DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P. B. A. - On Motion for Reconsideration

Decided by the Board August 14, 1986

On April 7, 1986 the Board of Appellate Review granted the Department of State's motion for reconsideration of the Board's decision of January 6, 1986 on the appeal of P. B. A.

In the motion, the Department contended that the Board had not taken jurisdiction of the case; had rendered what amounted to an advisory opinion; and had not addressed the issue of the timeliness of the appeal.

Held: By a vote of 2 to 1, the Board modified its original decision and held that the Department's 1969 determination of loss of appellant's nationality was a final determination from which an appeal was properly taken to the Board. In so doing, the Board affirmed its original decision that an appeal was not time-barred, given that appellant probably did not receive notice of loss of his nationality. The Department's determination that appellant expatriated himself being voidable, the Board, for the reasons set forth in its original opinion reversed the Department's 1969 determination that appellant had expatriated himself.

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The Board of Appellate Review on April 7, 1986 granted the Department of State's motion for reconsideration of the Board's January 6, 1986 decision on the appeal of P. B. A.

The Department's motion and appellant's response clearly call for clarification of our conclusion (a) that the Department erred in its issuance of A.'s certificate of loss of nationality based on an oath whose potentially expatriating effect A. could have vitiated any time prior to 1972, and (b) that the appeal was timely because appellant had no notice of the Department's 1969 action until 1983. The Department contends that the Board did not take jurisdiction of the case; that the Board rendered what amounted to an advisory opinion; and that the Board did not address the issue of timeliness. In light of the confusion revealed by these contentions, we believe it important to set forth expressly our views on each of the matters raised by the Department.

In its original decision, the Board concluded that the Department erred in 1969 in approving the certificate of loss of nationality (CLN) that had been executed in A.'s name; that the oath A. swore to Queen Elizabeth the Second upon obtaining naturalization in Canada in 1963 on the petition of his father could not, as the Department held, have been expatriating in 1969 since he had until 1972 (his 25th birthday) to vitiate the potentially expatriating effect of his naturalization; therefore no final determination of loss of A.'s nationality could have been made in 1969 from which an appeal might be taken to the Board; and finally, that although the appeal should be and was dismissed, the Board invited the Department to re-examine the case and take such further action as might appear appropriate.

The applicable federal regulations prescribe that if the Board grants a motion for reconsideration, it shall review the record and upon such further reconsideration, shall affirm, modify or reverse its original decision. Section 7.9 of Title 22, Code of Federal Regulations, 22 CFR 7.9. Having reviewed the record, we modify our original decision by concluding as follows: the Department's 1969 determination of loss of nationality in the case of P. B. A. was a final determination from which an appeal might be taken; A.'s appeal was timely; the Department's determination that A. expatriated himself in 1963 was in error; and finally, that the Department's determination should be reversed.

I

Although the Department's 1969 determination that A. expatriated himself was an erroneous application of the statute to his case, upon reconsideration the Board concludes that in determining A. expatriated himself, the Department was plainly exercising the authority granted to the Secretary of State by statute to determine the nationality of a person not in the United States. 1/ The Department's determination thus was a final decision from which an appeal might be taken. In concluding that the Department's determination was erroneous, the Board should have characterized the Department's action as voidable rather than void.

1/ Section 104(a)(3) of the Immigration and Nationality Act, 8 U.S.C., (a)(3), provides in pertinent part as follows:

(a) The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to

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(3) the determination of nationality of a person not in the United States. He shall establish such regulations; prescribe such forms of reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out such provisions.

II

In its motion for reconsideration the Department correctly noted that, in a departure from its customary practice, the Board did not address specifically the question of the timeliness of the appeal, although implicit in the Board's decision was a finding that the appeal was timely. Similarly, our decision that the Department could not, on the basis of the facts before it in 1969, legally make a determination of expatriation under section 349(a)(2 of the Act 2/ on the basis of an oath taken in the course of a naturalization proceeding of the kind specifically referred to in section 349(a)(1), demonstrated that the Board took jurisdiction. However, the Board appreciates that the Department's uncertainty as to whether the Board took jurisdiction might have been avoided had the Board made its views on the issue of timely filing explicit.

2/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), provides that:

(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 --

...

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or....

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

(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:....

The Board is acutely aware of the importance of timely filing to the integrity of the appellate process. And, as the Department points out, has found numerous cases of the vintage of A.'s time-barred. In every case before it the Board has most carefully scrutinized the facts, especially in light of the revisions in applicable regulations pertaining to the time within which an appeal may be taken and revisions in practices regarding transmitta of CLNs. Never has the Board been confronted with the combination of facts and legal considerations presented in this case.

