December 30, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: D[redacted] G[redacted] A[redacted]

This case is before the Board of Appellate Review on an appeal taken by D[redacted] G[redacted] A[redacted] from an administrative determination of the Department of State that he expatriated himself on June 2, 1977, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in the United Kingdom upon his own application. 1/

I

Appellant A[redacted] was born at P[redacted] on [redacted] [redacted] thereby acquiring United States citizenship at birth. It appears that he also acquired a claim to British nationality through his father who had been born in Canada in 1892.

A[redacted] received his schooling in Philadelphia and attended the University of Virginia for part of the academic year 1942-43. In May 1943 he enlisted in the United States Army Air Force and flew seventeen heavy bombardment missions over Northern Europe. He was a prisoner of war in Germany for four months and honorably discharged from the Air Force in August 1945.

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

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, . . .

From 1945 to 1970 A[redacted] seems to have lived variously in the United States and Europe. He took up residence in [redacted] in October 1970 and has lived there since. For several years after his arrival in [redacted] A[redacted] held a variety of temporary minor jobs. He is now Director of [redacted] Town Transfer, a service which assists Americans who have been transferred to [redacted]

Sometime in 1977 Allan applied for naturalization in the United Kingdom. In an affidavit executed on February 8, 1982, A[redacted] stated that following separation from his wife in November 1972 and subsequent divorce, he went through "a period of emotional disturbance lasting, really, three or four years." He further stated:

> I had no money, worked at the most junior jobs in offices....The bleakness seemed without respite. It was during that period that I applied to be naturalized British.

In the same affidavit he explained that he had become naturalized because:

> (1) I saw it as a natural extension of my residence here (2) I thought it might be helpful in finding a good job.

On June 2, 1977, after taking the prescribed oath to Queen Elizabeth II, A[redacted] was granted citizenship of the United Kingdom and Colonies pursuant to section 10 of the British Nationality Act of 1948.

The day after he became a United Kingdom citizen A[redacted] sent the following letter to the United States Embassy at London:

> I am returning my passport owing to my recent naturalization as a British subject, and would be grateful for its return to me after cancellation.

On July 8, the Embassy acknowledged A[redacted] letter and invited him to call at the Embassy to discuss his citizenship status. Since Allan did not reply to that letter, the Embassy again wrote him on November 21, informing him that his naturalization might result in loss of his United States citizenship. He was invited to submit evidence regarding his naturalization and to fill out a short citizenship questionnaire.

A[redacted] replied to the Embassy's November 21 letter on January 9, 1978. He returned the questionnaire, answering "yes" to questions asking whether he performed the act of naturalization voluntarily and with the intention of relinquishing his United States citizenship. Under "remarks", he added:

> (Passport already in your possession) As my father was a British subject at my birth I also acquired British nationality then although I underwent naturalization. As I had not been told of my British status until naturalization processing had been virtually completed it seemed quicker to go on with naturalization. 2/

A[redacted] did not request an appointment at the Embassy, nor did he submit any additional information about his naturalization.

Accordingly, as required by section 358 of the Immigration and Nationality Act, the Embassy on January 13, 1978, prepared a certificate of loss of nationality in the name of

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2/ With respect to A[redacted] contention that he acquired British nationality at birth, the British Home Office informed the Embassy on June 29, 1982 that:

> When Mr. A[redacted] was advised of his possible claim to citizenship of the United Kingdom and Colonies in 1977 he decided, in view of the difficulties he would experience in producing the necessary documentary evidence, to proceed with naturalization. He was regarded as a United States citizen with no claim to citizenship of the United Kingdom and Colonies or British subject status and his certificate of naturalization was therefore not issued in error.

Douglas Gordon Allan. 3/ The Embassy certified that appellant was born at Philadelphia, Pennsylvania on December 30, 1923; that he acquired the nationality of the United States by virtue of birth therein; that he acquired the nationality of the United Kingdom and Colonies by virtue of naturalization upon his own application; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on February 8, 1978, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be taken to this Board. The Embassy forwarded a copy of the approved certificate to Allan on February 22, 1978, by recorded delivery. In his affidavit of February 8, 1982, A[redacted] stated that the Embassy had informed him of his right to take an appeal to this Board.

3/ 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 part III of this subchapter, 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.

On August 17, 1979, A[redacted] received from the American Embassy a non-immigrant visa on the British passport which he had obtained on January 17, 1978.

A[redacted] initiated this appeal on February 8, 1982. His affidavit of that date and supporting documents (including letters from numerous friends attesting that they had always considered him to be an American) constitute his brief. He concedes that his naturalization in the United Kingdom was a voluntary act, but contends that:

> I had hoped to keep my U.S. citizenship as I've never considered myself to be anything but American and at no time have I abandoned allegiance to the U.S. I certainly never intended to relinquish all ties to the U.S., nor have I done so.

II

At the outset, the Board must determine whether the appeal before us was timely filed, a threshhold question which the Department does not address in its brief.

