

DEPARTMENT OF STATE
BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J C

This case is before the Board of Appellate Review on the appeal of J C from an administrative determination of the Department of State, dated January 27, 1987, that he expatriated himself on March 13, 1964 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon the application of a parent on September 15, 1959 while under the age of twenty-one and thereafter failing to establish a permanent residence in the United States prior to his twenty-fifth birthday. 1/

1/ In 1964, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read 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, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: Provided, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: And provided further, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a

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After pleadings had been completed, the Department requested that the Board remand the case so that it might vacate the certificate of loss of appellant's nationality. The Board grants the request.

I

Appellant became a United States citizen by birth at [REDACTED], South Carolina on [REDACTED]. He lived in the United States until 1946 and later in Europe. In 1953 he moved with his family to Canada.

Appellant entered college in Vermont in 1956. At age 18, he registered for United States Selective Service with a local board in Vermont, and later was classified 1-A. On September 15, 1959, aged 20 years and 6 months, appellant obtained naturalization in Canada under section 10(5) of the Canadian Citizenship Act of 1946, as amended. Section 10(5) provided that the competent minister might grant a certificate of Canadian citizenship to a minor child of a person to whom a certificate of citizenship had been granted under the Act. Appellant's parents apparently obtained naturalization in Canada before or at the time he did.

1/ Cont'd.

parent or parents, may, within one year from the effective date of this Act, apply for a visa and admission to the United States as a non quota immigrant under the provisions of section 101(a)(27)(E);...

Pub. L. No. 99-653, 100 Stat. 3655 (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".

Pub. L. No. 99-653 also amended paragraph 1 of subsection (a) of section 349 by striking out ", upon an application filed in his behalf by a parent, guardian or duly authorized agent, or through the naturalization of a parent having legal custody of such person" and all that followed through "section 101(a)(27)(E)" and inserting in lieu thereof "or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years".

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Late in 1959 the U.S. Consulate General (Consulate) at Montreal, where appellant was then living, learned that appellant had acquired Canadian citizenship, and accordingly requested confirmation from the Canadian authorities. Appellant executed an affidavit of expatriated person at the Consulate on December 21, 1959 in which he declared that he voluntarily obtained naturalization in Canada "upon my own application." Shortly thereafter the Canadian authorities confirmed that appellant acquired Canadian citizenship. The Canadian statement merely noted, however, that appellant had been granted a certificate of Canadian citizenship; it did not cite the provision of law under which he acquired citizenship. The Consulate was thus led to assume that appellant had obtained naturalization upon his own application, as he had stated in the affidavit of expatriated person.

In January 1960, in compliance with section 358 of the 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 United States nationality by birth therein; that he acquired the nationality of Canada on September 15, 1959 by naturalization upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

^{2/} Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, provides that:

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.

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In February 1961 the Department concluded that it was not the intent of Congress that a minor should have the capacity to expatriate himself by obtaining foreign naturalization upon his own application. Accordingly, the Department did not approve the certificate. The Department also informed the Vermont Selective Service Director that appellant remained a United States citizen. The Selective Service Director had inquired about appellant's citizenship status, having learned that he had become a Canadian citizen.

On March 13, 1964 appellant became 25 years of age. As far as can be ascertained from the record, he had not established a permanent residence in the United States prior to that date.

Appellant was again classified 1-A on November 17, 1965. He had been classified 2-S (deferred because of study) between 1962 and 1965.

On November 22, 1965 appellant wrote from Quebec to the local board in Vermont to state that: "I am no longer a citizen of the U.S.A., having been granted Canadian citizenship on 16 [sic] September 1959. Furthermore, I have voted in two Canadian elections; the general election of 1962...^{3/} and the general election of 8 November 1965...I believe this carries an automatic loss of citizenship. ^{4/} I trust this ends the question of my citizenship status."

The local board responded to appellant on December 14, 1965. It had verified that "you lost your claim to United States citizenship in 1962 when you first voted in a Canadian election." He was informed, however, that he was still a selective service registrant "and you must give the information requested by this local board even though you have lost your United States citizenship status." He was told that his case would be taken up at

^{3/} According to the Canadian Embassy, Washington, D.C., the "Canada Yearbook" records that a general election was held on June 18, 1962.

^{4/} Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), provided that:

349(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --

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an early meeting of the Board for reclassification to 4-C (alien who has departed from the United States). On January 3, 1966 appellant was classified 4-C. He married a Canadian citizen later that year.

On September 20, 1967 the Consulate at Montreal wrote to appellant to inform him that the certificate of loss of nationality it had sent to him by letter dated December 3, 1965, certifying that he expatriated himself under section 349(a)(5) of the Immigration and Nationality Act (voting in a foreign election), was invalid in view of the decision of the Supreme Court in Afroyim v. Rusk, 387 U.S. 253 (1967). (See Note 4, supra). Appellant alleges that neither he nor his parents received the certificate referred to by the Consulate. The Department stipulated that its "records of this certificate and possible associated documents have not been located."

