May 12, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: H[redacted] R[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, H[redacted] R[redacted], expatriated himself on August 19, 1977, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Venezuela upon his own application. 1/

This appeal was filed more than four years after appellant was notified of the Department's holding of loss of his United States citizenship. Thus, the initial issue presented for determination is whether the appeal was filed within the time limitation prescribed by the applicable regulations. We find that since the appeal was not filed within the applicable limitation, it is barred by time. Thus lacking jurisdiction to entertain the appeal, we will dismiss it,

I

Appellant acquired the nationality of the United States by his birth at [redacted]. According to appellant, Cuba and Columbia during his early years, In 1939 he went to Venezuela where his father was employed by an oil company. During World War 11, appellant registered for Selective Service, but was found medically unfit for service. He married a Venezuelan citizen in 1944. After working for several years in Venezuela, appellant went to the United States in 1956, Thereafter, he was employed in New York, Caracas and Chicago by several important United States banks.

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, . . .

In November 1968 while working in Caracas, appellant renewed his passport at the United States Embassy and was registered as a United States citizen.

Following a three-year assignment in a Bank at Chicago, appellant returned to Venezuela in 1974 to represent that bank in Caracas. In 1975 he accepted a position as the Caracas representative of a Miami bank. He again registered at, and obtained a passport from, the Embassy in September 1976.

Appellant resigned as the Miami bank's representative in July 1977 allegedly due to a policy disagreement. Meanwhile, it appears that appellant had applied for naturalization in Venezuela, since, as he has stated, he knew he would not remain with the Miami bank very long. In an affidavit executed September 21, 1981, appellant describe as follows the circumstances surrounding his application for naturalization:

> It was a very bad moment to do so /resign/. I was 56 and emotionally very upset at every thing that had happened.. ..two thirds of the work force at each hierarchical level of each bank and other financial organization in Venezuela must be of Venezuelan citizenship. Therefore, every job opportunity I had required Venezuelan citizenship.
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> I had very little money left, mortgage payments to meet, a wife to support and an 18 year old son to put through college. I could not return to the United States at 56 without a job. I felt a beaten man and saw naturalization as my only hope, the only way I could get a decent job in a financial institution here.
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> So I applied for and was granted Venezuelan citizenship.

According to a report prepared by the Embassy at Caracas on April 28, 1982, appellant told a consular officer that he had had a change of heart in 1977 after making application for naturalization and had attempted to halt the naturalization process. He was, however,

unable to do so. On August 19, 1977, he was granted naturalization as a citizen of Venezuela. 2/

Appellant visited the Embassy in February 1978 for the purpose of informing a consular officer of his naturalization. The only contemporary account of that visit is a brief entry on the Embassy's record of consular contacts with appellant, and the affidavit of expatriated person which appellant executed on February 3, 1978. In the affidavit he swore that his act of naturalization was voluntary and had been done with the intention of relinquishing his United States citizenship, The Embassy cancelled appellant's 1976 passport and returned it to him.

As required by section 358 of the Immigration and Nationality Act, the Embassy prepared a certificate of loss of nationality in appellant's name on February 8, 1978. 3/

The Embassy certified that appellant acquired the nationality of the United States at birth; that he obtained naturalization in Venezuela upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

As far as can be ascertained from the record, the consular officer involved prepared no commentary on appellant's naturalization; she merely forwarded the certificate of loss of nationality to the Department with the affidavit of expatriated person and a copy of the Gaceta Oficial of August 19, 1977.

2/ Gaceta Oficial No, 2.079, Extraordinario, August 19, 1977.

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

Section 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.

The Department approved the certificate of loss of nationality on February 21, 1978 and sent a copy to the Embassy to deliver to appellant. This the Embassy did by letter dated March 15, 1978.

Three and a half years passed. On September 28, 1981, appellant visited the Embassy at Caracas to present "an appeal", as the consular officer who later interviewed him reported to the Department on April 28, 1982. The consular officer stated in her report that as appellant could not be fully interviewed in September $981, because of his business travels, he was given an appointment for March 1982 and was re-interviewed at that time to clarify some of the statements in the affidavit which appellant had left with the consular officer the preceding September.

During the interview on March 31, 1982, appellant explained the circumstances of his naturalization, emphasiz: that he had tried to stop the naturalization application, but had been unable to do so. He also stated that he had only applied for naturalization in order to be able to continue to work in the banking sector in Venezuela. In requesting the Department's opinion on appellant's ease, the consular officer expressed the view that he had obtained naturalization with full realization of the possible consequences even though he hoped he might hold both citizenships.

