August 5, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: B[redacted] E[redacted] W[redacted]

This is an appeal from an administrativ[redacted] te[redacted] io[redacted] of the Department of State that appellant, B[redacted] E[redacted] W[redacted] expatriated himself on May 24, 1974, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1

This appeal was filed on November 3, 1982, more than six 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 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 the record, appellant lived in the United States

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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 --

(I) obtaining naturalization in a foreign state upon his own application, . . .

until September 8, 1968, when he entered Canada to place "myslef /sic/ outside the jurisdiction of the U.S. courts ..." On September 25, 1968, the United States Selective Service Board Number 155 (New Orleans) declared him delinquent for failure to report for induction into the U.S. Armed Forces on September 16, 1968. In connectl'on therewith, on April 7, 1969, the U.S. Government filed a complaint in the U.S. District Court for the Eastern District of Louisiana charging him with violation of U.S. Code, Title 50, Section 462E. A warrant for appellant's arrest was issued that same date. According to a Federal Bureau of Investigation (FBI) document dated August 12, 1975, W[redacted] was interviewed by Canadian authorities, upon a requ[redacted] of the FBI, on February 21, 1969. In this interview, he stated that he had obtained landed immigrant status in Canada (admission for permanent residence), that he had no intention of returning to the United States in order to comply with the Selective Service Act, and that he intended to become a Canadl'an citizen upon satisfaction of all requirements applicable to that process.

In reply to an inquiry by the American Embassy Ottawa of September 8, 1975, the Canadian Government stated that appellant was granted citizenship/naturalization and took an oath of allegiance to Canada pursuant to the Canadian Citizenship Act on May 24, 1974. [redacted]n November 28, 1975, the Vice Consul sent a letter to W[redacted] inviting him to submit any comments and evidence he [redacted] desire the Department of State to consider in determining his citizenship status, particularly regarding the voluntariness of his action or his intent tc relinquish U.S. citizenship by his actl'on when he became naturalized in Canada. He was also invited to consult with a member of the consular staff about applicable laws or any relevant matter. He was asked to complete the form on the reverse of the letter regarding his naturalization. Appellant replied by returning the embassy's form letter and a short questionnaire. In the box next to the following typed statement on the questionnaire, appellant marked "X".

> I (was naturalized as a citizen of Canada on 24 May 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 persons, and that it was done without any reservation and with the intention of relinquishing my United States citizenship.

Appellant signed his name and dated the form, February 1, 1976.

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 June 22, 1976. 2/

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

The Department approved the certificate of loss of nationality on July 13, 1976, and sent a copy to the Embassy to deliver to appellant. This the Embassy did by letter dated August 3, 1976, which informed appellant in considerable detail of his right to take an appeal to the Board of Appellate Review

Appellant filed this appeal in November 1982.

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2/ 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.

II

Before proceeding we must determine whether the Board has jurisdiction to consider the appeal. Our jurisdiction is dependent upon a finding that the appeal was filed within the limit prescribed by the applicable regulations. If we find that the appeal was not timely filed, we would lack jurisdiction and would have no alternative but to dimiss 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. 3/ 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 three years after the certificate of loss of nationality had been approved in appellant's name. In July 1976, when the Department approved the certificate that was issued in this case, the 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 within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 4/

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

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

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 July 1976 should apply In the appeal before us.

The rule on reasonable time is well settled. 5/ 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, generally is fatal. 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 case before the Board the Department approved the certificate of loss of nationality on July 13, 1976. Appellant brought his appeal more than six years later.

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5/ See, for example, Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); In re Roney, 139 F. 2d 175 (1943); Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F. 2d 733 (1926); Smith v. Pelton Water Wheel Co., 151 Ca. 393 (1307); Appeal of Syby, 66 N.J. Super. 460, 169 A. 2d 749 (1961).

The record shows that the Embassy sent a copy of the approved certificate to appellant on August 3, 1976, noting in the covering letter the grounds on which an appeal may be based and the procedure to be followed, including submitting a written appeal "within a reasonable time after receiving notice of the Department's administrative holding of loss of nationality." Appellant has not contended that he did not receive a copy of the certificate, or that he was not on notice from some time close to August 3, 1976, that the Department had determined that he had expatriated himself. Indeed, in his letter of November 3, 1982 to the Board, appellant states that:

> (1) This appeal is being filed some six years after the administrative determination of my loss of U.S. citizenship. This is indeed a long time, and ordinarily could not be considered "reasonable."

