DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

Decided by the Board June 2, 1987

IN THE MATTER OF: L. D. B. - In Loss of Nationality Proceedings

After living several years in Israel, appellant became an Israeli citizen under the Law of Return in July 1964. In August 1964, the day before he was ordered to report for induction into the Israeli Defense Forces, he made a formal renunciation of his United States nationality at the Embassy at Tel Aviv. The Embassy executed a certificate of loss of nationality (CLN) under section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act which the Department approved later in August. No appeal from the Department's determination of loss of appellant's citizenship was entered until 1985. Appellant argued that he lacked the requisite intent to relinquish citizenship in 1964. As he put it in his appeal:

> ...Mr. B.'s formal renunciation reflected a lack of awareness of the consequences of the renunciation, because he believed that his action merely formally confirmed what had already taken place. His belief was based in significant part on statements by American officials to the effect that the Israeli government's action in conferring citizenship on him led inexorably to his loss of American citizenship, regardless of his own intentions.

Decision of the Board: The passage of so many years after appellant performed the expatriating act raised a threshold issue: whether the Board had jurisdiction to entertain the appeal. The limitation on appeal that the Board applied was the one prescribed by federal regulations in force from 1967 to 1979, namely, "within a reasonable time" after appellant received notice of the Department's holding of loss of his nationality. Appellant did not recall receiving a CLN; was never advised of his right to appeal the Department's decision; and because until 1980 he did not believe he had grounds to take an appeal. It was asserted that his appeal should be deemed timely because only with the Terrazas decision [Vance v. Terrazas, 444 U.S. 252 (1980)], he stated, that it became clear that specific intent to relinquish citizenship was a requirement for expatriation and that acquisition of Israeli citizenship by operation of law did not automatically result in loss of nationality.

The Board found appellant's reasons for his delay in taking an appeal insufficient to excuse it.

20 years after the event it was impossible to know whether appellant received a copy of the approved CLN, although it was reasonable to presume that the Embassy mailed it to him. Nonetheless, whether he received the CLN or not, he had sufficient notice of loss of his citizenship, for he performed the most unambiguous of the statutory expatriating acts. Whether he received notice of the right to take an appeal or not was also probably unknowable, although there it might be presumed that the Embassy complied with departmental guidelines and sent him information about appeal rights when it forwarded the certificate to him of loss of nationality. In any event, knowing he had lost his United States citizenship, appellant had sufficient knowledge of the essential facts to be put upon inquiry about possible recourse from the Department's decision that he expatriated himself. Finally, as to appellant's argument that not until 1980 could he avail himself of lack of intent to relinquish citizenship as grounds for an appeal, the Board was unpersuaded. From 1969 a person situated as appellant was might have asked for reconsideration of his case on grounds of lack of intent. Following the Attorney General's 1969 opinion interpreting Afroyim v. Rusk, 387 U.S. 253 (1967), the Department of State widely publicized its readiness to reconsider loss of nationality cases to determine whether the ex-citizen intended to relinquish citizenship. So appellant, who was living in Israel, was constructively on notice that he had the right to ask for reconsideration of his case, but did not exercise that right until many years later.

The Board concluded that the appeal was time-barred, and, accordingly, dismissed it for want of jurisdiction.

* * * * * * * * * *

L D B appeals an administrative determination of the Department of State that he expatriated himself on August 4, 1964 under the provisions of section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a Consular officer of the United States at Tel Aviv, Israel. 1/

The Department determined on September 23, 1964 that B expatriated himself. He entered an appeal from that determination on October 25, 1985. A threshold issue is thus presented: whether, in the circumstances of the case, the appeal may be deemed to be timely. Appellant's having

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1/ Section 349(a)(5), formerly section 349(a)(6), of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads 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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> . . .
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of section 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of section 349(a) as paragraph (5).

Public Law 99-653, approved November 14, 1986, 100 Stat. 3655, amended subsection 349(a) by inserting "voluntarily performing any of the following acts" after "shall lose his nationality by;".

presented no persuasive reason why he could not have appealed sooner, we find the appeal time-barred and not properly before the Board. The appeal is hereby dismissed.

