DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

DECISION #94-4 DATE: December 28, 1994

IN THE MATTER OF: D L H

This is an appeal from a decision of the Department of State, dated August 11, 1980, that appellant, D L H , expatriated himself on August 24, 1979, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application.[1]

Since the appeal was not filed within the time allowed (one year after approval of the certificate of loss of nationality that was executed in appellant's name) and since he has proffered no legally sufficient excuse why the appeal could not have been filed within the time allowed, we deny the appeal for lack of jurisdiction.

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

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality - -
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> . . .
>
> (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; . . .

I

Appellant acquired United States citizenship by virtue of his birth at ██████, Montana, on ██████. In 1944 he married D C , who is also an appellant in a loss of nationality case now before the Board. An executive of the ██████, appellant worked and lived abroad for many years. While abroad, three children were born to him and his wife.

In 1968 appellant moved to Australia where he resided and worked until 1988. It appears that he was issued a United States passport in Australia in 1976. Three years later, he applied to be naturalized as an Australian citizen, and on August 24, 1979, made the prescribed oath of allegiance which read in part as follows: "I...., renouncing all other allegiance, swear by Almighty God [or solemnly and sincerely promise and declare] that I will be faithful and bear true allegiance to her majesty Queen Elizabeth the Second, Queen of Australia...." He became an Australian citizen as of the date he took the oath of allegiance. Three days later, he obtained an Australian passport.

In the spring of 1980, appellant visited the United States Consulate General at Melbourne to apply for a non-immigrant visa to visit the United States. On March 13, 1980, he executed an affidavit of expatriated person, in which he swore in part as follows:

> That I obtained naturalization in a foreign state, to wit, the Commonwealth of Australia, upon my own application on August 27, 1979 [sic].
>
> I further swear that the act mentioned above was my free and voluntary act and that no influence, compulsion, force or duress was exerted upon me by any other person, and that it was done with the intention of relinquishing my United States citizenship.

On the basis of appellant's execution of an affidavit of expatriated person and the advice of the Australian Department of Immigration and Ethnic Affairs that he had acquired Australian citizenship, an officer of the Consulate General executed a certificate of loss of nationality (CLN) in appellant's name on

May 6, 1980, as required by law.[2] Therein the officer declared that appellant acquired United States citizenship by virtue of his birth in the United States; that he obtained naturalization in Australia upon his own application, and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Naturalization Act. The Consulate General forwarded the certificate and supporting papers to the Department under cover of a memorandum which read in part as follows:

> 1. Forwarded for the Department's consideration is a Certificate of Loss of Nationality in the subject's name. It is supported by the customary statement from the Australian Department of Immigration and Ethnic Affairs, Canberra. It is also supported by Mr. H 's signed Affidavit of Expatriated Person dated March 13, 1980.
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> . . .
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> 3. This case came to our attention when Mr. H applied to this office for a non-immigrant visa.

The Department approved the certificate on August 11, 1980, approval constituting an administrative determination of loss of nationality from which a timely appeal may be taken to the Board of Appellate Review. The Consulate General at Melbourne sent a copy of the approved CLN to appellant, receipt of which his wife acknowledged on his behalf in September 1980.

In 1988, one of appellant's American citizen children petitioned for issuance of an immigrant visa to his father, and in December of that year appellant was admitted to the United States as an immigrant.

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[2] 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. 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.

Some five years later, appellant applied for a United States passport at the Los Angeles Passport Agency, presenting an expired (in 1981) United States passport as evidence of citizenship. Since a record check revealed that he expatriated himself in 1979, the Agency requested that he complete a questionnaire titled "Information to Determine United States Citizenship." As the Department points out in its brief,

> In answering the questionnaire, appellant admitted to having applied for and obtained Australian passports in 1979, 1984, and 1989 to live and work in Australia, and asserted that he had not intended thereby to abandon allegiance to the United States or transfer allegiance to Australia. He further stated that he was told that he was a U.S. citizen while in Australia from 1968 to 1988. However, he made no mention in his answers of: (i) Australian naturalization; (ii) his affidavit of expatriation; (iii) his CLN; or, (iv) his immigration visa and admission as an alien.

The passport agency referred appellant's application to the Department. There it was reviewed under the current evidentiary standard which provides that one who performs certain statutory expatriative acts (among them, obtaining naturalization in a foreign state) shall be presumed to intend to retain United States citizenship, absent evidence to the contrary. The Department concluded that appellant's execution of an affidavit of expatriated person overcame the presumption that he intended to retain United States citizenship when he became a citizen of Australia. Accordingly, the Department instructed the Passport Agency to deny appellant's application for a passport. The Agency so informed appellant in February 1994. On March 25, 1994, counsel for appellant noted an appeal on his client's behalf to this Board. Counsel acknowledged that appellant obtained an Australian passport in 1979, but asserted that appellant did not intend "to formally renounce U.S. citizenship."

II

As an initial matter the Board must determine whether the jurisdictional prerequisites to our hearing and deciding the appeal have been satisfied. Timely filing being mandatory and jurisdictional, (United States v. Robinson, 361 U.S. 220 (1961)), the Board's jurisdiction depends upon whether the appeal was filed within the limitation on appeal prescribed by the applicable federal regulations. The limitation on appeal is set forth in section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), which reads as follows:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation under subpart c of Part 50 of this Chapter is contrary to law or fact shall be entitled to appeal such determination to the Board upon written request made within one year after approval of the Department of the certificate of loss of nationality or a certificate of expatriation.