The Department replied to the Embassy by airgram on July 9, 1982, stating that after reviewing appellant's file, the Department had concluded that the evidence, mainly his affidavit of expatriated person, indicated that he becan naturalized with the intention of relinquishing his United States citizenship. The Department informed the Embassy that in the event appellant wished to take an appeal to the Board of Appellate Review, it was attaching a copy of the Department's current regulations on appeals for his consideration. The Department noted, however, that the current regulations prescribe that appeals must be filed within one year after a holding of loss of nationality, and that it was not known whether the Board would consider appellant's appeal.

Appellant initiated this appeal by letter to the Board dated August 7, 1982.

Appellant contends that his naturalization was involuntary because he was under strong economic and emotional pressures at the time he applied for and obtained naturalization. He also contends that he did not intend to abandon his United States citizenship when he obtained naturalization in Venezuela.

II

We may not proceed in this matter until we determine the threshold issue: whether the Board has jurisdiction to entertain the appeal. The Board may not assume jurisdiction unless it finds that the appeal was filed within the time limit prescribed by the applicable regulations. Thus, if the appeal was not filed within the operative limit, the appeal would be time barred and the Board would lack jurisdiction to consider it. We would have no alternative but to dismiss it.

Under the current regulations of the Department the time limitation on 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 current regulations were, however, promulgated on November 30, 1979, more than a year after the certificate of loss of nationality had been approved in appellant's name. In February 1978 when the Department approved the certificate that was issued in this case, the regulations provided as follows:

4/ Section 7.5(a) of Title 22, Code of Federal Regulations, 22 CFR 7.5(a).

> 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 within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 5/

It is generally recognized that a change in regulations shortening a limitation period is presumed to be prospective, not retrospective, in operation, since retrospective application would disturb a right acquired under former regulations. We are therefore of the view that the limitation in effect in February 1978 should apply in the appeal before us.

The Chairman of the Board of Appellate Review informed appellant by letter dated August 17, 1982, that the limit of "reasonable time" would apply in his case, and that whether his appeal had been timely filed presented a jurisdictional question to be decided at the outset.

What constitutes reasonable time is a matter of interpretation, but a range of judicial decisions offers objectiv guidelines to facilitate determination of that issue. 6/

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

6/ See, for example, Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); In re Roney, 129 F. 2d 175 (1943); Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F. 733 (1926); Smith v. Pelton Water Wheel Co., 151 Ca. 493 (1907); Appeal of Syby, 66 N.J. Super. 460, 196 A. 2d 749 (1961).

Whether an appeal was taken within a reasonable time depends on the circumstances of the particular case. It has been held to mean as soon as the circumstances and with such promptitude as the situation of the parties will permit. A party may not be allowed to determine a time suitable to him or herself. Further, the rule presumes that an appellant will pursue an appeal with the diligence of an ordinary prudent person. A protracted and unexplained delay, particularly one which is prejudicial to the interests of either party cannot be permitted. Where an appeal has been long delayed it has been held that the appellant must show a valid excuse. Reasonable time begins to run with receipt of notice of the Department's holding of loss of citizenship, not at some later date when the appellant for whatever reason may seek to restore his or her citizenship.

In the appeal now before the Board the Department approved the certificate of loss of nationality on February 21, 1978. Appellant lodged his appeal four and one-half years later.

The record shows that the Embassy at Caracas sent a copy of the approved certificate to appellant on March 15, 1978. Appellant has not denied receipt. He was thus on notice shortly after Marsh 15, 1978, that a determination of loss of his United States nationality had been made. The time for him to take an appeal began to run from that moment.

Three and a half years passed before appellant attempted to assert a claim to his lost nationality. As we have seen, appellant visited the Embassy at Caracas in September 1981 to present "an appeal". On July 9, 1982, the Department confirmed its 1978 holding of appellant's loss of nationality. Appellant initiated this appeal the following month.

In his letter to the Board of August 30, 1982, appellant made the following comment on the Chairman's statement that the time limit on appeal in his case would be a reasonable time after receipt of notice of the holding of loss.

> As to filing within a reasonable time....what I read now in the Department's regulations under Part 50-52 /sic/ either I was not notified of-myright to appeal or too sick to realize it as I was sick enough not to realize what I was doing.