- I -

B became a United States citizen by virtue of his birth at [redacted]. He received a high school education in the United States. In September 1959 B went to Israel to study. He registered for United States selective service in February 1960 at the Consulate General in Jerusalem, and was issued an identity card. At that time he was attending a seminar at the Jewish Agency in Jerusalem. Later in 1960 B returned to the United States and enrolled as a student at Yeshiva University in New York City. He remained at Yeshiva for only one year. In the spring of 1960 he obtained a new United States passport, stating in his application that he planned to study for several years in Israel. He went to Israel in the autumn of 1961 and registered again as a United States citizen at the Consulate in Jerusalem. He was then studying at the Hebrew University. B renewed his passport in May 1964. In July 1964 he changed his status in Israel to that of permanent resident. Through failure to "opt out" (that is, to decline Israeli citizenship), B automatically became a citizen of Israel under the provisions of the "Law of Return." 2/

Shortly thereafter he received notice to report for induction on August 5, 1974 into the Israel Defense Forces (IDF). He appeared at the Embassy on August 4, 1964, stating that he wished to renounce his United States nationality. The oath of renunciation was administered to him that same day by a consular officer. B was then 22 years of age.

2/ There is no documentation in the record from the Israeli authorities attesting to B 's acquisition of Israeli citizenship, but the Embassy at Tel Aviv has stated as a fact that he acquired such citizenship. It is reasonable to assume he acquired Israeli citizenship under section 3(a) of the Law of Return of 1950, 4 L.S.I. 114 and section 2(b)(4) of the Nationality Act of 1952, 6 L.S.I. 50.

As required by law, the consular officer who administered the oath of allegiance to B executed a certificate of loss of nationality in his name. 3/ Therein he certified that B acquired United States nationality by virtue of his birth in the United States; that he acquired the nationality of Israel by failure to decline such citizenship; that he made a formal renunciation of United States nationality; and thereby expatriated himself under the provisions of section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act.

The consular officer forwarded the certificate to the Department under cover of a memorandum that read as follows:

> There is submitted for the Department's approval a Certificate of Loss of Nationality and the Oath of Renunciation of the Nationality of the United States of L D B .
>
> L D. B has been in Israel since October 1961. On July 23, 1964 he changed his status to that of a permanent resident and through failure to decline Israeli citizenship at that time, he automatically acquired such citizenship.

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

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.

> On August 4, 1964, Mr. B called at the Embassy for the purpose of renouncing his American nationality. During the ensuing interview, he was strongly discouraged from doing so. However, it became apparent that he was adamant in his desire to divest himself of his American citizenship and be considered an Israeli citizen only. Under the circumstances, his oath was taken.
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> For the Department's information, Mr. B was last documented as an American citizen when his application for registration executed on May 5, 1964 was approved through May 4, 1966.

The Department approved the certificate on September 23, 1964. B was inducted into the IDF on August 5, 1964 and served until December 1967. On October 25, 1985 counsel for B gave notice of appeal from the Department's determination of loss of his nationality.

Bensky argues that the Department erred in approving the certificate of loss of nationality that the Embassy executed in his name because he did not really intend to relinquish United States nationality. "It was Mr. B 's understanding in July 1964," counsel submits, that:

> ...under American law the act of the Israeli government in declaring him to be an Israeli citizen resulted in the loss of his American citizenship. His understanding was based in significant part on statements of American officials, and indeed, it reflected a position generally held at that time that American law precluded dual citizenship in such circumstances.
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> Having been determined under Israeli law to be an Israeli citizen, and residing in Israel, Mr. B was obligated to serve in the Israeli armed forces. He believed that his entry into the Israeli armed forces would by itself automatically divest him of American citizenship. This belief, too, was based in significant part on statements made by American officials, and it, too, reflected American policy at the time.

> D B did not want to hide from American officials the fact which he believed automatically resulted in the loss of his citizenship. Instead, he voluntarily informed American officials of his situation, and did what he though was proper to do under the circumstances under American law: He went to the American Embassy on August 4, 1964, and he executed the Oath of Renunciation. He believed that this act merely confirmed what in fact had taken place when the Israeli government automatically conferred Israeli citizenship on him in July 1964.

