DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

January 2, 1981

CASE OF: S[redacted] L[redacted] S[redacted]

This is an appeal from an administrative holding of the Department of State that appellant, S[redacted] L[redacted] S[redacted], expatriated herself on March 28, 1969, under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Israel upon her own application. 1/

Appellant, S[redacted] L[redacted] S[redacted], was born in [redacted], [redacted], thus acquiring United States citizenship at birth. She resided in the United States until April 1959, when she emigrated to Israel with her family who became permanent residents of Israel on April 20, 1959. Her parents included appellant, who was then aged 12, in their exercise of an option against acquiring Israeli citizenship with their signing, on April 30, 1959, of the so-called opting-out declaration as provided under section 2(c)(2) of the Israeli Nationality Law. 2/ Ms. S[redacted] completed grades seven and eight of her elementary

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

> "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, ..."

2/ Section 2(c)(2) of Israeli Nationality Law, 1952 provides:

> "This section [re an immigrant becoming an Israel national under the Law of Return, 1950] does not apply--
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> "(2) to a person full of age who, immediately before the day of his immigration or the day of the issue of his immigrant's certificate, is a foreign national and who, on or before such day or within three months thereafter and whilst still a foreign national, de-

(contd)

school education in Israel. Two years after graduation in 1965 from an Israeli high School, Ms. S[redacted] entered Ort Medical Technical College in Israel in 1967 and received a diploma in 1969. She then majored in biology at the Ben Gurion University from 1971 to 1974, when she received a BSC Degree in Biology. From January 1969 through August 1974, Ms. S[redacted] worked in various Israeli hospitals and clinical and medical centers initially as a laboratory trainee and later as a laboratory technician.

Although not an Israeli citizen, appellant was conscripted into and served in the Israeli Army from September 12, 1965 to May 9, 1967, and took an oath of allegiance to Israel in connection with this service. On March 28, 1969, her parents in cancelling their opting-out declaration automatically acquired Israeli citizenship pursuant to Amendment No. 2, section 9(a) of the Israeli Nationality Law. 3/ Appellant, who having

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2/ (contd)

clares that he does not wish to become an Israel national; such a person may, by notice in writing to the Minister of the Interior, waive his right to make a declaration under this clause;"

The effect of this provision is to exempt the declarants from automatically acquiring Israeli nationality under section 2(b)(2) of the Law of Return.

3/ Amendment No. 2, section 9 of the Israeli Nationality Law provides:

(a) Where an inhabitant of Israel was not granted Israel nationality by reason of a declaration made prior to the commencement of this Law under section 2(c)(2) of the principal Law--

(1) he may, during the period between the commencement of this Law and the 31st March 1969, file with the Minister of the Interior a notice to the effect that he is cancelling the declaration;

(2) the Minister of the Interior, or a person authorized by him in that behalf, may, during the said period, cancel the declaration if it is proved to his satisfaction that it was made in error.

(contd)

reached the age of 18, could not be included as a minor in her parents' cancellation under section 9(a) of the Amendment, obtained Israeli citizenship on the same date, March 28, 1969, by virtue of her independent declaration to the Israeli Ministry of Interior pursuant to section 9(d) of Amendment No. 2 of Israeli Nationality Law (see footnote 3).

Following appellant's application for a United States passport at the American Embassy at Tel Aviv on August 12, 1969, the Department concluded on August 29, 1969,that she did

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3/ (contd)

(b) A person whose declaration has been cancelled under sub-section (a) shall, notwithstanding the provisions of the principal Law, become an Israel national by return with effect from the day of the cancellation.

(c) Cancellation of a declaration under sub-section (a) also confers Israel nationality by return upon a minor included in such declaration, provided that on the date of cancellation he was still a minor and an Israel inhabitant; where the declaration of only one parent is cancelled, this sub-section will apply if such parent is entitled to sole custody of the minor or if the other parent has given his written consent.

(d) An Israel resident, who was not granted Israel nationality by reason of a declaration made prior to the commencement of this Law under section 2(c)(3) of the principal Law and who has attained the age of 21 at the date of the commencement of this Law, may, during the period between the commencement of this Law and 31st March 1969, make a declaration under section 2(d) of the principal Law.

Section 2(d) of the principal Law provides:

An Israel inhabitant who has not been granted Israel nationality by reason of a declaration made under subsection (c)(3) may, during the period between his 18th and 21st birthdays, declare that it is his wish to become an Israel national and, from the date of such declaration, shall become an Israel national by return.