Appellant maintains that he "set in motion the steps leading to this appeal shortly after first learning that I possibly had grounds on which to appeal." In 1982, he asserts, on a business trip to the United States, a U.S. immigration officer told him that he might not have lost hfs United States citizenship because of his naturalization in Canada and he should look into the matter. Appellant made inquiries at the Consulate in Toronto and as presented in his Brief:

> .., learned that becoming a Canadian citizen no longer led to virtually automatic loss of U.S. nationality. In particular, the U.S. consulate gave me a copy of a form letter they had prepared OR the subject....This letter explained that in January 1980 (four years after the determination of my loss of U.S. citizenship), "in the case of Vance v. Terrazas, the United States Supreme Court held that a U.S. citizen cannot be found to have expatriated himself by performing one of the acts listed in Section 349(a) /of the Immigration and Nationality Act/ unless he thereby intended to relinquish U.S. citizenship."

> This information was entirely new to me as of July 1982. It was the first indication I had that I had any grounds for this appeal....My claim, therefore, is that this appeal is filed within a reasonable time because I filed this appeal soon after I became aware of the above-mentioned judicial decision.

Appellant admits that he "was in error not to have pursued the available channels in 1976 despite their expected outcome" but he maintains that "my failure to do so cannot be isolated from the fact that the Supreme Court did not separate until 1980 the issues of voluntary naturalization in a foreign country from intent to relinquish U.S. citizenship."

We find appellant's contention without merit. The letter from the Consul of August 3, 1976, to appellant enclosing the certificate of loss of nationality, clearly notified him of his right of appeal, the applicable time constraint and the grounds for appeal. Appellant had ample opportunity at that time to make inquiries at the Consulate General, the Department or the Board of Appellate Review, Indeed, he might reasonably have sought the advice of legal counsel regarding the most precious right of United States citizenship. He made none of these inquiries for six years, in spite of the fact that the American Consul's letter referred, inter alia, to the possibility "that /if/ the holding of loss of nationality in your ease is contrary to law or fact, you may present an appeal...." Appellant was not an attorney but was clearly put on notice that legal questions might be grounds for appeal. He made no inquiry of others competent in these matters as an ordinary prudent person should have done.

Moreover, we note that the Supreme Court in Afroyim v. Rusk, 387 U.S. 253, 268 (1967) stated:

> Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship,

On January 18, 1969, the Attorney General issued a Statement of Interpretation which reads in pertinent part as follows:

> 2. For administrative purposes, and until the courts have clarified the scope of Afroyim, I have concluded that it is the duty of Executive officials to apply the Act on the following basis. "Voluntary relinquishment" of citizenship is not confined to a written renunciation, as under section 349(a)(6) and (7) of the Act, 8 U.S.C. 1481(a)(6) and (7). It can also be manifested by other actions declared expatriative under the Act, if such actions are in derogation of allegiance to this country. Yet even in those cases, Afroyim leaves it open to the individual to raise the issue of intent.
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> Once the issue of intent is raised, the Act makes it clear that the burden of proof is on the party asserting that expatriation has occurred. Afroyim suggests that this burden is not easily satisfied by the Government. 6/

Had appellant made inquiries in 1976 upon receipt of the consul's letter he could be expected to have learned of Afroyim and the Attorney General's Statement of Interpretation. 7/ Appellant's failure to ascertain the applicable law is no excuse for failure to take an appeal within a reasonable time.

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6/ 42 Op. Atty. Gen. 397 (1969).

7/ The substance of the Attorney General's Statement of Interpretation, and, inter alia, instructions for the processing of cases in light of Afroyim and the Attorney General's Statement of Interpretation and procedural instructions for action by diplomatic and consular posts in developing cases for submission to the Department of State were sent to all American Diplomatic and Consular Posts May 16, 1969, by Department Airgram CA-2855. The Statement itself was incorporated into the Department's Foreign Affairs Manual, 8 FAM 284.

As the applicable regulations make absolutely clear, the period of "reasonable time" begins to run from the date an expatriate receives notice of the Department's holding of loss of his nationality -- not sometime later when the person, for whatever reason, believes he may have a basis for claiming restoration of his nationalfty, or when he finds it convenient and propitious to do so. To follow appellant's theory that reasonable time should run from the date on which he discovered that he might have a legal rationale on which to prosecute an appeal would wrongly invest in the appellant a unilateral right to determine "reasonable time," contrary to the applicable regulations.

The rationale for allowing appellant a reasonable time to take an appeal is to permit him an adequate period within which to prepare a case to support his contention that the Department's holding of loss of citizenship was contrary to law or fact.

In our view appellant, had ample time to prepare an appeal. Nothing in the record indicates that appellant was prevented by forces beyond his control from taking a timely appeal. The Board is therefore of the opinion that appellant's delay of six years in bringing this appeal to the Board is unreasonable.

III

On consideration of the foregoing and our review of the entire record, we are unable to conclude that the appeal was filed within the time limitation of the applicable regulations. Accordingly, we find it barred, and the Board lacks jurisdiction to consider it, The appeal is dismissed,

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

Alan G. James, Chairman

James G. Sampas, Member

George Taft, Member