointed out, the "negative evidence" upon which the Department rests its case is too imprecise and open to more than one reasonable interpretation to support a finding that appellant intended to relinquish her United States citizenship.

22/ TR 39, 40.

23/ TR 40.

We must therefore conclude that the Department has not carried its burden of proof.

III

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

Alan G. James, Chairman

Howard Meyers, Member

George Taft, Member