In a letter dated January 27, 1983, replying to the Department's contention that appellant's appeal should be deemed time barred, appellant elaborated on the reasons for his delay as follows:

> On the question of REASONABLE TIME: The only reason why I failed to file an appeal to my loss of citizenship before I did was plain ignorance. I did not know that I had a right to do so. I was told of this by an in-migration /sic/ official during a trip to the United States in 1981 and I went to the U.S. Embassy upon my return from that trip to inquire what could be done. It was then that I filed my original affidavit.
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> If I was notified of my right to appeal at the time the certificate of loss of citizenship was delivered I may, as I stated before, have been too sick to realize, too confused also to understand. So confused in fact that 'it was only after I started these proceedings to try to regain my U.S. citizenship that I read the certificate fully and realized what the printed form says.
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> As to the state of my health, I was still ill in 1977 and 1978. I did not wxplain /sic/ to Dr. Ibanez-Petersen the reason why I required his statement, 1/ He is careful

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1/ Appellant refers to the certificate of one Dr. E. H. Iba Petersen, a psychiatrist of Caracas, dated September 20, 19 which reads in pertinent part:

> Hector del Rio has been under treatment here since December 16, 1975,,,
> At the time of his first appointment he was extremely depressed, insecure, inattentive, forgetful and suffering from insomnia. In addition, he was experiencing uncertainty caused by having left his own country where he had friends and a steady position to live in Venezuela against his wishes.
>
> Mr. d[redacted] R[redacted] has been a regular patient here and has totally recovered from the aforementioned symptoms,

English translation, Division of Language Services, Departme State, LS no. 107647 (Spanish) 1982.

> to state the fact that I have totally recovered when he signs the statement in September 1982 thinking perhaps that it was required in connection with a job application. I did not ask him to state what my condition was in 1977 but in my recollection it was worse than in 1975 aggravated by the anguish of the situation.

On its face a delay of over four years in bringing an appeal to this Board would appear to be unreasonable in the absence of a very persuasive explanation for such delay. Briefly stated, appellant's grounds for excusing a delay in his case are that he was not aware of his right to appeal until 1981 and that had he been advised of his right of appeal in 1978, he was then too depressed and ill to appreciate the fact.

Appellant must be deemed to have been cognizant of his right of appeal from the date of his receipt of a copy of the certificate of loss of nationality. The appeal procedures are spelled out on the reverse of that document.

Although, as he avers, he may have been depressed and ill at the time, he has adduced insufficient evidence of an incapacitating physical or mental condition. The certificate of his psychiatrist does not bear out that he was so ill as to be completely incapable of attending to his daily affairs. The symptoms described by Dr. Ibanez Petersen, without a specific opinion that they were of a debilitating nature, do not set appellant apart from countless individuals who suffer depression due to financial and professional problems. They do not, in our view, have any evident bearing on appellant's ability to comprehend the significance of the certificate of loss of nationality. Nor is there any evidence, save his own statement, that these symptoms persisted into 1977 and 1978, several years after he began treatment with Dr. Ibanez Petersen.

In the opinion of the Department, appellant's delay has placed it at a disadvantage in rebutting certain allegations made by appellant. The consular officer who was responsible for appellant's case in 1977-78 has retired and no longer remembers any details of his case; it would be difficult for the Department to verify appellant's assertion that he tried to withdraw his naturalization

application (and we note that appellant has adduced no evidence to support his assertion.) The Department is, in our view, justified in taking this position.

The rationale for allowing an appellant a reasonable time to take an appeal is to permit him an adequate period to prepare a case in support of his contention that the Department's holding of loss of his nationality is contrary to law or fact. It also makes allowance for the interposit. of obstacles beyond his control which make it difficult for an appellant to move expeditiously to protest loss of his citizenship.

In the case before us appellant had adequate time to prepare a case in support of his claim to United States citizenship. He has presented no evidence to show that he encountered obstacles not of his own creation that prevel him from proceeding with dispatch.

We are therefore of the opinion that appellant's unsatisfactorily explained delay of more than four years in appealing to the Board of Appellate Review is unreasonable.

8/ It is true that in 1981 appellant requested that the Department reverse its holding of loss of his citizenship. But even that attempt was made three and one half years after he had been notified of the Department's holding. His action in requesting review of his case did not toll the time limitation; for although the Embassy called appellant's request for review "an appeal", it was not an appeal to this Board.

III

On consideration of the foregoing and our review of the whole record, we are unable to conclude that the appeal was filed within the time limitation of the regulations applicable in this case. Accordingly, we find the appeal time barred. Thus lacking jurisdiction, the Board has no alternative but to dismiss the appeal.

Given our disposition of the case, we do not reach the other issues presented.

Alan G. James, Chairman

Warren E. Hewitt, Member

George Taft, Member