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. 4/ 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 Department approved appellant's certificate of loss of nationality on February 8, 1978, nearly two years before the current regulations went into effect. The Department's regulations, which were in force in 1978, 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 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. 5/

4/ Section 7.5 of Title 22, code of Federal Regulations, 22 CFR 7.5.

5/ Section 50.60 of Title 22, Code of Federal Regulations, (1978), 22 CFR 50.60.

The Board has held that the current regulations regarding the time limit on appeal should not apply retrospectively and the Chairman of the Board informed appellant on August 13, 1981, in reply to his inquiry about how to take an appeal, that the time limit on appeal stipulated in the previous regulations would apply in his case. The Chairman also informed appellant that if he took an appeal, the Board would first have to determine whether his appeal had been timely filed in order to establish the Board's jurisdiction before proceeding to consider the merits of his case.

Thus, under the governing time limitation, a person who contends that the 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.

What is a reasonable time depends, of course, on the facts of each particular case. Unlike a fixed determinate limitation, it would not depend upon the fact that a certain period of time had elapsed. Although the term "reasonable time" cannot be defined in the abstract, the criteria for determining whether an appeal has been taken within a reasonable time have been well established by judicial decisions.

Whether an appeal has been timely filed depends on the circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). It has been held to mean as soon as circumstances will permit and with such promptitude as the situation of the parties will allow. This does not mean, however, that a party will be allowed to determine a "time suitable to himself". In re Roney, 139 F. 2d 175 (1943). Nor should reasonable time be interpreted to permit a protracted and unexplained delay which is prejudicial to either party. Smith v. Pelton Water Wheel Co., 151 Ca. 393 (1907).

The rationale for allowing a reasonable period of time within which to take an appeal from a determination adverse to one's citizenship status is pragmatic and fair. It is intended to allow an appellant sufficient time to prepare a case showing that the Department's holding of loss of citizenship was contrary to law or fact. It presumes, however, that an appellant will prosecute his or her appeal with the diligence and prudence of an ordinary person. Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F.

2d 733 (1926). At the same time allowance is made for circumstances beyond an appellant's control which may impede him or her from promptly petitioning the Board. Where there has been a delay in taking an appeal the appellant is required to show a valid excuse. Appeal of Syby, 66 N.J. Super. 460, 169 A. 2d 749 (1961). Further, reasonable time begins to run with receipt of notice of the Department's holding of loss, not at some time years later when an appellant for whatever reason may seek to restore his or her United States citizenship status.

In the instant appeal, the Department approved the certificate of loss of nationality on February 8, 1978. Two weeks later, on February 22 the Embassy forwarded a copy of the approved certificate to appellant and informed him of his right of appeal, the procedures for which are spelled out on the reverse side of the certificate of loss of nationality. We have seen that appellant specifically stated that he had been informed of his right to appeal.

This appeal was initiated nearly five years after appellant performed a statutory expatriating act and four years after the Department approved the certificate of loss of nationality issued in his name.

Our key inquiry therefore is whether in the circumstances of this case a delay of four years in lodging an appeal is reasonable or not.

In his affidavit of February 8, 1982, appellant briefly addressed the issue as follows:

> When the correspondence from the U.S. Embassy invited me to appeal my loss of U.S. citizenship, I was still in a state of depression and thought I didn't care. And so I did not appeal. Now, however, my life is great. I see the world more clearly and more than ever before know that I can never be other than American.

The foregoing is appellant's only explanation of his failure to take an appeal before 1982. He has not contended, much less offered proof, that his alleged state of depression was of such duration and severity as to render him incapable of seeking timely relief from the Department's determination of loss of his citizenship. However much one may sympathize with appellant as he passed through an apparently difficult stage in his life, we are unable to consider that an unproved state of depression is sufficient justification for a delay of four years in taking this appeal.

Moreover, appellant has not shown that circumstances beyond his control impeded him from assembling and presenting a timely appeal. From the first he knew he had a right to appeal. Yet, he did not exercise that right until 1982 when his fortunes apparently had taken a more favorable turn and he decided to try to undo the consequences of an expatriating act which in 1977 he conceded he had performed voluntarily and with the intention of relinquishing his United States citizenship.

Whatever may have been his personal problems over the past few years, appellant did not use the diligence of an ordinarily prudent person to assert a timely claim to the most fundamental right of an American. Accordingly, we find that appellant's delay of four years in taking this appeal was unreasonable in the circumstances of his case.

Since appellant has shown no good cause why the Board should exercise the discretion granted it by the Department's regulations to enlarge the time for the taking of any action, the Board is without authority to proceed further in this case. 6/

III

Upon consideration of the foregoing, we conclude that the appeal was not taken within a reasonable time, as prescribed in the Department's regulations in effect in 1977 until revised in 1979. Accordingly, we find the appeal barred by the passage of time and that as a consequence the Board is without jurisdiction to entertain it.

Alan G. James, Chairman

Howard Meyers, Member

James G. Sampas, Member

6/ Section 7.10, Title 22, Code of Federal Regulations, 22 CFR 7.10, reads in part:

...The Board, for good cause shown, may in its discretion enlarge the time prescribed by this part for the taking of any action.