DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

February 21, 1996

Decision 96-1

IN THE MATTER OF: T W

This appeal, which was entered in February 1995, is from an administrative determination of the Department of State, dated January 21, 1974, that appellant, T W , expatriated herself on June 22, 1973, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Brazil upon her own application.[1]

For the reasons that follow, the appeal is dismissed on the grounds that it is time-barred and the Board accordingly lacks jurisdiction to hear and decide it.

I

Appellant acquired United States citizenship by virtue of her birth on [redacted], at New York City where she lived until 1930 when her parents took her to Brazil. During World War II, she worked in the United States Consulate at Bahia, and later was Director of English Studies at the U.S.-Brazilian Cultural Center at Salvador, Bahia. She married a Brazilian citizen with whom she had two children.

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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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> . . .
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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; . . .

In the early 1970s, appellant was offered a position with the United States Information Service (USIS) in the Consulate at Salvador, and gave up her teaching position in anticipation of being hired by USIS. Appellant was informed that she could not be hired as a United States citizen but only as a foreign national. Anxious to qualify for the position ("I was financially dependent on this opportunity"), appellant applied to become naturalized as a Brazilian citizen, apparently aware that obtaining naturalization would likely result in loss of her United States citizenship.

The record shows that on June 22, 1973, the Brazilian Ministry of Justice granted appellant naturalization. As prescribed by law, she appeared before a federal judge on July 16, 1973, and, as stated in the judge's attestation of the proceeding, made an oath of allegiance to Brazil and "declared that she renounced for all purposes the previous nationality."

Three days later, appellant visited the Consulate at Salvador and informed a consul that she had obtained Brazilian citizenship. Apparently, she requested that procedures be instituted for her to be adjudged expatriated so that she might qualify for the USIS position. To this end she made an affidavit of expatriated person in which she stated inter alia:

> 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 December 29, 1973, a consular officer of the United States Embassy at Brasilia executed a certificate of loss of nationality (CLN) in appellant's name, as prescribed by law.[2]

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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

(continued...)

(Earlier, both the consulate at Salvador and the Embassy sequentially prepared CLNs which the Department rejected because they did not conform to the guidelines of the Foreign Affairs Manual.)

The consular officer certified that appellant acquired United States citizenship by birth therein; and that she obtained naturalization in Brazil upon her own application, thereby expatriating herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on January 21, 1974, approval constituting an administrative holding of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

In 1987, appellant lost her job when the Consulate and the USIS office were closed. In December of that year, she wrote to the United States Consulate General at Rio de Janeiro to inquire whether she "might be considered for recovering my American citizenship." She explained that in 1973 she had needed the position with USIS. Although documents she enclosed in her letter "might prove that I voluntarily resigned my American citizenship, it could also be considered involuntarily since it was the only way I could get the job."

Appellant's request for reconsideration of the decision that she expatriated herself was sent to the Department in January 1988. What transpired thereafter is not relevant to our disposition of the case; suffice it to note that the Department did not at that time review its decision on appellant's case. However, in 1992, after appellant applied for a passport, the Consulate General at Rio again submitted appellant's case to the Department, stating that appellant "believes that she lost her U.S. citizenship" at the time she acquired Brazilian naturalization in 1973, and that she requested that her case be reopened and considered under the new evidentiary criterion to determine intent to relinquish citizenship. (Under that criterion one who performs one of certain statutory expatriative acts, including obtaining naturalization in a foreign state, is presumed to intend to retain citizenship, absent evidence to the contrary.)

Upon completing a review of appellant's case, the Department informed the Consulate General that without additional evidence from appellant of involuntariness or lack of intent to

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[2](...continued)
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.

relinquish citizenship, the 1974 determination of a loss of appellant's expatriation would stand.

In February 1995, appellant noted an appeal to the Board of Appellate Review, alleging that her naturalization as a Brazilian citizen was involuntary. "The fact that I needed the job [with USIS] in my opinion constituted duress....I had no choice."

II

A threshold issue is presented: Whether the Board may assert jurisdiction to hear and decide this case. Timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if an appellant, providing no legally sufficient excuse, fails to take an appeal within the prescribed limitation, the appeal must be dismissed for want of jurisdiction. See Costello v. United States, 365 U.S. 265 (1961).

Under current federal regulations (promulgated in 1979), the limitation on an appeal is one year after approval of the certificate of loss of nationality.[3] The regulations further provide that an appeal filed after the time limit shall be denied unless the Board, for good cause shown, determines that the appeal could not have been filed within the prescribed time.

In 1974, when the Department approved the certificate of loss of nationality that was executed in appellant's name, the federal regulations then in effect 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 of 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 Review on Loss of Nationality.[4]

We consider it appropriate to apply the standard of "reasonable time" to this case, rather than the current, more stringent limitation of one year after approval of CLN.

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[3] Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b) (1995).

[4] Title 22 Code of Federal Regulations, section 50.60. 22 CFR 50.60 (1974), effective from 1967-1979.

Thus, if we conclude that appellant did not initiate her appeal within a reasonable time after she received notice of the Department's adverse decision, the appeal would be time-barred and the Board would lack authority to entertain it.

