February 3, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: B[redacted] A[redacted] S[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, B[redacted] A[redacted] S[redacted], expatriated himself on October 17, 1974, u[redacted] t[redacted] ovisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in the United Kingdom upon his own application. 1/

I

[redacted] was born at [redacted], on [redacted] reby acquirin[redacted] - zenship at birth. In September 1963, he obtained a passport on which he traveled to the United Kingdom where, according to his own submission, he entered the London School of Film Technique. He renewed his passport at the United States Embassy at London in September 196[redacted] After finishing his studies at the film school S[redacted] reportedly formed **a** film company with two other graduates of the school.

The United States Commissioner for the W[redacted] District of Wisconsin issued a warrant for S[redacted] arres[redacted] on March 12, 1968, for violation of **50** U.S.C. section 462 -- failing to report for induction into the armed forces of the United States. Informed of the issuance of the arrest warrant, the Department on March 29, 1968, instructed the Embassy at London to revoke S[redacted]'s passport and offer him documentation for retu[redacted] to the United States.

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

See. **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, . . .

Some months later, after having finally located S[redacted], the Embassy, by letter dated June 26, 1968, requested that he surrender his passport and informed him that he had a righ[redacted] appeal the revocation decision. On July 9, 1968, S[redacted] responded to the Embassy's letter, stating that he wished to appeal, and requested a list of lawyers in London who might assist him. S[redacted] did not, however, respond to the Embassy's sub- s[redacted]t letter advising him that if he intended to appeal he should do so within sixty days.

As late as Octob[redacted] 1971, the Embassy informed the Department that S[redacted] had not requested a hearing. Subsequently, the Embassy further informed the Department that S[redacted] had not surrendered his passport, that he had [redacted]ined a British work permit and was employed by a film company.

The British Home Of[redacted] informed the Embassy on October 29, 1974, that S[redacted] had been naturalized on October 17, 1974, as a citizen of the United Kingdom and Colonies under section 10 of the British Nationality Act of 1948. 2/

The Embassy wrote S[redacted] on November 19, 1974, to inform him that by obtai[redacted] naturalization in the United Kingdom he might have lost his citizenship. He was invited to submit information about his naturalization and to complete a short questionnaire to assist the Department in determining whether he had expatriated himself. S[redacted] did not reply to this letter. Accordingly, the Embassy wrote him again on February 7, 1975, warning that if he did'not reply within sixty days it would be assumed that he had intended to relinquish his citizenship by obtaining British nationality.

2/ The record shows that S[redacted] obtained a British passport on November 7, 1974. The record also shows that S[redacted] obtained non-immigrant visas on his British passport in March 1976 and May 1978 from the American Embassy in London.

S[redacted] replied to the Embassy by letter dated February 24, 1975, in which he returned, completed, the short citizenship questionnaire. He marked "X" in the block opposite the following statement in the questionnaire:

> I was naturalized as a citizen of the United Kingdom and Colonies on October 17, 1974. I further state that this was my free and voluntary act and that no influence, compulsion, force or duress was exerted upon me by any other person, and that it was done without any reservation and with the intention of relinquishing my United States citizenship.

He indicated that he did not wish to submit any evidence or to contest a decision that he had lost his United States citizenship. He did, however, amplify the questionnaire by informing the consular officer concerned that:

> My decision to apply for United Kingdom nationality was made in January 1973.
>
> Recently I received a letter from the Department of Justice, a copy of which is enclosed, informing me that the indictment against me (which initially brought about the revocation of my U.S. passport) has been dismissed. While I do not regret becoming a citizen of the United Kingdom as my home and work are here, it is unlikely that I would have felt the need to acquire U.K. nationality if the indictment against me had been dismissed prior to 1973.

The record shows that the indictment against S[redacted] was dismissed on February 5, 1975, following a review of his case under President Ford's clemency program which had revealed that his record contained "certain legal defects." 3/

3/ Letter to S[redacted] from the United States Attorney for the Western District of Wisconsin, February 6, 1975.