His client's lack of intent to relinquish United States nationality is inherent in the circumstances surrounding his renunciation, counsel argues:

> Mr B 's situation is one of those rare instances in which an oath of renunciation does not indicate an intent to relinquish American citizenship. Mr. B 's formal renunciation reflected a lack of awareness of the consequences of the renunciation, because he believed that his action merely formally confirmed what had already taken place. His belief was based in significant part on statements by American officials to the effect that the Israeli government's action in conferring citizenship on him led inexorably to his loss of American citizenship, regardless of his own intentions.

- II

A threshold issue is presented here: whether the Board may assert jurisdiction over a case in which the expatriate waited twenty-one years to seek appellate relief. Since timely filing is mandatory and jurisdictional, United States v. Robinson, 361 U.S. 220 (1960), the Board may only consider the case on the merits if we determine that the appeal was filed within the limitation prescribed by the applicable regulations. If we find that the appeal is untimely, we must dismiss it.

The passage of so many years after appellant performed the expatriative act would in itself justify our dismissing the appeal out of hand. Nevertheless, we think it fair to examine the facts and circumstances around the time of his performance of the act and in the period thereafter to determine whether

a legally sufficient reason may have precluded an earlier appeal.

In September 1964 when the Department approved the certificate of loss of nationality executed in appellant's name, the Board of Appellate Review did not exist. There was, however, a Board of Review on the Loss of Nationality, an entity of the Passport Office of the Department, to which persons who had been found to have expatriated themselves might address an appeal. In 1964 there was no limitation on appeal in the rules governing appeals to that Board. But in 1966 federal regulations were promulgated which prescribed that an appeal should be taken "within a reasonable time" after the affected party received notice that the Department had made an adverse determination of his nationality. 4/

When the Board of Appellate Review was established in 1967, the regulations then promulgated adopted the "reasonable time" limitation. 5/ The regulations of the Board of Appellate Review were further revised in November 1979. They prescribe that an appeal be filed within one year of approval of the certificate of loss of nationality. 6/ Believing that the current regulations as to the time limit on appeal should not apply retroactively, we are of the view that the standard of "reasonable time" should apply in the case now before the Board.

4/ Section 50.60, Title 22, Code of Federal Regulations (1966), 22 CFR 50.60, 31 Fed. Reg. 13539 (1966).

5/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60, 32 FR 16359, Nov. 29, 1967, provided:

> 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.

6/ Section 7.5(b), Title 22, Code of Federal Regulations 22 CFR 7.5(b).

"What constitutes reasonable time," the 9th Circuit said in Ashford v. Steuart, 657 F.2d 1053 (9th Cir. 1981)

> 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). 7/

657 F.2d at 1055.

B asserts that he did not appeal sooner because he does not recall receiving a certificate of loss of nationality; that he was never advised of his right to appeal the Department's decision; and that until 1980 he did not believe he had grounds to take an appeal. "It was only with the Terrazas decision [Vance v. Terrazas, 444 U.S. 252 (1980)]," appellant's counsel states,

> ....that it became reasonably clear - if not to ordinarily prudent persons at least to those with a certain expertise in this area of the law - that specific intent [to relinquish citizenship] is indeed a requirement for expatriation and that the voluntary entry into a foreign army does not by itself automatically result in expatriation.

7/ In Lairsey v. Advance Abrasives Co., the court quoted 11 Wright & Miller, Federal Practice & Procedure, section 2866 at 228-229:

> 'What constitutes reasonable time must of necessity depend upon the facts in each individual case.' The courts consider whether the party opposing the motion 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.

542 F.2d at 930-931.

The record shows that the Department dispatched a copy of the approved certificate of loss of appellant's nationality to the Embassy on October 8, 1964 to forward to B . We may with fair assurance presume that the certificate reached Tel Aviv and that the Embassy mailed it to B at his last known address. This is so because there is a well-settled presumption that public officials execute their assigned duties faithfully and correctly, absent evidence to the contrary; appellant has presented no such evidence. See Boissonnas v. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1951). However, since there is no postal receipt signed by B or his agent in the record, there is simply no way we can now verify whether the certificate reached B . Nevertheless, B can have had no doubt that he definitely surrendered his United States citizenship, whether or not he received a certificate of loss of nationality. He performed the most unambiguous of the enumerated statutory expatriating acts. That on August 4, 1964 he did not understand he had forfeited United States nationality by formal renunciation strains credulity. In the absence of evidence to the contrary, and appellant has submitted none, we may reasonably assume that the consular officer who administered the oath of renunciation to B explained to him, as he was required to do by explicit, long-standing instructions incorporated into the Foreign Affairs Manual, that by making a formal renunciation of United States nationality he would divest himself of that nationality and become an alien vis-a-vis the United States. So, even if B never received the certificate of loss of nationality, he plainly was on notice that he had expatriated himself as a consequence of making a formal renunciation of United States nationality - not because he had earlier acquired Israeli citizenship or because of his prospective entry into the IDF. So, one month before the Department approved the certificate of loss of nationality in his name, appellant, by his own act -- not the Department's --, effectively expatriated himself. As the Attorney General held in his opinion in the citizenship case of Claude Cartier

