April 1, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: [redacted]

This is an appeal from an administrative ruling of the Department of State that appellant, [redacted], expatriated herself on October 28, 1961, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization as a citizen of Canada upon her own application. 1/

I

Appellant, Mrs. [redacted], was born at [redacted] on [redacted]. In 1946 she moved to the United States from Canada, and on April 1, 1952, acquired United States citizenship by virtue of her naturalization at Chicago, Illinois. In December 1953, Mrs. [redacted] returned to Canada and in January 1954 married a Canadian citizen. She has resided in Canada since that time.

Appellant avers that in 1961, when she visited the United States Consulate General at Montreal to renew her U.S. passport, she was informed that she had expatriated

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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, . . .

herself under the provisions of section 352(a)(2) of the Immigration and Nationality Act by residing outside of the United States for five years. 2/ There is no record tha a certificate of loss of nationality was issued to Mrs. H in 1961. Subsequently she applied for an obtained naturalization as a citizen of Canada on October 28, 1961.

On March 3, 1965, the Consulate General at Montreal wrote to appellant stating that as a naturalized American citizen who had resided in Canada for some time, she might have been informed by the Consulate General that as a result of such residence she either lost or was about to lose her American citizenship and therefore had applied for Canadian citizenship. The Consulate General pointed out that "as a result of a Supreme Court decision last year, 3/ naturalized American citizens do not lose their citizenship through prolonged residence abroad and this decision is retroactive." She was therefore invited to apply at the Consulate General for documentation as a United States citizen, and advised that if she did not reply to that communication within two weeks, her case would be considered closed. Appellant did not respond within the time stipulated, since, according to an affidavit she submitted on July 28, 1981, she was on an extended vacation from March 1 to April 15, 1965. She further alleges that when she did call

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2/ Section 352 of the Immigration and Nationality Act (66 Stat. 269, 8 USC 1484 (a) read:

(a) A person who has become a national by naturalization shall lose his nationality by --

(2) having a continuous residence for five years in any dther foreign state or states, except as provided in sections 353 and 354 of this title.

Public Law 95-432, approved October 10, 1978, 92 Stat, 1046, repealed section 352 of the Immigration and Nationality Act.

3/ Schneider v. Rusk, 377 U.S. 163 (1964).

the Consulate General after her return from vacation on a date unspecified, she was told "it was too late and her case was closed." Since the deadline had passed without any response from appellant, the Consulate General on April 2, 1965, prepared a certificate of loss of nationality as required by section 358 of the Immigration and Nationality Act. 4/

The Consulate General certified that appellant was born at Rjukun, Norway on July 4, 1922; that she acquired United States nationality by virtue of her naturalization before the United States District Court at Chicago on April 1, 1952; that she obtained the nationality of Canada by virtue of her naturalization on October 28, 1961; and that she thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate of loss of nationality on April 23, 1965. Thereafter the Consulate General sent Mrs. H[redacted] a copy of the certificate on May 12, 1965.

On July 27, 1981, sixteen years later, Mrs. H[redacted] took this appeal to the Board of Appellate Review which she submitted through the United States Consulate General at Toronto in the form of a statement which constitutes her brief.

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 sucn 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.

upon receipt or appel ant's statement, the Board requested the Office of Passport Services to submit the Department's brief in the appeal and the record upon which the Department's administrative holding of loss of nationality was based.

On February 1, **1982**, the Deputy Assistant Secretary for Passport Services submitted the record, accompanied by a memorandum, in lieu of a brief, setting forth the position of the Department in the appeal. The memorandum requested the Board to remand appellant's case to Passport Services for the purpose of vacating the certificate of loss of nationality.

The memorandum stated as follows:

> Under Section **352** of the Immigration and Nationality Act, loss of citizenship was automatic for naturalized citizens who had continuous residence for five years outside the United States in a foreign country not their country of origin. Mrs. H[redacted] therefore lost her United States citizenship in 1959 on the anniversary of her establishment of residence in Canada. Thus, the information from the Consulate concerning her loss was correct in **1961** and it may well have been the reason she naturalized as a Canadian citizen in late **1961**. Whatever the reason, however, when she naturalized then, it was not an expatriating act under the Immigration and Nationality Act because she was not a U.S. citizen at the time.