The threshold question before the Board was whether, in 1969, A. had notice of the Department's decision. Federal regulations in force in 1969 prescribed that an appeal from a determination of loss of nationality might be taken within a reasonable time after the affected person received notice of the Department's holding of loss of nationality (Emphasis added). Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60 (1967-1969). 4/

What constitutes reasonable time depends on a combination of variables. As the court said in Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir. 1981):

> What constitutes "reasonable time" depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. See Lairsey v. Advance Abrasives Co., 542 F. 2d 928, 930-31 (5th Cir. 1976); Security Mutual Casualty Co. v. Century Casualty Co., 621 F. 2d 1062, 1067-68 (10th Cir. 1980).

The record shows that on December 19, 1969 the Department sent a copy of the approved CLN to the Embassy at Ottawa to forward to A. A. contended in his opening brief that he never received the CLN. He explained that by the time the CLN was reportedly sent to him his parents had been divorced and he and they had changed residences; and that even if a CLN had been sent to him at his last recorded address, he did not receive it. He also stated that he had no reason to expect that a certificate would issue "in that he did not think he had taken any steps which would lead to his loss of U.S. citizenship.". If he had received the certificate, he would have appealed immediately, he asserted.

4/ 22 CFR 50.60 provided that: "A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review.

In the course of its initial deliberations, the Board asked the Department to ascertain from the Embassy at Ottawa whether it could be determined if the CLN sent by the Department to the Embassy had in fact been transmitted to A. The Department advised the Board that the Embassy in Ottawa does not hold record dating that far back and now did not even have a card on the A. case. The Department's memorandum to the Board relaying the above response from Embassy Ottawa also stated that "CLNs were not transmitted by certified mail at that time." 5/

In the absence of procedures such as a requirement for personal service or some other means by which to confirm receipt, the Board is unwilling to ascribe to A.'s actual notice of the Department's decision on loss of his nationality. The Department has provided no basis for rejecting A.'s claim that he did not receive the CLN in 1969. We are willing to presum that the Embassy correctly discharged its statutory duty and sent the CLN to A. 6/ Given the circumstances described by appellant, however, we believe it not unreasonable to accept his contention that he did not receive actual notice of the Department's holding of loss of his citizenship. In so concluding, we do no more than follow the injunction of the Supreme Court that in such proceedings the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Nishikawa v. Dulles, 356 U.S. 129, 134 (1958).

The question arises, however, whether A. should be deemed to have had constructive notice of the loss of his citizenship, and if so, whether he should be held to the consequences of failing to use the knowledge that his citizenship was at issue to find out what his appeal rights were and to avail himself of them in timely fashion.

Plainly, A. knew in 1969 that there was a cloud over his United States citizenship. He volunteered to a consular officer when he visited the Embassy at Ottawa in August 1969 that he believed he lost his United States citizenship when he acquired Canadian citizenship in 1963. However, there is no indication in the record that the consular officer who then interviewed A. either confirmed A.'s opinion that he had lost his United States citizenship, or advised A. of the provisions of the statute under which the Department might hold he expatriated himself. After interviewing A., the consular officer reported to the Department what A. had told him, and requested the Department's opinion. So it would not be unreasonable to assume that the consular officer simply told A. that the Department would have to make a decision in his case.

5/ Memorandum from PPT/C - Mr. William B. Wharton to L/BAR - Mr. Alan G. James, November 8, 1985.

6/ Public officials are presumed to execute their official duties faithfully and correctly. Boissonnas v. Acheson, 101 F. Supp. 138 (S.D. N.Y. 1951.)

There is no indication in the record that A. communicated with the Embassy (or the Embassy with him) after August 1969. It seems unlikely therefore that he knew the Department had instructed the Embassy to execute a certificate of loss of nationality in his name, or under which section of the statute the Department determined he had expatriated himself. Of course, it would have been prudent of A. to have pursued the question of his citizenship status after his August 1969 visit to the Embass But the relevant question is whether, in the circumstances, he had a legal duty to inform himself of the Department's decision in his case. We do not think he had such a duty. The cases and the commentators stress that constructive notice, a legal inference from established facts, is to be imputed with circumspection. See section 6, 59 AmJur 2nd:

> It has been said to be highly inexpedient to extend the doctrine of constructive notice. 19/ and the tendency is to restrict the doctrine. 20/
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> 19/ United States v. Detroit Timber & Lumber Co, 200 U.S. 321, 50 L Ed 499, 26 S Ct. 282; Ace v. Westcott, 46 NY 384.
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> 20/ Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 NW 265, 4 ALR 510.