(contd)

not expatriate herself under section 349(a)(3) of the Immigration and Nationality Act 4/ by her military service because of the lack of evidence that she intended to relinquish her citizenship by that service. On December 24, 1969, however, the Department concluded that appellant had lost her United States citizenship under section 349(a)(1) of the Immigration and Nationality Act (see footnote 1) by having obtained naturalization in a foreign state upon her own application, and requested the Embassy to prepare a Certificate of Loss of Nationality. The Certificate of Loss of Nationality, prepared by the Embassy on January 23, 1970, was approved by the Department on February 6, 1970. This approved Certificate of Loss of Nationality constitutes the administrative holding from which an appeal lies to the Board of Appellate Review.

On April 18, 1978, appellant's counsel gave notice of appeal to the Board and requested a hearing before the Board which was held on June 24, 1980. Appellant contends that her acquisition of Israeli citizenship was not an expatriating act, and that she did not intend to relinquish her United States citizenship when she acquired Israeli citizenship upon her own application.

3/ (contd)

Subsection (c)(3) provides that section 2 under which every immigrant under the Law of Return, 1950 shall become an Israel national, shall not apply

> (3) to a minor who is a foreign national born outside Israel and whose parents made a declaration under clause (2) and included him therein; the declaration of one parent is sufficient for this purpose if the written consent of the other parent has been attached thereto or if the parent who made the declaration is entitled to sole custody of the minor.

4/ Section 349(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(3), reads:

> 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--
>
> (3) entering, or serving in the armed forces of a foreign state...

II

Section 349(a)(1) of the Immigration and Nationality Act provides that a person who is a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application. There is no dispute that appellant obtained Israeli citizenship.

Appellant's counsel argued in a brief submitted on May 30, 1978, that appellant's initiative under section 9(d) of the Amendment No. 2 of the Israeli Nationality Law (see footnote 3) did not constitute an application for Israeli naturalization and was not, therefore, an expatriative act under United States law. In his brief, counsel for appellant argued the injustice of the Department's determination that appellant committed an expatriative act and thereby lost her United States nationality by proceeding to cancel the effect of her inclusion in her parents' opting-out declaration under section 9(d) of the Amendment No. 2. The injustice, he argued, inhered in the fact that her parents, who could simply revoke their opting-out declaration by proceeding under 9(a) of the Amendment were considered by the Department not to have committed an expatriative act, and to have, therefore, retained their United States nationality. The reason appellant was required to proceed under section 9(d) and make an independent declaration instead of 9(a) of Amendment No. 2, under which her parents proceeded, was because the simple 9(a) act of revoking a previous opting-out declaration did not affect the status of one who had at the time of the revocation reached the age of 18. Section 9(d) provided that a minor who was included in the opting-out declaration of a parent may between the ages of 18 and 21 "declare that he wishes to become an Israeli national and from the day of his declaration he shall be an Israel national by return." (See footnote 3) Appellant's counsel contended that essentially the whole S[redacted] family had gone together to reverse the effects of the parents' original opting-out declaration and that each had the same intention of retaining their United States nationality; but that appellant, by virtue of her age, had to proceed independently which under a peculiarity in Israeli law necessitated her separate declaration. Further, appellant's counsel at the hearing distinguished between the automatic acquisition of Israeli nationality under the Law of Return and Amendment 2 thereof, and the process of naturalization in Israel which would be governed by a separate provision of the law, Article 5. 5/ He stressed that appellant's act was pursuant

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5/ Article 5 of the Israeli Nationality Law provides:

(a) A person of full age, who is not an Israel national, may obtain Israel nationality by naturalization if the following conditions are fulfilled:

(contd)

only to the Law of Return under which Israeli nationals maintained the status of dual citizens and was not an expatriative act in the process of naturalization. (TR. 5-7) 6/

The Board, while sympathetic with the distinctions in Israeli law which appellant's counsel has drawn, is nevertheless concerned only with appellant's acts and the construction of United States law in the light of those acts. Section 349(a)(1) of the Immigration and Nationality Act provides:

5/ (contd)

(1) he is in Israel
(2) he has been in Israel for three years out of the five years preceding the day of the submission of his application;
(3) he is entitled to reside in Israel permanently;
(4) he has settled, or intends to settle, in Israel;
(5) he has some knowledge of the Hebrew language;
(6) he has renounced his prior nationality or proved that he will cease to be a foreign national upon becoming an Israel national.