As required by section 358 of the Immigration and Nationality Act, the Embassy prepared a certificate of loss of nationality in S[redacted] name on March 13, 1975. [4/] C[redacted] was born at [redacted] he acquired [redacted]ality of the United States by virtue of his birth therein; that he acquired the nationality of the United Kingdom and Colonies of Great Britain by virtue of registration (sic) upon his own application; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

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.

The Embassy forwarded the certificate and other relevant documents in his file to the Department on March 1975, without accompanying commentary. The Department approved the certificate on April 23, 1975, and sent a co thereof to the Embassy. The Embassy in turn sent a copy S[redacted] by recorded delivery on May 19, 1975. Approval of the certificate constitutes an administrative determinati of loss of nationality from which an appeal, properly and timely filed, may be taken to this Board.

Four years later, on April 19, 1979, S[redacted] appeared at the Embassy at London to apply for regis on as a United States citizen because, as the Embassy informed th Department on June PP, 1979, "he now wishes to appeal thi loss of nationality."

In an affidavit executed on April 19, 1979, S[redacted] gave the following reasons for his appeal:

> During the last two years my desire to regain my American nationality and return to the United States has increased. This is mainly due to the failing health el my mother Mrs. D S .... recently she h er major surgery....she has separated from my stepfather and is suing him for divorce....her health in general is not good.. ..I feel that she needs close looking after and I would very much like to be near her. ...Now that the indictment against me has been dismissed I feel that I should be allowed to return to the United States to live and work and for this reason I have decided to appeal the loss of my United States citizenship.

S[redacted] filled out two questionnaires to assist the Department in making a determination of his citizenship status.

In his affidavit and questionnaires, S[redacted] gave substantially the same reasons for his having become naturalized in the United Kingdom as he had done in his letter to the Embassy on February 24, 1975. In one questionnaire he amplified his previous statements about his naturalization as follows:

> The indictment against me was dismissed on Feb. 5, 1975 and I received notice of it approx. a week later. The certificate of loss of nationality /of U.S. citizenship/ was issued March 13, 1975, too late 1 thought to do anything about it. Had the indictment against me been dismissed prior to my British nationality coming through, 1 would have stopped my application. My allegiance has always been to the United States and I would never have considered obtaining British nationality if I could have avoided it. But my living was dependent upon possessing a valid passport.

In answer to another question concern is reasons for taking an oath to the British Crown, S stated:

> 1 intended to become a citizen of Great Britain and was aware that by so doing I would have to relinquish my United States citizenship.

On June 11, 1979, the Embassy forwarded S registration application, his affidavit and ot u-ments to the Department for a determination. The Department held the matter under consideration for six months before informing the Embassy on December 26, 1979, that:

> Under policy guidelines established in August 1979 the Department...will1 not reopen except under exceptional circumstances cases in which there has been a final determination of loss of nationali The proper avenue for Mr. S is to appeal the lost decision to the Board of Appellate Review....As the registra application executed by Mr. S on April 19, 1979, appears in the nature of an appeal, we have sent the application to the Board.. ..

Passport Services did not, however, forward S[redacted] documents to this Board until January 30, 1980, at which time they advised the Board that a memorandum giving the Department's position on his appeal was being prepared.

On February 1, 1980, the Chairman of the Board informed S[redacted] that the Board would accept his affidavit April 19[redacted] an appeal and that when the Board had received the Department's memorandum a copy would be sent to him,

One year later the Department's brief had still not been submitted to the Board. On July 8, 1981, the Department finally filed its brief, a copy of which the Board sent to S[redacted] by letter of July 10, 1981, and advised him tha[redacted] had the right to file a reply brief. Scobie did not reply to the Chairman's letter until June 14, 1982, and then only after the Board had twice written to inquire whether he intended to pursue his appeal. S[redacted] indicated that he wished the Board to proceed with his appeal, but did not submit a reply brief as such. He explained his delay in responding to the Chairman's letter of July 1981, as follows:

> In the course of moving your letter of July 10, 1981, was mislaid. By the time I found it I thought it too late to reply and assumed that the Board would have made its decision.

