DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

Decision # 96-4 October 15, 1996

IN THE MATTER OF: M J F

M J F appeals from an administrative determination of the Department of State, dated July 27, 1979, that he expatriated himself on September 22, 1976, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application.[1]

The appeal was entered in June 1995, sixteen years after the Department determined that appellant expatriated himself. For the reasons that follow, we conclude that the appeal is time-barred, and dismiss it for lack of jurisdiction.

I.

Appellant acquired the nationality of the United States by virtue of his birth at [redacted], Wisconsin, on [redacted]. He graduated from high school in Texas, and in 1967 joined the United States Air Force, serving until honorably discharged in January 1971. "Having been raised in a religious family," he states, he entered "Christian social work" a month later. According to appellant's first wife, he became a member of a religious group known as "The Children of God."

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1 Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1) (1988), 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; . . .

In July 1972 appellant married for the first time. Shortly thereafter, he and his wife, who had joined the Children of God, went to Australia to do volunteer Christian social work. In Australia two children were born to them. Both hold U.S. and Australian citizenship.

"In order to be able to remain in Australia and continue our work there," appellant states, "it was necessary that my wife and I take Australian citizenship. We would not have been allowed to stay otherwise." His application for naturalization was approved, and on September 22, 1976, he was issued a certificate of naturalization. (It appears that appellant's wife also received a certificate of naturalization at the same time.) Appellant obtained an Australian passport in October 1978.

Shortly after issuing a certificate of naturalization to appellant, the Australian Department of Immigration wrote to the Consulate General at Sydney (appellant was living in its consular district at the time) to give notice that appellant had acquired Australian citizenship, and to forward appellant's passport which, according to Australian practice, he was required to surrender. In November 1976, the Consulate General sent to appellant a "uniform loss of nationality" letter to inform him that he might have expatriated himself by obtaining naturalization in a foreign state and to elicit information to determine his citizenship status. It does not appear that appellant replied to that letter, and his case was held in suspense until the spring of 1979.

In March 1979, appellant's wife went to the United States to visit her parents, taking one of their children with her; the other remained with appellant in Australia. Allegedly having learned that his wife had been kidnapped at the instigation of her parents to undergo "cult de-programming," appellant visited the Consulate General at Melbourne, in whose consular district he then resided.

According to a report the Consulate General sent to the Department dated April 5, 1979, a consular officer asked appellant, when he arrived at the office reportedly to apply for a visa, if he had been issued a certificate of loss of nationality (CLN); that is, whether since he was applying for a visa, he was not a United States citizen.

Appellant reportedly replied that he had received "something" from the Consulate General at Sydney; he did not apparently elaborate. After inquiring of the Consulate General at Sydney, Melbourne learned that appellant's citizenship case (and that of his wife) had not been processed. Their files were then transferred to Melbourne.

When the Consulate General learned that no CLN had been prepared in appellant's name, he was given an affidavit of expatriated person to read. As the Consulate General's report ("Operations Memorandum") to the Department stated:

> After he had read it, he was asked if he was prepared to sign such an Affidavit. He said he was. The Affidavit of expatriated person was typed [and] was given to [appellant] for his perusal. He was informed that we could not oblige him to sign

it. He said he was prepared to sign it. His oath was then taken on the Affidavit of expatriated person and his signature affixed.

The affidavit of expatriated person reads in relevant part:

> I obtained naturalization in a foreign state, to wit, the Commonwealth of Australia, upon my own application on September 22, 1976.
>
> 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.
>
> I have read the foregoing statement in the English language and I understand its contents.

In his submissions, appellant disputes the Consulate General's account of his visit to its offices. He contends that he did not go there to apply for a visa; he went to ask for help and to find out the quickest way to get to the United States. As he put it in his reply to the Department's brief:

> When I visited the Consulate General in Melbourne on March 23, 1979 I explained to the Consular officer that my wife had been kidnapped and was being deprogrammed in New York and that I needed to go there immediately to help her. I was told that I could not have a U.S. passport unless I was prepared to wait for up to two weeks. This would have been impossible due to the circumstances. This consular officer took advantage of my highly emotional state and pressured me into signing these papers against my will. I never intended to give up my U.S. Citizenship. Wouldn't it be considered rather odd that the consular officer never mentioned in his 'Operations Memorandum' of April 5, 1979 that my wife had been kidnapped, nor of my well stated need to leave at once for the U.S. to try to find and help her and my son. This was something I had explained to him in great detail. Certainly this would stand out as something unusual in the normal course of events in the average consular officers daily routine. He pressured me into singing [sic] the papers by making me believe that this was the only way I would be allowed to go the U.S. immediately. Yes, I stated on my visa application I was going to 'find my wife'. After talking with this consular officer there wasn't need to say more. I was very emotional in my plea and it would seem that this would be mentioned as well.
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> The fact that I had never signed these papers before and would not have signed them if I had not been to pushed to doing so is born [sic] out by the fact that they were signed on the very day that I needed to leave for the U.S. to help rescue my wife who had been kidnapped and was in the process of being deprogrammed, a horrible experience likened to psychological torture.

A non-immigrant visa was issued to the appellant, and in early April 1979 he arrived in the United States.

Meanwhile, a consular officer prepared a CLN in appellant's name, as required by law.[2]

The officer certified that appellant acquired United States nationality by virtue of his birth; that he obtained naturalization in a foreign state, to wit, the Commonwealth of Australia upon his own application on September 22, 1976, and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the CLN on July 29, 1979, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review. On October 2, 1979, the Consulate General addressed a letter to appellant at a North Melbourne address and enclosed a copy of the approved CLN. His attention was invited to the appeal procedures described on the reverse of the certificate.

Appellant initiated this appeal in June 1995 when he visited the offices of the Board of Appellate Review.

Appellant maintains that he did not intend to relinquish his United States nationality when he obtained naturalization in Australia. While he does not specifically allege that he did not obtain naturalization voluntarily, he argues that he was subjected to duress when he signed the affidavit of expatriated person in which he swore that he had obtained naturalization of his

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2 Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501 (1994), 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. Approval by the Secretary of State of a certificate under this section shall constitute a final administrative determination of loss of nationality under this chapter, subject to such procedures for administrative appeal as the Secretary shall prescribe by regulation, and also shall constitute a denial of a right or privilege of United States nationality for purposes of section 1503 of this title.

own free will with the intention of relinquishing his United States nationality. As he declared in his reply to the Department's brief:

> I did take Australian Citizenship in 1976 but at no time did I relinquish my United States Citizenship nor did I ever intend to do so. I never signed a paper renouncing my United States Citizenship until I was forced to do so under duress by the consular officer in charge on March 23, 1979 in Melbourne, Australia. Having explained to him that my wife had been kidnapped and of my urgent need to leave for the United States at once to find and help her he took advantage of my highly emotional state and under duress forced me to sign these documents. He never mentions once in his entire "Operations Memorandum" of April 5, 1979 that my wife had even been kidnapped a fact of which he was well aware and which has now been documented by the official records from the Nassau County Police Department (enclosed with this letter). Had this consular officer handled himself in a professional and caring manor [sic] this whole incident would not have happened. I would have been given my U.S. Passport and would never have signed these papers and I would still have my United States Citizenship.

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. Costello v. United States, 365 U.S. 265 (1961).

Under current federal regulations (promulgated in November 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 July 1979, when the Department approved the certificate of loss of nationality that was executed in appellant's name, federal regulations 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 Review on Loss of Nationality.[4]

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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 to Nov. 1979.

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

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

The standard of reasonable time makes allowance for the intervention of unforeseen circumstances beyond a person's control that might prevent one from taking a timely appeal. Accordingly, appellant in the instant case has the burden of showing that he initiated the appeal within a reasonable time after October 1979, when notice was sent to him that the Department had determined that he expatriated himself. The rationale for allowing one a reasonable period of time within which to appeal an adverse citizenship determination is pragmatic and fair. It allows one sufficient time to prepare a case showing that the Department's decision was wrong as a matter of law or fact, while penalizing excessive delay which may be prejudicial to the rights of the opposing party since passage of time inevitably obscures the events surrounding the citizen's performance of the expatriative act. As the court observed in Maldonado-Sanchez v. Shultz, 706 F. Supp. 54, 57-58 (D.D.C. 1989):

> The Court agrees with the defendant's [the Secretary of State] argument that to allow plaintiff to challenge his renunciation some twenty years after the fact is contrary to public policy. It places a tremendous burden on the government to produce witnesses years after the relevant events and to preserve documentation indefinitely. Moreover, a reasonable statute of limitations period serves the important function of mandating a review of the issuance of the CLN when the relevant events are fresh in the minds of the participants.