In its letter of September 20, 1967, the Consulate advised appellant that in order to determine whether he had retained his citizenship he should call at the Consulate. Pending a decision on his nationality status, he was cautioned not to perform any of the acts set forth in an enclosed circular listing statutory expatriating acts. There is no indication in the record whether appellant responded to the Consulate's letter, which it appears he received, or visited that office to have his citizenship status determined.

Correspondence exchanged between appellant and the local board in Vermont in the spring of 1969 indicates

4/ Cont'd.

(5) voting in a political election
in a foreign state or participating
in an election or plebiscite to
determine the sovereignty over
foreign territory; or....

On May 29, 1967, in Afroyim v. Rusk, 387 U.S. 253 (1967), the Supreme Court declared a similar provision of the Nationality Act of 1940 (section 401(e), 54 Stat. 1169) unconstitutional. The effect of Afroyim was to invalidate section 349(a)(5) of the Immigration and Nationality Act as well.

Pub. L. No. 95-432, 94 Stat. 1046 (1978) repealed section 349(a)(5) of the Immigration and Nationality Act.

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that the board continued to carry appellant as an alien living outside the United States; obviously he had not informed the board that he had not lost his citizenship because he voted in Canada in 1962.

Seventeen years later, in 1986, appellant applied for a passport at the U.S. Consulate General in Calgary. In his application he acknowledged that he had obtained naturalization in Canada. This time, in confirming that appellant acquired Canadian citizenship, the Canadian authorities specified that he acquired citizenship under section 10(5) of the Canadian Citizenship Act, which provided that a minor might be naturalized upon the petition of a parent who had been naturalized in Canada. (Note 1, supra.) A consular officer executed a certificate of loss of nationality in appellant's name on July 2, 1986, in compliance with law. (Note 3, supra.) Therein he certified that appellant acquired United States nationality by virtue of his birth therein; acquired the nationality of Canada while a minor by naturalization on September 15, 1959; that he failed to establish a permanent residence in the United States by age twenty-five; and thereby expatriated himself on March 13, 1964 under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on January 27, 1987, 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. An appeal was entered through appellant's counsel on January 21, 1988.

II

After pleadings had been completed, the Board asked the Department and counsel for appellant to submit a memorandum of law on certain issues that the Board considered were raised by the rather unusual facts of the case. After summarizing the facts set forth above in this opinion, the Board noted that:

On March 13, 1964 C became 25 years old. Prior to that date he had not entered the United States to establish a permanent residence, as he was required by law to do to preserve his citizenship. On March 13, 1964, however, C was not a United States citizen, having previously lost his citizenship by voting in Canada, as the Department later decided.

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It would appear therefore that he could not have lost citizenship on March 13, 1964.

On May 29, 1967 the Supreme Court decided Afroyim v. Rusk, holding unconstitutional the statutory provisions that prescribed expatriation by voting in a foreign political election. The effect of Afroyim was automatically to render null and void all prior determinations of loss of nationality made under the statutory provisions for loss of nationality by voting in a foreign election. Thus, C's expatriation for voting in a Canadian political election in 1962 was a nullity.

The Board asked the parties to address the following issues:

Beyond rendering null and void C's loss of citizenship for voting in Canada in 1962, what legal consequences did Afroyim have for C's citizenship status? Did Afroyim, for example, retroactively make him a citizen of the United States on May 13, 1964 and thus, nunc pro tunc, result in his expatriation because he had not prior to that date established a permanent residence in the United States? Or should Afroyim be given less far-reaching effect? That is to say, while accepting that Afroyim rendered null and void C's loss of citizenship for voting in Canada, might it be asserted that Afroyim did not and could not erase the fact that between 1962 and 1967 C was not a U.S. citizen, and, therefore, lacking that status on March 13, 1964 could not have expatriated himself by failing to enter the United States to establish

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a permanent residence prior to his 25th birthday?

The Department responded to the Board's request by memorandum dated January 9, 1989. 5/ Having reviewed the facts in the case, the Department stated it concluded that it could not carry its burden of proof that appellant intended to relinquish his United States nationality when he failed to establish a permanent residence in the United States prior to his 25th birthday on March 13, 1964. 6/ The Department therefore requested that the Board remand the case so that it might vacate the certificate of loss of appellant's nationality (CLN).