The regulations further provide that an appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time. 22 CFR 7.5(a).

The Department of State on August 11, 1980, approved the CLN that was executed by the Consulate General at Melbourne in appellant's name. Under the regulations, he had until August 1981 to appeal the Department's holding. He did not do so, however, until 1994, 13 years after the time allowed for appeal. Therefore, appellant's delay in seeking appellate review of his case may be excused only if he is able to show a legally sufficient reason for not moving within the prescribed time.

"Good cause" is a term of art and settled meaning. It is defined in Black's Law Dictionary as "a substantial reason, one that affords a legal excuse. Legally sufficient ground or reason." What constitutes good cause depends upon the circumstances of the particular case. In general, to establish good cause for taking an action belatedly one must show that unforeseen circumstances beyond one's control intervened to prevent one from taking the required action.

There is no question that appellant received in timely fashion a copy of the approved CLN with information on the reverse about the time limit on appeal and how one might pursue an appeal before the Board. From the first he was on notice of his right to appeal and how to make one.

Appellant contends that good cause exists why the appeal could not be filed within the prescribed limitation. His argument seems to be that he was denied due process because he was not informed at the time his case was processed at the Consulate General in Melbourne, or at the time the Department approved the CLN that he had a constitutional right to remain a United States citizen unless he voluntarily performed an expatriative act with the intention of relinquishing his United States citizenship, citing Afroyim v. Rusk, 387 U.S. 253 (1967) and Vance v. Terrazas, 444 U.S. 252 (1980). The single page document, Affidavit of Expatriated Person, which he executed in March 1979, "does not comply with the safeguard mandated by the Terrazas decision," he asserts. In brief, as we understand his position, he argues that had he known in timely fashion that he could expatriate himself only if he so intended, he would have filed a timely appeal to contest the Department's decision. Thus, he submits, his failure to perfect an appeal within one year after approval of the CLN was due to failure of the Consulate General at Melbourne to give him vital information.

We are not persuaded that the reasons appellant offers for not taking this appeal until 13 years after expiry of the time for appeal are legally sufficient to excuse his delay.

Appellant was on notice from September 1980 not only that he had expatriated himself but also that he had a right to appeal the Department's decision of his expatriation. If loss of his United States citizenship was a matter of importance to him, one would imagine that appellant would have availed himself promptly of the recourse that was clearly described on the reverse of the CLN. Even if he was unaware that expatriation will only result if a voluntary expatriative act is done with the intention of relinquishing citizenship, concern about loss of his citizenship presumably should have moved him to inquire why the Department decided that he expatriated himself. One need not be versed in nationality law at least to enter a general protest against an adverse decision, while inquiring of competent authority what to do to make an effective protest. It is well-settled that knowledge of facts putting a person of ordinary prudence on inquiry is the equivalent of actual knowledge, and if one has sufficient information to lead him to a fact, he is deemed to be conversant therewith and laches is chargeable to him if he fails to use the facts putting him on notice. McDonald v. Robertson, 104 F.2d 945 (6th Cir. 1939). Here, appellant had facts that should have put him upon inquiry; the knowledge he had of his expatriation and the right to appeal from that decision was sufficient to lead him to the fact that expatriation depends on two elements – volition and an intention to relinquish citizenship. Having failed to use facts available to him, appellant is chargeable with laches.

As to appellant's implication that the Government had an affirmative duty to apprise him of the Supreme Court's decisions in Afroyim and Terrazas and related administrative guidelines, he is clearly on weak ground. The Department has no statutory duty to inform citizens who perform an expatriative act of the law and administrative guidelines regarding expatriation. These are matters that are in the public domain. The courts have consistently held that the administrative authorities have "no affirmative duty to inform citizens residing abroad of changes in nationality laws on a continuing basis." Icaza v. Schultz, 656 F. Supp. 819 (D.D.C. 1987). See also Rucker v. Saxbe, 55 2F.2d 998 (3rd Cir. 1977); cert. denied, 434 U.S. 919 (1977); Paul v. Smith, 784 F.2d 564 (4th Cir. 1986); and INS v. Hibi, 414 U.S. 5 (1973).[3]

No circumstances over which appellant lacked control prevented him from exercising in timely fashion the right to appeal to this Board the Department's determination that he expatriated himself.

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[3] In distinction to the case before the Board, the above-cited cases concerned individuals living abroad who challenged adverse decisions with respect to their nationality on the grounds that they had not been informed of changes in statutory requirements to retain the citizenship they acquired as a consequence of birth abroad to one U.S. citizen parent and one alien parent.

It is, however, settled that "The Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." INS v. Hibi, supra at 8. Absent affirmative misconduct (and clearly there is none here), the Government is not to be estopped from enforcing laws enacted by Congress because it did not publicize citizenship rights which are deemed to be matters of public knowledge.

III

Since the appeal was not filed within one year after the Department approved the certificate of loss of appellant's nationality and since he has failed to show good cause why the Board should enlarge the prescribed time for taking the appeal, the Board has no discretion to allow the appeal. It is time-barred and so must be, and hereby is, denied for lack of jurisdiction.

Given our disposition of the case, we do not reach the other issues that may be presented.

Alan G. James, Chairman

Frederick Smith, Jr., Member

George Taft, Member