September 15, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This case comes before the Board of Appellate Review on the appeal of C[redacted] H[redacted] C[redacted] from an administrative determination of the Department of State, dated August 13, 1987, that she expatriated herself on October 11, 1956 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

After the pleadings had been completed, the Department, at the suggestion of the Board, re-examined the case and concluded that its holding was wrong as a matter of law. Accordingly, the Department requested that the Board remand the case so that the certificate of loss of nationality might be vacated. The Board grants the request for remand.

I

Appellant was born in [redacted], thus acquiring Canadian nationality at birth. She lived in Canada until 1940 when her parents took her to the United States where she resided until 1952. In 1944 she acquired United States nationality by virtue of having been included in the naturalization of her father. She thus automatically lost her Canadian citizenship.

1/ In 1956, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), 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 --
>
> (1) obtaining naturalization in a foreign state upon his own application,...

Pub. L. 99-653, Nov. 14, 1986, 100 Stat. 3655, 3658, amended subsection (a) of section 349 by inserting "voluntarily performing any of tne following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

According to appellant, an officer of the Consulate General at Montreal told her (no date was specified, but it was probably late in 1954 or early in 1955) that she would have to return to the United States immediately to establish residence, since she had been absent for over two years, or she would lose her United States citizensnip. (The reference is to the provisions of former section 352(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1484(a)(1). That section of the Act prescribed that a naturalized United States citizen would lose his nationality if he had a continuous residence for three years in the territory of a foreign state of which he had been a national or in which he was born.) Appellant states that she told the consular officer that she had important obligations in Canada and could not return to the United States. Allegedly at his suggestion, in order not to become stateless, she applied to be naturalized in Canada. Appellant executed an affidavit of expatriated person in November 1956 at the Consulate General. Therein she declared that she voluntarily resided continuously for three years in Canada, such residence having commenced in 1952; that she thereby lost her United States nationality under section 352(a)(1) of the Immigration and Nationality Act; and that she acquired naturalization as a Canadian citizen on October 11, 1956.

Immediately thereafter, a consular officer executed a certificate of loss of nationality in appellant's name, as required by section 358 of the Immigration and Nationality Act. 2/ The certificate recited that appellant acquired

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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.

the nationality of the United States by virtue of having been included in the naturalization of her father; that she resided continuously in Canada, the place of her birth, for three years; and thereby expatriated herself under the provisions of section 352(a)(1) of the Immigration and Nationality Act, such residence having commenced on May 29, 1952, and expatriation being effective on May 29, 1955. The Department approved the certificate on December 7, 1956.

In 1964 the Supreme Court declared section 352 of the Immigration and Nationality Act unconstitutional. Schneider v. Rusk, 377 U.S. 163 (1964). Section 352 was repealed in 1978 by Pub. L. -432, Oct. 10, 1978, 92 Stat. 1046. The record does not show that the Department took any action to vacate the certificate of loss of appellant's nationality pursuant to the Supreme Court's decision in Schneider, or that appellant come forward, in response to widespread publicity given to the Schneider decision, to request that it be vacated.

In 1987 appellant applied to the Consulate General at Toronto for clarification of her citizenship status. After processing her case, a Consular officer executed a certificate of loss of nationality in appellant's name on July 31, 1987, in compliance with the provisions of section 358 of the Immigration and Nationality Act. The officer certified that appellant was born at Montreal, Quebec on September 18, 1930, thus acquiring Canadian nationality at birth; that she resided in the United States from 1940 to 1952; that she acquired the nationality of the United States by virtue of having been included in the naturalization of her father in 1944; that she acquired the nationality of Canada by virtue of her naturalization on October 11, 1956; and that she thereby expatriated herself under the provisions of section 349(a)(1) of tne Immigration and Nationality Act. The Department approved the certificate on August 11, 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. Appellant entered the appeal pro se in November 1987.

The Department filed a brief in July 1988, supporting its 1987 determination of loss of appellant's nationality. Appellant replied thereto in August. After reviewing the appeal, the Board suggested that the Department might wish to re-examine the case. The Department submitted a memorandum on September 6, 1988 which read as follows:

> The Department has reexamined the citizenship file of [redacted]

We have concluded tnat the Certificate of loss of Nationality approved on August 13, 1987 was approved in error and should be cancelled. We move the Board to remand Ms. [redacted] case to the Department for the appropriate action.

As a naturalized United States citizen, Ms. [redacted] was subject to the provisions of Section 352 of the Immigration and Nationality Act when she moved back to Canada in 1952 and took up residence there. Under the provisions of that Act, continuous residence in Canada for three years resulted in loss of U.S. citizenship, in her case on May 29, 1955. The Supreme Court decision in Schneider V. Rusk, 377 U.S. 163, which voided the section and invalidated all decisions made under it, did not occur until 1964. Thus Ms. Clarke was not a U.S. citizen by the operation of Section 352 after May 29, 1955.

Ms. [redacted] naturalized as a citizen of Canada on October 11, 1956, over one year after she was by statute no longer considered a U.S. citizen. (The 1956 Certificate of Loss invalidation in 1964 by the Supreme Court decision attests to 'that status.) Her naturalization could not affect her U.S. citizenship status since she was not at that time a U.S. citizen. It is clear that the Certificate of Loss based upon naturalization in Canada is without effect.

The Board is requested to remand this case for cancellation of the Certificate of Loss.

III

We agree with the Department that the 1987 holding of loss of appellant's nationality was wrong as a matter of law. Accordingly, we hereby grant the Department's request that the case be remanded for the purpose of vacating the certificate of loss of appellant's nationality.

The case is hereby remanded for further proceedings. ?/

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member

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 appropriate and necessary to the disposition of cases appealed to it.