Whether an appeal has been taken within a reasonable time depends on the circumstances of each case. Generally, reasonable time means reasonable under the circumstances. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). Courts take into account a number of considerations in determining whether the facts of a particular case indicate that the affected party moved within a reasonable time, including 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 the other party. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Security Mutual Casualty Co. v. Century Casualty Co., 621 F.2d 1062, 1067-68 (10th Cir. 1980); and Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930-31 (5th Cir. 1976).

The rationale for allowing a reasonable time to appeal an adverse decision is to afford an appellant sufficient time upon receipt of such decision to assert law or fact, and to compel appellant to take such action within a reasonable time so as to protect the adverse party against a belated appeal that could more easily have been resolved when the recollection of events upon which the appeal is based is fresh in the minds of the parties involved. Unreasonable lapses of time cloud a person's recollection of events and also make it difficult for the trier of fact to determine the case, particularly where the record is incomplete, or lost, or obscured by the passage of time. Further it should be noted that the period of a reasonable time begins to run with the receipt of notice of the Department's holding of loss of nationality, not at a later date when an appellant, for whatever reason, may seek to regain or re-establish his or her United States citizenship status.

Appellant gives these reasons for not coming to the Board until 1995.

> When I discussed with officials at the Consulate the details of my relinquishing my citizenship, absolutely no one informed me that I would have the right to appeal this decision.

* * *

> Subsequent to the decision, I checked twice with the consulate in Salvador and in Rio de Janeiro to see if I would indeed be allowed to appeal. On both occasions, I was told that it would not be possible.
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> In 1987, after being separated from my position at USIS Salvador, I contacted the Consulate in Rio de Janeiro, but once again not informed that I had the right to appeal. Just last year, over twenty years since I relinquished my citizenship, I was told that there had been changes in the U.S. law, and that people like me who had resigned their citizenship could now appeal their case. It took me nearly a year to get the exact details on how to appeal. My letter of February 13, 1995, represented my first step in the process. The basic reason that it took me so long to do this then is simple. I did not have the knowledge that I could appeal.
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> I have no documents that prove that I was never informed of my right to appeal. In fact, I thought, as I was told, that such a right did not exist. All I have is my word.

The reasons appellant gives for her lengthy delay in seeking relief from the Board of Appellate Review are insufficient to excuse her failure to act much sooner.

As to appellant's allegation – that at the time she discussed with officials of the Consulate (at Salvador, presumably) "the details of my relinquishing my citizenship" no one informed her she might appeal from a decision on loss of her nationality – we have the following comment. There is a legal presumption that public officials carry out their official duties faithfully and in accordance with law and regulations, absent evidence to the contrary. Accordingly it must be presumed that the Consulate General at Rio de Janeiro wrote to appellant shortly after the Department approved the CLN that was executed in her name (a) to enclose a copy of the CLN as mandated by law, and (b) to inform appellant of her right to appeal to this Board, as mandated by the Foreign Affairs Manual. Since it is customary to send the affected party such a communication by registered mail, the odds are that she received the Consulate General's letter. However, appellant stated to the Consulate General in

1991, when she applied for a passport, that she did not remember receiving a CLN.

Conceivably the Consulate General's 1974 letter never reached appellant. But even if it did not, she had a responsibility to ascertain whether she had any recourse from the decision that she had lost her nationality; that she had expatriated herself was a fact of which she assuredly was aware. Appellant asserts that after "the decision [the Department's determination of loss of nationality] I checked twice with the Consulate in Salvador and in Rio de Janeiro to see if I would indeed be allowed to appeal. On both occasions I was told it would not be possible." To the latter allegation, we must point out that appellant gives no particulars about when, how and of whom she made inquiries. Assume, however, that she made inquiry. Applying the presumption of official regularity, it may be presumed that the official involved gave appellant correct information about her right to appeal, there being no evidence to the contrary; appellant concedes that she has no evidence to support her allegation, and the record is silent on the matter.

We consider it moot, however, whether, as appellant alleges, lack of information or misinformation prevented her from making a timely appeal. The decisive consideration is, as the facts of the case make clear, that not until 1987 at the earliest did appellant have any intention to take an appeal. When she lost the job with USIS, she changed her mind about being an alien toward the United States. There is no question that she sought expatriation in 1973 in order to qualify for a foreign national position with USIS. To keep that position, it was essential for her to remain a foreign national. Had she appealed and regained her United States citizenship, she would have lost the job which she purportedly considered essential to hold. In effect, she made a choice, reluctantly perhaps, to remain without U.S. citizenship for as long as she held her job. By 1987 when she finally inquired about what recourse she might have, 13 years had passed without her having taken any action to try to recover her citizenship and without a colorable excuse for not acting. Nothing beyond appellant's control prevented her from making an earlier appeal; she alone was responsible for the delay.

Even if we were to consider that appellant's initiation of inquiries in 1987 about how she might recover her citizenship tolled the limitation on appeal to the Board (while the Department considered her case), the fact remains that a delay of 13 years is, in the circumstances of the case, unreasonable.

III

Upon consideration of the foregoing, we conclude that the appeal was not taken within a reasonable time after appellant received notice (or was aware) of the Department's holding of loss of her citizenship. As a consequence, we hold that the appeal is time-barred and that the Board is without jurisdiction to hear and decide it. The appeal is hereby dismissed.

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

Alan G. James, Chairman,
J. Peter A. Bernhardt, Member
Frederick Smith, Jr., Member