DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

September 29, 1980

CASE OF: H[redacted] H. B[redacted]

This case is before the Board of Appellate Review on appeal from an administrative holding of the Department of State that appellant, H[redacted] H. B[redacted], also known as H[redacted] H[redacted] B[redacted], expatriated himself on August 8, 1954, under the provisions of section 349(a)(3) of the Immigration and Nationality Act, by entering and serving in the armed forces of Israel. 1/

The appellant, B[redacted], was born in [redacted] on [redacted]. He departed from the United States in April 1950 for Israel, and has resided there ever since. He acquired Israeli nationality by operation of law on July 14, 1952. He had the option under Israeli law to decline Israeli nationality status, but chose not to take such action. 2/

1/ Section 349(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 141(a)(3), reads:

> Sec. 349. 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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> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense; Provided, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; . . .

2/ Section 2(c)(2) of the Israeli Nationality Law of April 1, 1952, provided that automatic acquisition of Israeli nationality by return was not to apply to a person who was a foreign national and who, on or before July 14, 1952, declared that he or she did not desire to become an Israeli national. United Nations Legislative Series, ST/LEG/SER.B/4., Laws Concerning Nationality, 264 (1954).

Prior to his departure to Israel, B[redacted] registered with Local Board No. 17 in Newark, on June 27, 1949, under the Selective Training and Service Act of 1940, as amended. He was classified I-A in the summer of 1951. He was ordered to report for a physical examination in December 1951, and in February 1952, for induction. B[redacted], however, failed to report on either occasion. It appears from the record that B[redacted], by letter dated January 24, 1952, informed Local Board 17 that he intended to remain in Israel and that he no longer considered himself a citizen of the United States. He later informed the Embassy at Tel Aviv on November 18, 1952, that he declined to report for service in the United States armed forces. On June 30, 1953, a criminal indictment was returned by the Federal Grand Jury sitting at Newark, charging B[redacted] with failing, neglecting and refusing to appear and report for induction into military training and service in the armed forces of the United States. 3/

On December 3, 1954, the Embassy at Tel Aviv prepared a certificate of loss of nationality, as required by section 358 of the Immigration and Nationality Act. 4/ The Embassy certi-

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3/ By order of the United States District Court, District of New Jersey, the indictment against H[redacted] H[redacted] B[redacted] was dismissed on September 1, 1967.

4/ 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 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.

fied that B[redacted] expatriated himself under the provisions of section 349(a)(10) of the Immigration and Nationality Act by remaining outside the United States for the purpose of evading military service. 5/ The Department approved the certificate of loss of nationality on December 21, 1954, a copy of which the Embassy sent to B[redacted] on January 12, 1955. He was considered to have lost his citizenship as of December 24, 1952.

On February 18, 1963, the Supreme Court of the United States struck down section 349(a)(10) of the Immigration and Nationality Act. Kennedy v. Mendoza-Martinez and Rusk v. Cort, 372 U.S. 144 (1963). The Court declared section 349(a)(10) unconstitutional because it was punitive and lacked the procedural safeguards guaranteed by the Fifth and Sixth Amendments. In advising all diplomatic and consular posts of this Supreme Court decision in November 1963, the Department stated that all prior determinations of loss of nationality based on section 349(a)(10) were void. It also informed the posts abroad that --

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5/ Section 349(a)(10) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(10) reads:

> Sec. 349. 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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> (10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

> The Department does not contemplate that posts will undertake a general review of their files for the purpose of reactivating cases which were the subject of prior adverse determinations under the cited sections of law. It is anticipated that reconsideration for documentation as an American citizen will be initiated by the person who was the subject of the prior determination or in connection with the determination of a derivative claimant. 6/

In February 1964, B[redacted] appeared at the Embassy at Tel Aviv to obtain a non-immigrant visa to the United States. During the examination of his citizenship status, the Embassy learned that B[redacted] entered and served in the Israeli Defense Forces. According to the Israeli authorities, he was drafted on August 8, 1954, but was deferred until October 1957, to enable him to continue his academic studies. Appellant was released from the Israeli Army on February 4, 1960.

Upon learning of B[redacted]'s military service in the Israeli Army, the Embassy prepared a new certificate of loss of nationality on February 24, 1964. The Embassy declared that B[redacted] acquired the nationality of Israel by virtue of his failure to decline Israeli citizenship on July 14, 1952, and that he expatriated himself on August 8, 1954, under section 349(a)(3) of the Immigration and Nationality Act, by entering and serving in the armed forces of Israel. 7/ The Department approved the certificate of loss of nationality on May 4, 1964; the Embassy forwarded a copy of the approved certificate to appellant on May 15, 1964.

On January 15, 1976, approximately twelve years later, appellant visited the Embassy and inquired about the possibility of regaining his United States citizenship. He claimed that his service in the Israeli Defense Forces was involuntary and that he had no intention of relinquishing his United States citizenship by performing such service. The Embassy referred the case to the Department for consideration.