(b) Where a person has applied for naturalization and the conditions set out in subsection (a) have been fulfilled, the Minister of Interior, if he thinks fit to do so, shall grant him Israel nationality by the issue of a Certificate of Naturalization.

(c) Prior to the grant of nationality, the applicant shall make the following declaration:

I declare that I will be a loyal national of the State of Israel.

(d) Nationality is acquired from the day of declaration.

6/ TR. 5-7 refers to the transcript of the proceedings before the Board of Appellate Review, June 24, 1980, at pages 5-7 thereof.

> ...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... (See footnote 1)

Section 101(a)(23) of the Act defines "naturalization" as the "conferring of nationality of a state upon a person after birth, by any means whatsoever." 7/

The Department has recognized that naturalization in Israel under section 2(b)(2) of the Israeli Nationality Law 8/ is granted by automatic operation of law, and that acquisition of Israeli nationality pursuant thereto is not an expatriative act under section 349(a)(1) since it does not involve an application by the person concerned.

When applying for a passport at the Embassy on August 12, 1969, Ms. S[redacted] signed an affidavit in which she stated that she had applied to the Israeli Ministry of Interior in March 1969 (actually on March 28, 1969), to cancel her parent's declaration opting-out of Israeli nationality on her behalf.

In 1968, the Israeli Nationality Law of 1952 was amended. Under section 9(a)(1) of the Amendment, Nationality (Amendment No. 2) Law, 1968 (see footnote 3) a resident of Israel who had earlier opted out of Israeli citizenship could during a six-months period, revoke his opting out declaration by so informing the Minister of Interior. Under section 9(a)(2) of this same amendment, the Minister of Interior or his authorized designee, was authorized, within the same period, to cancel or void a resident's opting-out declaration if proved to his satisfaction that it had been made "in error." Under section 9(d) of this same Amendment, an Israeli resident who had attained the age of 21 at the date of the commencement of this Law, could, during the same six-months period, make a declaration that it is his wish to become an Israeli national.

Ms. S[redacted], as noted previously in this opinion, proceeded under section 9(d) because she had attained the age of 21 before the effective date of the Amendment and therefore could not be included in her parents' cancellation of their 1959 opting-out declaration.

The Board determined in the case of R - - C - - , decided February 22, 1974, that the procedure followed there, namely, the voiding of the opting-out declaration by the Israeli

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7/ 8 U.S.C. 1481(a)(23).

8/ 2(a) Every immigrant under the Law of Return, 1950 shall become an Israel national.

(contd)

Minister of Interior pursuant to section 9(a)(2) did not constitute an acquisition of naturalization upon one's own application. The Department, in an Operations Memorandum to the Embassy of September 19, 1974, distinguished between the two methods provided for in sections 9(a)(2) and 9(d), respectively, noting "This method of acquisition (that method pursued by Ms. S[redacted] under §9(d))is naturalization upon one's application and does not appear to involve the same process as was employed in [the case of R - - C - -], namely, that the Minister of Interior voided the opting-out declaration under section 9(a)(2) since the declaration was made in error. In fact section 9(d) requires the same sort of declaration to become a citizen that is required in section 2(d) of the main law."

The Board agrees with the distinction made by the Department. We concur with the view that Ms. S[redacted]'s declaration to the Israeli Minister of Interior was an application within the meaning of section 349(a)(1) of the United States Immigration and Nationality Act of 1952 which provides that a person who is a national of the United States shall lose his nationality by "obtaining naturalization in a foreign state upon his own application."

In Ms. S[redacted]'s particular circumstances, having been included in her parents' 1959 opting-out declaration, but excluded by law from their subsequent cancellation, she thereby continued to be a non-national of Israel with her status as a United States citizen unaffected. There was no way in this circumstance that she could have automatically become a national of Israel were it not for her having voluntarily taken the initiative in submitting her declaration to the Israeli Minister of Interior for Israeli nationality as stated in her affidavit. As a result of this declaration, appellant acquired Israeli nationality. This was the avowed purpose of her initiative. The Board regards Ms. S[redacted]'s declaration submitted to the Israeli Minister of Interior that she desired to become an Israeli national as the equivalent of an application for naturalization in a foreign state within the meaning of section 349(a)(1) of the Act.

III

The second and determinative issue is whether Ms. S[redacted] intended to relinquish her United States citizenship at the time she performed the expatriating act.