> Cartier lost his nationality not as the result of any action of the Department of State, but directly by virtue of his own act of renunciation. Section 349(a)(6), 8 U.S.C. 1481(a)(6). The subsequent proceedings of the Department of State were merely in the nature of reports, which, in the case of renunciation, are purely ministerial.

Office of Attorney General, Washington, D.C. File: CO-349-P, February 7, 1972.

As to B 's claim that he was never informed of his right of appeal, it should be noted that the Department's internal guidelines required in 1962 (and, in fact, long before then) that when consular officers sent the certificate of loss of nationality they should inform an expatriate in writing of the right of appeal to the predecessor of this Board, Board of Review on Loss of Nationality of the Passport Office. 8 Foreign Affairs Manual 224.21(a), "Advice on Making of Appeals," April 20, 1962. In the absence of contrary evidence, and appellant has submitted none, it may be presumed that the consular officer concerned wrote to B to inform him how he might take an appeal. Whether B received such information is, of course, another matter. But even if B did not receive notice of the right of appeal, that fact would not constitute denial of due process. Due process does not contemplate the right of appeal. District of Columbia v. Calwans, 300 U.S. 617 (1936). While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process. National Union of Cooks and Stewards v. Arnold, 348 U.S. 37 (1954).

Here a right of appeal existed, but B alleges he was never informed of that right. It is well-established that whatever puts, or should put, a party upon inquiry is sufficient notice of a right of redress where the means of ascertaining the existence of such redress is at hand. Here, appellant was duly put on notice of his loss of nationality from the very day of his formal renunciation of his United States citizenship. Consequently, he was, or should have been, put upon inquiry at that time. And the means of knowledge that redress existed were at hand. He could have ascertained that fact any time after 1964 from any United States diplomatic or consular establishment in Israel, had he exercised reasonable diligence in asserting a claim to his lost citizenship.

Finally, we are not persuaded by appellant's argument that because he did not believe he had legal grounds to take an appeal until sometime after the Supreme Court's decision in Vance v. Terrazas, 444 U.S. 252 (1980), his appeal should be deemed timely. In Terrazas, the Court clarified and extended the reach of its holding in Afroyim v. Rusk, 587 U.S. 253 (1967). In Terrazas the Court held that Afroyim stands for the proposition that a specific intent to renounce citizenship must be shown before citizenship will be lost. "In the last analysis," the Court said, "expatriation depends on the will of

the citizen rather than the will of Congress and its assessment of his conduct." 444 U.S. at 260. The Court noted that in 1969 the Attorney General issued a statement clarifying Afroyim 8/ that was little different from its own. 444 U.S. at 261.

After the Attorney General issued his opinion, United States courts consistently addressed the issue of a party's intent to relinquish citizenship in loss of nationality proceedings. See Baker v. Rusk, 296 F. Supp. 1244 (C.D. Cal. 1969); Jolley v. INS, 441 F.2d 1245 (5th Cir.), cert. denied, 404 U.S. 946 (1971); King v. Rogers, 463 F.2d 1188 (9th Cir. 1972); Peter v. Secretary of State, 347 F. Supp. 1035 (D.D.C. 1972); United States v. Matheson, 400 F. Supp. 1241 (S.D.N.Y. 1975), aff'd, 532 F.2d 809 (2d Cir.), cert. denied, 429 U.S. 823 (1976); Davis v. INS, 481 F. Supp. 1178 (D.D.C. 1979).