The Department deemed the dispositive issue in the case to be "whether, as a matter of law, Mr. C can be shown to have formed an intent to relinquish U.S. citizenship when he remained outside the U.S. thus failing to establish a residence here before his 25th birthday." The Department noted that appellant was not a United States citizen on March 13, 1964, since he had expatriated himself in June 1962 by voting in a political election in Canada. The certificate of loss of nationality that was approved in appellant's name for voting in a foreign political election was rendered null and void, however, by the decision of the Supreme Court in Afroyim v. Rusk, supra. "[A]fter a CLN is cancelled for whatever reason," the Department stated,

..., to the extent possible, on equitable grounds, the cancellation is considered nunc pro tunc as well, so that, for example, children born between the performance of the expatriating act and the cancellation of a CLN are documented as U.S. citizens as of the date of birth

5/ Counsel for appellant also submitted a memorandum responding to the Board's request. Given our disposition of the case, there is no need to summarize counsel's analysis of the issues, however.

6/ In loss of nationality proceedings, the government bears the burden of proving by a preponderance of the evidence that the citizen claimant intended to relinquish his United States nationality when he or she performed a statutory expatriating act. Section 349(c), Immigration and Nationality Act, 8 U.S.C. 1481(c); Vance v. Terrazas, 444 U.S. 252 (1980).

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if they otherwise qualify. See Rocha v. INS, 450 F.2d 946 (1st Cir. 1971).

While implying that the effect of Afroyim was to wipe the slate clean and restore appellant to United States citizenship during the period between his voting in a Canadian political election and May 31, 1969, the date of the Supreme Court's decision in Afroyim, the Department nevertheless believed,

...given the subjective nature of intent to relinquish 4/, that there must be a link between the expatriating act and relinquishment of citizenship; that proving a nexus between Mr. C's manifest intent not to be considered a U.S. citizen and the fact of his failure to establish a residence in the U.S. would be extremely difficult. Although the Department considered him to be a U.S. citizen until well beyond his 25th birthday, he clearly, though incorrectly, believed himself not to be a U.S. citizen after his naturalization in 1959; he held the same belief after voting in a Canadian election in 1962, which belief was finally confirmed in 1965.

Because the link or relation between the expatriating act and the manifest intent is here tenuous, the Department believes the better view in this case would be to be guided by the individual's contemporaneous belief concerning his citizenship and to hold that no intent to relinquish could be formed during the period when he thought himself not a U.S. citizen.

4/ Richards v. Secretary, 752 F.2d 1413 (1985); U.S. v. Matheson, 532 F.2d 809 (2nd Cir. 1976).

Having thus re-analyzed the case, the Department decided that it could not in the end meet its burden of proof on the issue whether appellant intended to relinquish United States nationality on March 13, 1964

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when he failed to comply with the statutory condition subsequent to retain his nationality.

III

The Board takes no position on the rationale on which the Department bases its request that the case be remanded. Nonetheless, since the Department now believes that the certificate of loss of appellant's nationality should be vacated, the Board considers it proper to accede to the Department's request, perceiving no overriding interest that would warrant denying the request. Accordingly, the case is hereby remanded for further proceedings. 7/

Alan G. James, Chairman

Warren E. Hewitt, Member

7/ Section 7.2(a) of Title 22, Code of Federal Regulations, 22 CFR 7.2(a), provides in part that: "The Board shall take any action it considers necessary and appropriate to the disposition of cases appealed to it."

Dissenting Opinion

For the reasons set forth below, I must dissent from the decision of the majority to grant the January 9, 1989 request of the Department of State to remand this case to the Department in order that it may vacate the Certificate of Loss of Nationality it approved January 27, 1987.

I believe the Department's request is based on a misunderstanding of the burden of proof it bears in this case and a mistaken conclusion that it cannot meet that burden. I further believe that although the majority has stated that it takes no position on the rationale on which the Department bases its request, the Chairman's letter of December 1, 1988, to the Parties, the Department of State's reply thereto and the opinion of the majority might create the impression that the Board is of the opinion that on March 13, 1964, Mr. C was not a U.S. citizen and thus could not form an intent to relinquish U.S. citizenship. To the contrary, I find that the law, and the effect of Afroyim, properly understood, require the conclusion that prior to his twenty-fifth birthday in 1964, C was a U.S. citizen, but in a legal "limbo" with respect to maintenance of his U.S. citizenship, that his intent to divest himself of U.S. citizenship, while not required to be demonstrated by anything other than his failure to establish a residence in the U.S. prior to his twenty-fifth birthday, was manifest, and that by failing to return to the U.S. C confirmed the expatriating effect of his 1959 naturalization as a Canadian.

This case is unusual, in that the sequence of events, changes in the law and administrative oversights by the Department combine to raise questions regarding the effect of Section 349(a)(1) of the Immigration and Naturalization Act (the Act), as it read prior to amendment in 1986, not previously addressed by the Board. Primary among these is the precise status of an individual during the period between taking out citizenship in a foreign country as a minor and his twenty-fifth birthday. In addition, it is necessary to discuss Afroyim both in terms of C's citizenship status in the 1962-1964 period and with respect to the effect of Afroyim's requirement of a finding of intent in cases falling under Section 349(a)(1). And finally, it should be determined whether the performance of an act initially determined to be expatriating but subsequently determined not to be may be considered indicative of a state of mind.