Whether an appeal has been taken from an adverse administrative or judicial decision within a reasonable time depends upon the circumstances of the particular 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 variables 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).

Explaining why he did not take an appeal sooner, appellant states:

> I realize now that I should also have appealed this long ago, except that I do not believe that I ever received a copy of the "Certificate of Loss of Nationality." Had I received a copy of this certificate I might have known that an appeal was possible. The circumstances that took place on March 23, 1979 at the

> Consulate office in Melbourne left me without much hope. I felt I had no chance of appeal or ever regaining my U.S. Citizenship. It wasn't until returning to the U.S. [in 1995] and talking to [the Chairman of the Board of Appellate Review] that he made me aware that I could appeal my case and ask that my U.S. Citizenship be granted to me.

Specifically, he asserts that he never received the October 2, 1979, letter sent to him by the Consulate General at Melbourne in which was enclosed a copy of the approved CLN with appeal procedures on the reverse side.

> During the years of 1978-1980 I was involved in a mobile ministry to youth and was traveling almost continually. I only lived at [redacted], North Melbourne for a short period during this time. I would have left my forwarding address but unfortunately I never received any mail from the Consulate General. Had I received the letter mentioned I would have responded immediately.

It may be presumed (absent contrary evidence) that the Consulate General at Melbourne duly complied with the statute and mailed a copy of the approved CLN to appellant on October 2, 1979.[5] In 1979 (as now), it was customary to send a CLN to the affected party by registered mail, but there is no postal receipt in the record. So it cannot be stated with assurance whether or not appellant received the letter.

So we will assume, arguendo, that the Consulate General's letter was duly mailed to him at his last known address in October 1979 but that for some reason it did not reach him. Would that circumstance suffice to excuse a delay of sixteen years before contesting the Department's decision that he expatriated himself?

Even if he was not actually informed that he had lost his United States citizenship, appellant plainly knew, as he has conceded, that he probably expatriated himself. Thus he was in possession of a fact which should have moved him to ascertain promptly what recourse he might have to try to recover his United States citizenship. He may not have had actual notice of loss of his citizenship, but he clearly had what is known as constructive notice of that fact, as well as of the right of appeal. For it is well settled that knowledge of a fact or 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 (failure to do the required thing at the proper time) is chargeable to him if he does not use the facts putting him on notice. (McDonald v. Robertson, 104 F.2d 945, 948 (6th Cir. 1939)).

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5 It is curious, however, that the letter in the record appears to be an original. It is a form letter in which appellant's name and address and the date have been typed. The signature of the consul concerned appears to be original, not a photo copy. One might wonder whether a copy of the letter was sent to appellant and the original made part of the case record. What actually happened is probably now unknowable.

In short, in the circumstances, appellant had a responsibility to ascertain what recourse he might have from the Department's adverse decision. Not having done so, and in the absence of credible evidence that the Consulate General was in any way negligent in carrying out its statutory responsibilities, appellant cannot be heard to justify making no effort to appeal before 1995 by alleging that he did not receive notice of the right of appeal.

Furthermore, in the circumstances, it would clearly be prejudicial to the interests of the other party, the Department of State, if we were to allow the appeal and hear it on the merits. At this distance from 1979, the Department would be at a distinct disadvantage to try to rebut appellant's claim that he signed under duress the affidavit of expatriated person (a central piece of evidence in the case) in which he averred that he obtained naturalization in Australia voluntarily and with the intention of relinquishing United States citizenship.

There is also another important consideration which must be given deference. Given the long, insufficiently explained delay in appellant's taking the appeal, the interest in finality, stability and dignity of administrative determinations is entitled to substantial weight.

On all the evidence, appellant's delay of sixteen years in taking the appeal can hardly be considered reasonable. We therefore conclude that it is time-barred and not properly before the Board.

III.

Upon consideration of the foregoing, we hereby dismiss the appeal. Given our disposition of the case, we do not reach the other issues presented.

Alan G. James, Chairman

Howard Meyers, Member

Gerald A. Rosen, Member