Following a protracted review of appellant's case, the Department (Passport Office) in August 1977 concluded that the evidence of record did not warrant a reversal of the prior

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6/ Department of State Circular Airgram, CA-5454, dated November 21, 1963, to all American diplomatic and consular posts.

7/ See note 1 supra.

determination of loss of nationality. Thereafter, appellant's counsel sought a further review of the case. By letter dated February 17, 1978, the Passport Office on behalf of the Department informed appellant's counsel that "the Passport Office is satisfied that Mr. B[redacted] lost his United States citizenship as a result of his voluntary service in the Israeli military with the intention of relinquishing his United States citizenship." Appellant filed an appeal with this Board on June 22, 1978, from the Department's 1964 administrative holding of loss of nationality.

The Department's regulations, which were in effect at the time this appeal was taken, provide that a person, who contends that a Department's administrative holding of loss of nationality is contrary to law or fact, is entitled to appeal such holding to the Board within a reasonable time after receipt of notice of the holding. 8/ Accordingly, under those regulations, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's holding of loss of nationality, the appeal would be time barred and the Board would lack jurisdiction to entertain it. The question of whether an appeal is filed within a reasonable time depends on the facts in a particular case. Unlike a fixed limitation, it would not depend upon the fact that a certain fixed period of time has elapsed. 9/

As the Department pointed out in its memorandum of law of March 5, 1979, to the Board, "reasonable time" has been held to mean as soon as circumstances will permit, and such promptitude as the situation of the parties and the circumstances of the case will allow. 75 CJS 636-673. In the case of Chesapeake and Ohio Railway v. Martin, 283 U.S. 209(1931), the Supreme Court said, "What constitutes a reasonable time depends upon the circumstances of a particular case." A Federal Court in In re Roney, 139 F.2d 175, 177 (1943), declared that reasonable time did not mean that a party be allowed to determine "a time suitable to himself." Furthermore, it appears that in every

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8/ Section 50.60 of Title 22, Code of Federal Regulations, 22 C.F.R. 50.60, 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.

9/ The time limit under the current regulations of the Department of State, effective November 30, 1979, is fixed at one year after approval by the Department of the certificate of loss of United States nationality (22 C.F.R. 7.5(b), 44 Federal Register 68825, November 30, 1979).

case "reasonable" means reasonable under the circumstances, and that unnecessary delay, or lengthy delay calculated to benefit only that person causing the delay, should not be tolerated.

The record before the Board shows that appellant received from the Embassy a copy of the certificate of loss of nationality that the Department approved on May 4, 1964, and was thus fully aware in 1964 of the Department's administrative determination of his loss of United States citizenship. It does not appear, however, that appellant raised any question about his loss of citizenship until his visit to the Embassy in January 1976.

It is beyond dispute that appellant permitted a substantial period of time to elapse before taking an appeal. The record shows that the appeal was not filed with this Board until June 22, 1978, fourteen years after the Department's determination of loss of nationality in 1964. Appellant offered no explanation for the great bulk of the delay. At a hearing before this Board on June 24, 1980, appellant's counsel offered the view that B[redacted] "believed there was nothing he could do", and that it was only until appellant was importuned by his parents and found competent counsel "that the possibility arose that perhaps he had not, in fact, expatriated himself." (TR. 10) 10/ Appellant's counsel also suggested that there would have been no valid grounds to object prior to the U.S. Supreme Court's decision of May 27, 1967, in Afroyim v. Rusk, 387 U.S. 253 (1967). (TR. 37) There is, however, no record of any interest by appellant in reestablishing his claim to United States citizenship prior to his visit to the Embassy in January 1976. In our view, his failure to take any action before 1976 demonstrates convincingly that his delay in seeking appeal was unreasonable. Whatever the meaning of the term "reasonable time", as used in the regulations, may be, we do not believe that such language contemplates a delay of fourteen years in taking an appeal, at least eight of which are unexplained.

We are also of the view that the delay of fourteen years in taking an appeal to this Board prejudices the Government's ability to meet its burden of proof. The Department, for example,

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10/ "TR. 10" refers to the transcript of the proceedings before the Board of Appellate Review, June 24, 1980, at page 10 thereof.

is not in a position at this late date to provide any information which would confirm or disprove the alleged advice given appellant by the United States Consul in February 1964, when appellant sought a visa to the United States and executed at the Embassy an affidavit stating that he entered the Israeli Army voluntarily on August 8, 1954. Indeed, the record shows that the United States Consul before whom appellant appeared at the Embassy in 1964 informed the Passport Office of the Department on April 6, 1977, "that after nearly thirteen years I have no recollection of Mr. B[redacted] or his case."

On consideration of the foregoing, 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 prior to 1979. Accordingly, the appeal is time barred and the Board is without authority to consider this appeal.

EDWARD G. MISEY, Presiding Member

ALAN G. JAMES, Member

GERALD A. ROSEN, Member