Despite S[redacted] dilatoriness in replying to the Board's correspondence and the casualness he has shown throughout in his dealing with U.S. officials about mat affecting his citizenship rights, we believe we should proceed to consider his appeal. Given the unwarranted delays of the Department, first, in acting on his registration application and later, in submitting its brief, it would be inequitable were we not to do so.

II

Before the Board may proceed we must determine whether we have jurisdiction to consider the appeal. Therefore, we must first reach a judgment on whether th appeal was timely filed. If the appeal was not filed within the time prescribed by the applicable regulation the Board would lack jurisdiction over the case.

The current regulations prescribe that the time limitation on appeal shall be one year after approval by the Department of the certificate of loss of nationality. An appeal filed after the prescribed time shall be denied unless the Board, for good cause shown, determines that the appeal could not have been filed within the stipulated time. 5/

In our opinion, however, the current time limitation should not be applied retrospectively. We therefore believe that the appropriate time limitation is that stipulated in the regulations which were in effect on April 23, 1975, the date on which the Department approved the certificate of loss of nationality issued in appellant's name. Those 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 time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 6/

5/ Section 7.5(a) and (b) of Title 22, Code of Federal Regulations (1982), 22 CFR 7.5(a) and (b).

6/ Section 50.60 of Title 22, Code of Federal Regulations (1975), 22 CFR 50.60.

Under the standard of "reasonable time", 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 appeal to the Board within a reasonable time, the appeal would be barred and the Board would be without authority to entertain it. The reasonable time limitation is thus clearly jurisdictional. 7/

The Chairman of the Board informed S[redacted] by letter dated February 1, 1980, that the Board had accepted his appeal. The Chairman also informed S[redacted] that the Department's regulations regarding the time limit on appeal which were in effect on the date he had expatriated himself (22 CFR 50.60) were relevant to his case. A copy of the regulations was enclosed in the Chairman's letter.

The criteria for determining whether an appeal has been filed within a reasonable time are well established. 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). Reasonable time

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7/ The Attorney General of the United States in an opinion rendered in the citizenship appeal of Claude Cartier in 1973 stated:

> The Secretary of State did not confer upon the Board the power...to review actions taken long ago. 22 C.F.R. 50.60, the jurisdictional basis of the Board, requires specifically that the appeal to the Board be made within a reascnable time after the receipt of an administrative holding of loss of nationality or expatriation.

Office of Attorney General, Washington, D.C. File: CO-349-P, February 7, 1972,

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 Cal. 393 (1907).

The rationale for allowing a reasonable period of time to appeal a decision adverse to one's citizenship status is pragmatic and fair. It is intended to allow an appellant 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., C.C.A.N.Y. 9 F. 2d 733 (1926).

Excessive delay cannot be permitted, for it may be detrimental to the rights of the other party -- the Department. Further, passage of an unreasonable time between the performance of the expatriating act and the taking of the appeal can make It difficult for the trier of fact objectively to establish whether the essential elements in a loss of nationality case are present, namely, whether the act was performed voluntarily and with the requisite intent to relinquish United States citizenship.

At the same time the rule of reasonable time makes allowance 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, however, the appellant is required to show a valid excuse. Appeal of Syby, 66 N.J. Super. 460, 196 A. 2d. 749 (1961). Further, reasonable time begins to run with receipt of notice of the Department's holding of loss, not at some subsequent time years later when appellant for whatever reason may seek to restore his or her United States citizenship status.

Neither appellant nor the Department addressed the threshold question of timeliness of filing of the appeal in their submissions. At the request of the Board, however, both subsequently did so. The Department's memorandum to the Board of November 5, 1982, on timeliness set forth with particularity points of law and fact which in the judgment of the Department demonstrated that s[redacted]

delay of four years in taking an appeal was unreasonable in the circumstances of his case and therefore should be deemed to Be time barred.