The Board has imputed constructive notice of Departmental determinations of loss of nationality to a person in a number of cases where an appeal has been taken long after the expatriating act was done and a citizen has attempted to excuse the delay by alleging that he never received notice of the Department's holding in his case. Those kinds of cases, however, are distinguishable from A.'s. In many, the citizen could have had no doubt that he had expatriated himself, for he had made a formal renunciation of his United States nationality. In others, the citizen had been expressly informed by a diplomatic or consular post that he might have lost his United States citizenship under a specific provision of the Act, and that the post intended to execute a certificate of loss of nationality and submit it to the Department for approval. Furthermore, in all of the above-cited types of cases the Board determined that to allow the appeal would work prejudice on the Department since it would clearly lack the means to undertake its burden of proof precisely because the appellant had allowed so many years to pass before acting.

However, even if A.'s excuse for his delay were deemed insufficient, other variables must still be considered to determine whether his delay was unreasonable. The cases on reasonable time make it quite clear that the issue of timely filing does not hinge solely on whether one submits a legally sufficient excuse. See Ashford v. Steuart, supra. Similarly, Lairsey v. The Advance Abrasives Company, 542 F. 2d 928, 930 (5th Cir. 1976) where the court said:

As Professors Wright and Miller state:

> 'What constitutes reasonable time must of necessity depend upon the facts in each individual case.' The courts consider whether the party opposing has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner. 11 Wright & Miller, Federal Practice & Procedure, section 2866, at 228-29.

There is no discernible prejudice to the Department by the delay in this case. To allow the appeal would not force the Department to undertake to prove facts which after the passage of a considerable period of time it patently lacks the resources to do. Since, in our view, the sole substantive issue presented is whether or not the Department made a correct determination in 1969 with respect to loss of A.'s loss of nationality, one does not reach any other issues such as voluntariness and intent to relinquish United States citizenship, matters on which the Department must carry the burden of proof. Resolving the question of whether the Department erred or not is simply a matter of straightforward statutory construction.

Nor is the general interest in finality and stability of administrative determinations of paramount concern in this case. Barring actions or words by A. that could be construed unequivocally as a waiver of his rights, it would be unfair if the appellate process could not void what we consider to be material error on the part of the Department. An erroneous decision cannot be considered sacrosanct simply because it was made a number of years ago.

III

As we stated in our decision of January 6, 1986, we are unable to accept the Department's contention that an oath taken in conjunction with a naturalization proceeding of the kind specifically

referred to in the first proviso to section 349(a)(1) of the Act 7/ can be disassociated from that proceeding and used under section 349(a)(2) of the Act 8/ to deny an individual the protection afforded by section 349(a)(1). The Department's argument on "separable" and "concomitant" oaths is unpersuasive. In its motion the Department states that an oath taken in conjunction with an event such as naturalization is "...nevertheless expatriating under section 349(a)(2) if it is voluntary and meaningful because it is considered to be an abandonment of allegiance to another country, and because the primary act in itself cannot be considered expatriating." (Emphasis added.) But the primary act - obtaining naturalization while under age 21 on the petition of another - is, obviously, potentially expatriating.

The Department's reference in its motion to cases involving an oath of allegiance to Mexico taken in conjunction with obtaining a certificate of Mexican nationality evidences that the Department has completely missed the Board's point, for nowhere in the cited line of Mexican cases is there to be found a section 349(a)(1) situation, i.e., a situation in which the nature of the very proceeding in which the oath was taken conferred a statutory right to undo the entire effect of the proceeding, which necessarily included the oath. The Board is unwilling to attribute to the drafters of section 349 an intention to vitiate in subparagraph (a)(2) an entitlement conferred in subparagraph (a)(1).

Having herewith underscored once more that our decision related exclusively to the particular combination of law and facts presented, i.e., to a finding of loss of nationality based solely on an oath taken in conjunction with naturalization by parental petition, the Board assumes that it will now be appreciated that the Department's comments regarding a person's right (granted by section 351(b) of the Act) 9/ to negate an act deemed expatriating under section 349(a)(2) of the Act are irrelevant to this case. We originally found that the oath appellant took was inseparable from the naturalization proceeding. That oath could not, therefore, as a matter of law, be found to be an expatriating act under section 349(a)(2). Whether or not appellant performed some

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7/ Supra, note 2.

8/ Supra, note 1.

9/ Section 351(b) of the Immigration and Nationality Act, 8 U.S.C. 1483(b) provides that:

A national who within six months after attaining the age of eighteen years asserts his claim to United States nationality, in such manner as the Secretary of State shall by regulation prescribe, shall not be deemed to have expatriated himself by the commission, prior to his eighteenth birthday, of any of the acts specified in paragraphs (2), (4) (5), and (6) of section 349(a) of this title.

other act which might have been expatriating, including but not limited to renouncing his U.S. citizenship, in some context other than the naturalization proceeding, or failed to meet any requisit residence requirement, was not before the Board.