From 1967, and certainly from 1969, a person who had been the subject of an adverse citizenship determination had the right to ask that his case be reopened, or to take an appeal, on the grounds that when he performed an expatriative act he lacked the requisite intent to relinquish United States citizenship. In the spring of 1969 the Department of State sent guidance to all diplomatic and consular posts instructing them how to process potential loss of nationality cases in light of Afroyim. 9/ With respect to cases in which an adverse determination of citizenship had been made prior to the Supreme Court's decision in Afroyim, the Department's instructions read as follows:

> 4. Reconsideration of Previous Adverse Determinations
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> Initiation of reconsideration of previous determinations of loss of nationality may be made by the person against whom the previous determination was made or any person claiming United States citizenship through him by filing the FS-176 form as noted above. It is not considered

8/ 42 Op. Atty Gen. 397 (1969).

9/ Circular Airgram to All Diplomatic and Consular Posts, CA-2855, May 16, 1969.

> feasible to give individual notice to each person who is recorded at each post as the subject of a prior determination of loss of nationality. In view of the enormous number of cases that are involved, the only practical means of informing the potential citizenship claimants is through extensive public notice.

All posts were instructed to give wide dissemination to the circular instruction:

> 5. PUBLICITY
> Each post is requested to give the most extensive publicity to this instruction appropriate for its consular district. Publicity should be given by newspapers or other mass media unless such publication is not possible or politically feasible for a particular country or consular district. The substance of the public statement in whatever form it is given should be as follows:
>
> 'A recent Statement of Interpretation of the Attorney General of the United States may result in the reversal of many previous determinations of loss of United States citizenship. Any person who was the subject of such a determination or any person who may have a claim to United States citizenship through such person should communicate with this office.'

We may fairly assume that the United States representation in Israel complied promptly and conscientiously with the foregoing directive. As a matter of law therefore, B was put on notice that he had the right to reopen his case. That he may not have read or heard about the Attorney General's interpretation of Afroyim does not excuse him from having the constructive notice that he might seek redress from the Department's 1964 decision in his case. In an affidavit executed March 30, 1987, B stated that: "While I did not think that I had any basis to claim American citizenship, I would have liked to have been an American citizen. At no time in my life did I desire not to be an American citizen." Had he been as concerned then as he alleges he was about loss of his United States citizenship, surely he would have remained in touch with the Embassy, at least after he was discharged from the IDF in December 1967, and, as the opportunity presented itself, would have inquired whether there had been any developments in law or regulations that might enable him to

re-open his case. Appellant may not be heard to maintain his appeal was timely in 1985 when for so many years he remained passive, at least until 1978 when, he alleges, he went to the Embassy and asked for copies of his records. But after being informed that those records had been destroyed, B took no further action until 1980 or 1981 when he allegedly "took other preliminary steps toward becoming an American citizen through procedures." (Affidavit of March 30 1987).

To allow the appeal would result in prejudice to the Department so blatant that the matter merits only very brief discussion. The officer who administered the oath of allegiance to B died in 1978. There is no documentation in the case dating from the time of appellant's renunciation save the oath of renunciation, the consular officer's memorandum transmitting the certificate of loss of nationality to the Department, and the certificate itself. As is well-known, the Department bears the burden of proving that appellant intended to relinquish United States nationality. Terrazas, supra, at 264-267. Appellant alleges that he renounced United States nationality only after he was given certain advice by unnamed consular officers on unspecified dates from which he concluded that he had no alternative but to divest himself of United States citizenship. How at this late date the Department could fairly essay its burden of proof we fail to see.

The essential purpose of a limitation on appeal is to compel the timely exercise of the right while recollection of the events surrounding the performance of an expatriating act are still fresh in the minds of the parties involved. That is not the situation here. B has not shown a requirement for an extended period of time to prepare an appeal, or any obstacle beyond his own control preventing him from taking one in a timely fashion. In our view, appellant's delay in taking an appeal is unreasonable.

No legally sufficient excuse having been presented by appellant and the potential prejudice to the Department being so obvious, the interest in finality and stability of administrative determinations must be served in this case.

- III -

Upon consideration of the foregoing, we conclude that the appeal is time-barred and not properly before the Board. It is hereby dismissed.

Alan G. James, Chairman

Mary Elizabeth Hoinkes, Member

James G. Sampas, Member