Appellant, by a letter to the Board dated January 12 1983, offered the following explanation of his delay in appealing:

> The reason my appeal was first made in April 1979, was that that was the earliest I knew that US citizenship had been restored to some whose cases were similar to mine, and that it was possible to appeal at that date. Had I known before then that there was a chance of successfully appealing, I would have lodged an appeal earlier.

He also made the following observation on "timelines

> Surely it is the right of every appellant to know the conditions under which his appeal is to be heard at the time he first makes his appeal. The decisions of the cases in the memorandum /the Department's memorandum- to. the Board of November 5, 1982/...are all decisions made several years after my appeal was filed on April 19, 1979. When I initiated my appeal I received no information from the Department of State or the American Embassy in London about the question of timeliness or, indeed, that timeliness was relevant to my appeal at all. Thus for timeliness to be trotted out at a later date as means of barring an appeal when it was not considered important enough to be mentioned at the time of the filing of the appeal seems contrary to the ruling In re Rony (1943): "Reasonable time may vary with the circumstances,... it is not set by one party to suit his own purpose and convenience." /Emphasis in original/.

The Department approved the certificate of loss of nationality issued in appellant's name on April 23, 1975 The Embassy at London sent appellant a copy of the appro

certificate by recorded delivery (effectively, registered delivery) on Nay **19, 1975.** Appellant initiated this appeal on April 19, **1979,** some four years later.

Appellant does not contend that he did not receive a copy of the approved certificate within **a** reasonable time after it was mailed to him on May 19, **1975.** And he had been aware as early as February **1975** that his naturalization in the United Kingdom could cost him his United States citizenship; he acknowledged as much in his letter to the Embassy of February **24, 1975,** and the questionnaire which he had completed at the request of the Embassy.

We are unable to accept appellant's assertion that he did not know until April **1979** that he had recourse to an appeal to this Board. The procedures for taking an appeal are spelled out on the reverse of the certificate of **loss** of nationality. Further, the Department's Foreign Affairs Manual **(8** FAM **224.21)** requires that an expatriate be informed in writing of his right to appeal at the time a copy of the approved certificate of loss is sent to him. Absent evidence to the contrary, it may be assumed that the Embassy duly complied with this requirement of the Foreign Affairs Manual.

Appellant's assertion that he did not until April **1979** think an appeal would be successful is an insubstantial excuse for his failure to contest promptly the loss of the most fundamental right of an American.

Appellant's general observation about the issue of timeliness of filing an appeal is misconceived. **As** we have seen, the Chairman of the Board informed him by letter dated February 1, 1980, that the standard of "reasonable time" would apply in his case, and sent him a copy of the pertinent regulations. Since the Chairman's letter was sent to appellant through the Embassy at London with the request that it be sent in London to appellant by registered mail or equivalent, it is reasonable to assume that appellant received the letter and the enclosed copy of the regulations. If he did not read the regulations at the time he received them, he has no one but himself to blame. If he did not understand them, he could have consulted competent legal counsel. Appellant's apparent failure to do either gives him no standing to assert at this juncture that he did not grasp that timely filing of an appeal is a threshold jurisdictional issue.

Appellant has adduced no valid reason why his appeal could not have been lodged well before April 19, 1979. In the circumstances of this case where there has been nc showing of a requirement for an extended period of time t prepare and file an appeal or any obstacle beyond appellant's control to do so, the norm of "reasonable tin cannot extend to a delay of nearly four years.

III

Since the Board is of the opinion that the elapse of four years constitutes an unreasonable delay in taking this appeal, we find that the appeal initiated on April 1 1979, was not filed within a reasonable time after recei by appellant of notice of the Department's determination loss of his nationality, and is therefore time barred.

As a consequence, the Board is without jurisdiction to consider it. The appeal is dismissed. Given our disposition of the case, we do not reach the other issue 'presented.

Alan G. James, Chairman

Edward G. Misey, Member

James G. Sampas, Member