The Department therefore concluded that if the initial holding of loss is later voided for whatever reason, any intervening expatriating act cannot be revived to cause expatriation.

II

Before the Board may properly act on the Department's request for remand, we are of the view that the Board must determine whether it has jurisdiction to consider this appeal. The first issue before us therefore is whether the appeal has been timely filed. If the appeal has not been filed within the prescribed period of time, the Board would lack jurisdiction over the case.

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. 5/ 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 were not, of course, in force at the time the Department approved the certificate of loss of nationality which was issued in this case.

The Department's regulations which were in effect on April 23, 1965, the date the Department approved Mrs. H[redacted]' certificate of loss of nationality, contained no provision for a time limit within which to appeal loss of nationality to the Board of Review of Loss of Nationality, the predecessor of the Board of Appellate Review. However, the Department's regulations published in 1966 provided that an appeal from the Department's administrative determination of loss of nationality might be taken to the Board of Review of Loss of Nationality within a reasonable time after receipt of notice of such holding. The time for filing appeals set forth in the 1966 regulations was carried over into the Department's regulations which took effect on November 29, 1967. These latter regulations 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 period of time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 6/

We consider the latter time limitation is applicable in the circumstances of this case. Thus, under the governing time limitation, a person who contends that an administrative determination by the Department of loss of nationality is contrary to law or fact is required to appeal such holding to the Board within a reasonable period of time after receipt of notice of the holding. If a person does not initiate his or her appeal with a reasonable time, the appeal would be barred.

5/ Section 7.5 of Title 22, Code of Federal Regulations, 22 CFR 7.5.

6/ Section 50.60 of Title 22 Code of Federal Regulations, (1967-1979), 22 CFR 50.60.

The question of whether an appeal was taken within a reasonable time depends on 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 the 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 may be allowed to determine a time suitable to himself. In re Roney, 139 F. 2d 175, 177 (1943). Nor should "reasonable time" be interpreted to permit a protracted and unexplained delay. Smith v. Pelton Water Wheel Co., 151 Cal. 393 (1907).

The criterion of "reasonable time" is therefore considered to allow, inter alia, sufficient time to prepare an appeal. The tolling of "reasonable time" commences with the receipt of the Department's holding of loss, and not at the moment when an appellant may decide it is convenient or desirable to take action.

In this case the United States Consulate General at Montreal forwarded appellant a copy of the certificate of loss of nationality in May 1965. It does not appear from the record that appellant took any meaningful action to challenge her loss of nationality until she wrote her letter to the Board of July 27, 1981. Nor has she offered any convincing explanation for such delay.

In two communications to the Board of Appellate Review dated July 27, 1981 and November 5, 1981, appellant states that only on a recent visit to the Consulate General at Toronto (July 1981) was she informed of her right to appeal, and that up to that time such advice had never been suggested or mentioned. She concedes that in 1965 when she was told her case was closed, she more or less accepted her position for the time being. In 1976 she apparently intended to take steps to reacquire her United States citizenship when she requested and obtained from the former United States Consul General at Toronto an affidavit purporting to substantiate her reasons for seeking naturalization in Canada. She did not, however, pursue that objective until nearly five more years had elapsed.

Although the regulations of the Department in effect in 1965 did not require that a diplomatic or consular post inform a person in whose case a certificate of loss of nationality had been issued that he or she had the right of

appeal, an appeal process, was, as noted above, in effect in 1965. Appellant could have readily ascertained this fact from any United States consular or diplomatic post, had she exercised reasonable diligence in protesting her loss of nationality.

In light of the current and more exacting standard of one year's time for taking an appeal and the circumstances of this case where there has been no showing of a requirement for an extended period of time to prepare an appeal or any obstacle beyond appellant's control in taking one, it is apparent to us that the norm of "reasonable time" would not have extended to a delay of sixteen years.

Since the Board is of the view that the elapse of sixteen years clearly constitutes an unreasonable delay in taking the appeal, we find that the appeal taken on July 27, 1981, was not made within a reasonable time after receipt by appellant of notice of the Department's holding of loss of nationality, and therefore is time barred. As a consequence, the Board is without jurisdiction to entertain the appeal.

Given our disposition of this case, we need go no further.

Alan G. James, Chairman

Edward G. Misey, Member

G. Jonathan Greenwald, Member