January 20, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: B[redacted] F[redacted] K[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, B[redacted] F[redacted] K[redacted], expatriated himself on April 3, 1957, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/ On June 4, 1976, the Consulate General at Montreal executed a certificate of loss of United States nationality which the Department approved. During the summer of 1976, appellant immigrated to the United States, and reacquired his United States citizenship status by naturalization on March 7, 1980, at San Diego, California. He is now appealing the Department's administrative holding of loss of citizenship that was made in 1976.

Appellant, K[redacted], was born in [redacted], and acquired United States citizenship at birth. He emigrated with his parents to Canada in 1930, when he was three years of age, and resided continuously in Canada until 1976, except for temporary stays and visits in the United States, including a brief period of military service in the United States. According to appellant's written submissions to the Board, he had trained as a pilot in the Royal Canadian Air Force from 1943 to 1945, served in the U.S. Army Air Force from August 1945 to April 1946, attended the University of Buffalo in 1947, continued his education in Canada, served in the Royal Canadian Air Force from 1951 to 1953, and subsequently qualified to practice law in Canada. It appears that in 1947, he was also employed by American Airlines in Buffalo, New York and during 1951 by North American Aviation in Los Angeles.

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

> 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 --
>
> (1) obtaining naturalization in a foreign state upon his own application, ...

On April 3, 1957, K[redacted] obtained naturalization in Canada upon his own application. Although the record contains no contemporary account or explanation of his naturalization, K[redacted] stated in an affidavit executed on October 22, 1980, that his "sole and only intention in becoming a Canadian citizen in April, 1957, was to qualify to practice law in Canada."

It appears that it was not until 1976, some nineteen years later, that the Consulate General at Montreal first learned of K[redacted]'s naturalization in Canada. In June of 1976, he applied at the Consulate General for an immigrant visa to the United States. The consular officer reported to the Department at that time that K[redacted] stated that "he had never been documented as a U.S. citizen." The consular officer also reported that K[redacted] presented his Canadian passport and certificate of citizenship as evidence of his Canadian nationality and a certificate of his birth in Philadelphia on June 3, 1927. Appellant also executed on June 4, 1976, at the Consulate General an "Affidavit of Expatriated Person" in which he declared that he was naturalized as a citizen of Canada on April 3, 1957, that the act was free and voluntary, that no influence, compulsion, force or duress was exerted upon him by any other person, and that it was done with the intention of relinquishing his United States citizenship.

On the same day, June 4, 1976, the Consulate General prepared a certificate of loss of United States nationality, as required by section 358 of the Immigration and Nationality Act. 2/ The Consulate General certified

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

> 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 to the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be

that appellant obtained naturalization in Canada on April 3, 1957, upon his own application, and thereby expatriated himself under provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate of loss of United States nationality on July 9, 1976. Thereafter, the Consulate General forwarded to K[redacted] a copy of the certificate of loss of nationality and invited his attention to the appeal procedures described on the reverse side of the certificate.

K[redacted] moved to the United States in the summer of 1976, and became a naturalized United States citizen on March 7, 1980, at San Diego, California. On October 22, 1980, he filed this appeal from the Department's 1976 administrative holding of loss of nationality, notwithstanding that he had since that time regained his United States citizenship status by naturalization.

Appellant alleges in his appeal that it was not until August of 1980, after his naturalization in the United States, that he first became aware of the law relating to his citizenship status as a consequence of his reading, "entirely by chance," the decisions of the Supreme Court in Afroyim v. Rusk, 387 U.S. 253 (1967) and in Vance v. Terrazas, 444 U.S. 252 (1980). In these decisions, the Supreme Court declared that in order to find that a person has expatriated himself or herself, the Government must not only show that the expatriating act has been voluntarily performed, but must also show that the act was performed with an intent to relinquish United States citizenship.

Appellant further alleges that he never intended or wished to renounce or relinquish his United States citizenship in 1957. As to the "Affidavit of Expatriated Person" which he executed on June 4, 1976, and in which he swore that his naturalization in Canada was done with the intention of relinquishing his United States citizenship, appellant repudiates it "as being false". He now states that he swore that affidavit "without a full understanding

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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.

of its full impact upon his U.S. citizenship", and that he believed it to be "an insignificant administrative document". He also states that he swore to that affidavit after he had been informed by consular officers that he had lost his United States citizenship, and after he had advised a consular officer that his only intent in becoming a Canadian citizen was to qualify to practice law in Canada. Appellant argues that his intent to relinquish his United States citizenship has not been proven by a preponderance of the evidence.