None of these issues has been addressed with any specificity by the majority, due primarily to the majority's agreement to remand the case for the purpose of vacating the CLN, as requested by the Department. While I can appreciate the majority's reluctance to deny the Department's request, given its primary responsibility for dealing with cases of loss of citizenship, I believe that to

acquiesce in the course of action the Department proposes would result in a serious miscarriage of justice. For that reason I would affirm the Department's approval of a Certificate of Loss of Nationality, but remand the case for amendment of the CLN to identify the date of the expatriating act as September 15, 1959, and the effective date of loss of nationality as March 13, 1964.

* * * *

The proviso contained in Section 349(a)(1) of the Act prior to its amendment in 1986, made it clear that the effect upon a minor of being naturalized in a foreign country as a consequence of a parent's naturalization, or upon the application of another, would not be finally determined until the individual's twenty-fifth birthday. Mr. C originally asserted, in his sworn Affidavit of Expatriated Person of December 21, 1959, that his taking out of Canadian citizenship in September of that same year, was upon his own application. On the face of things, therefore, it would have appeared logical to conclude that C did not fall within the proviso, and that since his application was his own, the effect of his expatriating act was immediate. The record clearly indicates that this is what Mr. C expected and desired in 1959. However, the Department at that time, in response to the Consulate's recommendation that a Certificate of Loss of Nationality be issued, informed the Consulate that the legislative intent of the statute was otherwise; that despite the clear statement of Section 349(a)(1) that its proviso applied only to those individuals whose foreign naturalization resulted from the naturalization or application of another, it was the intent of Congress "to continue to enforce the rule laid down by the courts in construing the Act of 1907 that a minor does not have the capacity to expatriate himself by obtaining naturalization in a foreign state of his own application." The Department did not, however, address the applicability of the proviso to a minor making his own application, or make any reference at that time to the effect of a failure by C to establish a residence in the United States prior to his twenty-fifth birthday.

With the expertise that hindsight frequently provides, it is easy to say that the Department should more precisely have described Mr. C's status at the time it disapproved the CLN. Was the effect of the Department's interpretation of the law to put Mr. C on the same footing as a minor whose foreign naturalization was the result of a parent's naturalization or an application made by an agent? It may be assumed so. To conclude otherwise would have created the anomalous situation that a minor taking out foreign citizenship on his own application would be placed in a more favorable situation vis a vis his ability to retain U.S. citizenship

than a minor becoming a foreign citizen by virtue of the action of another. Surely that was not the position maintained by the Department. But apart from the lack of refinement of the Department's legal analysis, what is of more importance here is the position that was conveyed to Mr. C , and the effect that it had on his subsequent behavior.

Mr. C was advised of his citizenship status by his draft board on February 21, 1961. The record does not reveal any contemporaneous correspondence with C by the Department. In its 1961 letter, the Clerk of the draft board informed C that U.S. authorities had determined that C had not lost his U.S. nationality "up to the present time" and that "apparently you will continue to have a dual(sic) citizenship status until such time as you lose one of the nationalities."

It is thus reasonable to assume that upon receiving this letter Mr. C understood that the United States still considered him to be a U.S. citizen (a status that he had made clear in his Affidavit of Expatriated Person he did not intend or want) but that this status was not necessarily permanent. It would also appear reasonable to assume that the Department had not entirely wiped Mr. C 's slate clean, but rather, as evidenced by its reference to the possibility of his future loss of U.S. citizenship, considered him to be on the same footing as a minor who became a foreign national by virtue of parental action. Thus, in 1961, Mr. C was contending to his draft board that he had made application himself to become a Canadian and had no desire to be a U.S. citizen (a clear, albeit not self-fulfilling, expression of intent) and U.S. authorities were implying that he came within the proviso of Section 349(a)(1). The Department has subsequently confirmed that this was its position, for it was on this basis that the CLN here at issue was approved. Two other factors suggest that further consideration of any possible difference in the legal effect of a minor's own application and a naturalization upon application of another be put aside in this case. First, Mr. C now maintains that, his affidavit notwithstanding, he did not make application himself but acquired Canadian citizenship as a consequence of his parents' naturalization, and second, Canadian authorities have now indicated that they consider C 's naturalization to have derived from his parents' action.

That Mr. C had more than a passing familiarity with Section 349 may be inferred from his November 22, 1965, correspondence with his draft board. In that letter, which Mr. C expressed as dispositive of the question of his citizenship status, he advised the draft board that he was not completing the forms they had sent him because he was not a citizen of the United States, having been granted Canadian citizenship on 16(sic) September, 1959. He then