Finally, the Department's position that the oath of allegianc A. made to Queen Elizabeth upon his naturalization is expatriating is all the more difficult to accept in view of the contrary position the Department adopted in the Foreign Affairs Manual (FAM). Therein the Department states that the only way a person who obtained naturalization under the age of 21 on the petition of a parent may lose his United States nationality is by failing to establish a residence in the United States by age 25 See 7 FAM 1261(a)(4) (March 31, 1984) which reads as follows:

> The first proviso to Section 349(a)(1) INA can cause loss of nationality by a person naturalized through the naturalization of a parent or on an application on the person's behalf while under age 21 only if the person fails to enter the United States for permanent residence before age 25. The act made potentially expatriating by law is completed only when a person attains age 25 or older.

IV

Upon reconsideration of the Board's January 6, 1986 decision a for the foregoing reasons, the Board hereby reverses the Department's December 16, 1969 determination that P. B. A. expatriated himself in 1963 by obtaining naturalization in Canada upon the petition of his father.

Alan G. James, Chairman

Mary Elizabeth Hoinkes, Member

Dissenting Opinion

I cannot agree with the majority that appellant did not receive actual or constructive notice in early 1970 that the Department had determined, at the appellant's initiative and insistence, that he had lost his American nationality by taking an Oath of Allegiance to the Queen of Canada on July 11, 1963. I am afraid that the majority in Don Quixote-like eagerness to correct what it perceives as an error in law by the Department has closed its eyes to the facts in blind pursuit of correcting that error. Brushing aside its own regulations as to timely submissions of appeals this time the majority bluntly asserts, "An erroneous decision cannot be sanscrosanct simply because it was made a number of years ago."

When the Board originally reviewed the case, the majority could not get around the fact that the appeal had not been filed within a reasonable time. The majority, therefore, enunciated the untenable position that the Department had not made a final determination from which an appeal, if timely made, could be taken to the Board and ruled that the Board did not have jurisdiction. The majority of the Board, thereupon, issued what the Department has not incorrectly called an advisory opinion. Since that position could not be sustained, the majority now reverses itself, admits that indeed a final determination was made by the Department fifteen years ago, and that the appeal, which was filed more than ten years after the Department's determination was made, was filed within a reasonable time, and that the Board now has jurisdiction.

The facts before the Board show that appellant's purpose in approaching the American Embassy in 1969 was to obtain formal action to record that he was no longer a citizen of the United States and that, therefore, he had improperly been called by the United States Selective Service authorities to report for a pre-induction physical examination during the Viet-Nam war. Indeed, appellant complained, in writing, that the claims of American officials that he was an American citizen were interferring with the exercise of his rights as a Canadian citizen. He thus took the position that his standing as a Canadian national was incompatible with the claim that he was an American citizen. Moreover, appellant stated that if the Department found he had not already lost his American nationality, he would formally renounce it.

As a direct result of appellant's actions to shed his American citizenship if he did in fact possess it at the time, the Department determined that he had indeed lost his American citizenship and on December 18, 1969 approved the certificate of loss of Nationality and forwarded it in the customary way to the Embassy to be delivered to appellant in the customary way.

We have no evidence of any worth that the certificate was not mailed to appellant in the customary way. I give no credence to appellant's self-serving declaration that he did not receive the certificate. In view of the contradictions in the position which appellant took on his nationality and the statements he made when he approached the Embassy in 1969 and the position he now takes and the statements he has made in support of his appeal I fail to comprehend why the majority gives it credence. If indeed appellant had no notice of the Department's action, I assume that he would submit evidence in support of that statement such as, for example, evidence that, since he was still an American citizen and had not been notified otherwise, he complied with the provisions of the Selective Service laws.

The majority should have been guided by the knowledge that whether the Department was in error in 1969 in approving the certificate is beside the point. The determining issue in this case is whether the appeal was filed within a reasonable period of time. Clearly it was not and the Board, therefore, lacks jurisdiction.

What I stated in my dissent on January 6, 1986, is equally applicable to the majority's holding of today:

> The majority holding is especially disturbing because it implies that where the Department has made an error in law, that determination may be upset at any time and the passage of years/,/ even decades/,/ may be ignored no matter what the effect is on availability of evidence and no matter how much the decisions of the Department's officers in the field may be challenged unfairly with self-serving declarations whose veracity cannot be reasonably put to question with evidence contempraneous with the allegedly expatriating act. The majority would risk opening up a Pandora's box of ill-founded claims to American nationality which the regulations regarding timeliness were designed to prevent.

What I fear the majority is also saying is that, despite what the courts have said, one may indeed shed one's American citizenship when it suits one and then don that citizenship when it is convenient to do so.

James G. Sampas, Member