While it appears anomalous for K[redacted], a United States citizen, to take an appeal from an earlier administrative determination of his loss of citizenship, he points out that "he may no longer be considered a native born U.S. citizen and no longer entitled to such benefits as are extended to native born citizens." He also points out that the citizenship of his daughter, Catherine Ann Kennerly, who was born in Canada on June 16, 1962, of a Canadian citizen mother, and is presently a resident alien of the United States, will be determined by the appeal.

In a memorandum to the Board dated July 7, 1981, Passport Services on behalf of the Department urges us to dismiss this case as barred by res judicata of the judgment of naturalization. Because appellant was naturalized in the United States in 1980, four years after the Department's administrative holding of loss of nationality, it is argued that the court order of naturalization is conclusive as to appellant's United States citizenship status and that appellant may not now collaterally attack that judgment or other relevant issues that he could have raised in the 1980 naturalization proceedings in the United States.

It could perhaps be also argued that the appeal is frivolous and should be dismissed. On the face of the record it may be said to be devoid of merit and substance in that appellant who recently reacquired his United States citizenship status is now seeking a reversal of an earlier administrative holding of the Department of loss of citizenship.

Although, upon examination, there may be merit to the above arguments, we believe that the Board in the first instance must determine whether the appeal was filed within

the prescribed period of time. If the appeal was not timely filed, the Board would lack jurisdiction to hear the appeal.

Under the current regulations of the Department, which were promulgated on November 30, 1979, the time limitation for filing 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. The current regulations, of course, were not in force at the time the Department approved the certificate of loss of nationality that was issued in this case.

The Department's regulations, which were in effect on July 9, 1976, the date the Department approved the certificate of loss of nationality issued in appellant's case, provided as follows:

> 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. 4/

We consider the above time limitation applicable in the circumstances of this case. Thus, under the governing time limitation, a person who contends that a Department's holding of loss of nationality is contrary to law or fact is required to appeal such holding to the Board within a reasonable time after receipt of notice of the holding of loss of nationality. If a person does not initiate his or her appeal to the Board within a reasonable time, the appeal would be barred and the Board would be without authority to entertain it.

3/ Section 7.5 of Title 22, Code of Federal Regulations, 22 C.F.R. 7.5.

4/ Section 50.60 of Title 22, Code of Federal Regulations (1976), 22 C.F.R. 50.60.

The question of whether an appeal was taken within a reasonable time depends upon the circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). Generally, reasonable time means reasonable under the circumstances. It has been held to mean as soon as circumstances will permit, and with such promptitude as the situation of the parties and the circumstances of the case will allow. This does not mean, however, that a party be allowed to determine "time suitable to himself." In re Roney, 139 F.2d 175, 177 (1943).

As the Department pointed out in its appeal memorandum of July 7, 1981, the time limitation of a reasonable time to appeal an adverse decision is to allow an appellant sufficient time upon receipt of such decision to assert his or her contentions of law or fact against the Department's holding of loss of nationality. Further it should be noted that the period of a "reasonable time" begins to run with the receipt of the Department's holding of loss of nationality, and not at some subsequent time, years later, when appellant may chance upon a court decision bearing upon citizenship matters or when appellant, for whatever reason, may seek belatedly to restore his United States citizenship status.

Here, as we have seen, the Consulate General at Montreal forwarded appellant in July 1976, a copy of the certificate of loss of nationality, and called specifically to his attention the procedures for taking an appeal. Appellant, however, did not dispute the finding of loss of nationality at that time. Instead, he sought and received an immigrant visa to the United States, and thereafter applied for and obtained naturalization in the United States. Whatever the reason, it is beyond dispute that appellant had ample opportunity to take an appeal to the Board prior to that time. In our view, appellant's delay in pursuing an appeal until October 22, 1980, was unreasonable in the circumstances of this case.

We are unable to conclude that the appeal was made within a reasonable time after receipt of the Department's administrative holding of loss of nationality, as prescribed in the regulations on limitations then in effect. Accordingly, we find that the appeal is time barred and

that the Board is without authority to determine the appeal. The appeal is denied.

Julia W. Willis, Chairman

Edward G. Misey, Member

G. Jonathan Greenwald, Member