/ (contd) (b) Nationality by return is granted--

* * * *

(2) to a person coming to Israel as an immigrant after the establishment of the State--with effect from the day of his immigration;

Section 349(c) of the Immigration and Nationality Act provides:

> 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... 9/

In Afroyim v. Rusk, 387 U.S. 253, 268 (1967), the Supreme Court ruled in effect that the commission of a statutory expatriative act was not alone sufficient to deprive a United States citizen of his citizenship; that Congress was without power to take away citizenship by specifying through legislation certain expatriative acts; and that, therefore, citizenship can be lost only through the citizen's voluntary relinquishment of it.

The Supreme Court in Vance v. Terrazas, 444 U.S. -- (No. 78-1143, January 15, 1980), upheld the power of Congress to require "proof of an intentional expatriating act by a preponderance of evidence." (Id., p.) With reference to its holding in Afroyim that loss of citizenship requires the individual's "assent" in addition to his commission of the expatriating act, the Court in Vance stated:

> It is difficult to understand that "assent" to loss of citizenship would mean anything less than an intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proven conduct. (Id. at p.)

Appellant's counsel argues that with respect to appellant's intent, it was identical with that of the other members of her family, who relied on the advice of the Association of Americans and Canadians in Israel that cancelling the opting-out declaration would not result in loss of American citizenship. Counsel further contends in his brief that as long as appellant believed it was necessary to remain in the "opting-out" status in order to preserve her American citizenship she accepted that necessity; but when she believed that she could take advantage of an unique privilege, acquiring Israel citizenship while retaining her American citizenship, she and her parents acted.

9/ 8 U.S.C. 1481(c).

Counsel for the Department attached significance in showing an intent to relinquish her United States citizenship, to the facts that (1) appellant, after being advised by the Embassy in 1965 that her proposed military service would cause her to lose United States citizenship and that the Embassy was prepared to assist her to obtain exemption from such service, appellant nevertheless served in the Israeli Army; (2) in connection with her military service, appellant took an oath of allegiance to Israel, although not an Israeli citizen at that time; and (3) appellant failed to consult the Embassy at the time of her 1969 declaration, as she had done in 1965 with respect to her military service, concerning the effect her proposed action would have regarding her United States citizenship. With respect to this last point, counsel for the Department contended that such failure gave rise to the inference that she was not concerned about retaining her United States citizenship.

The Board notes from the record before it that Ms. S[redacted], after acquiring Israeli citizenship in 1969, in that same year acquired an Israeli passport, voted in an Israeli election, and changed her name from Sandra to SHOSHADA. 10/ While these acts indicate an intention to identify and affiliate with the State of Israel, they are not, even when considered in combination, tantamount to an expression of intention to relinquish her United States citizenship.

Notwithstanding the above arguments of the Department and separate observations by the Board, the Board finds that the record provides no actual expression of Ms. S[redacted]'s intent to relinquish her United States citizenship at the time she acquired Israeli citizenship. Moreover, the Board is unable to draw from the proven conduct reflected in the record, a fair inference of such an intent.

Under section 349(c) of the Immigration and Nationality Act, (see footnote 9) which was upheld by the Supreme Court in Vance v. Terrazas, the Department must show such an intent by the preponderance of the evidence.

Neither Ms. S[redacted]'s service in the Israeli Army in 1965, nor her oath of allegiance to Israel in connection therewith are evidence of an intent to relinquish United States citizenship in 1969, the time of the expatriating act, especially when she and her family were in 1965 covered by her parents' opting-out declaration made for the purpose of preserving their United States citizenship. Her failure to consult the Embassy at the time of her 1969 declaration is not in and of itself conduct from which can be inferred an intent to relinquish her United States citizenship, nor could this fact alone serve to meet

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10/ Passport files "S[redacted], S[redacted] W."

the test of showing such intent by a preponderance of the evidence.

Taking into account the entire record before the Board, we are of the opinion that the Government has not sustained a burden of proof by a preponderance of the evidence that appellant, either by her own words or as a fair inference from her conduct at the time of expatriation, intended to relinquish her United States citizenship.

IV

On consideration of the foregoing and on the basis of the entire record before the Board, we conclude that appellant has not lost her United States citizenship by obtaining naturalization in Israel upon her own application and, accordingly, reverse the Department's administrative holding of February 6, 1970, to that effect.

Julia W. Willis

JULIA W. WILLIS, Chairman

Edward G. Misey

EDWARD G. MISEY, Member

Warren E. Hewitt

WARREN E. HEWITT, Member