September 15, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M C (M)

This case is before the Board of Appellate Review on ught by M C (also known as from an in determination o t of State that she expatriated herself on May 25, 1951, under the provisions of section 401(d) of the Nationality Act of 1940 by accepting a post under the Government of Greece for which only nationals of such state are eligible. 1/

The threshold issue presented is whether the Board has jurisdiction to entertain an appeal brought to the Board approximately twenty-seven years after the Department approved the certificate of loss of nationality that was issued in appellant's name, We find the appeal barred by time. Thus lacking jurisdiction, we will dismiss it.

I

Appellant acquired United States citizenship by birth on . She apparently als Greece rough her parents her mother was a citizen of Greece and her father appears to have been a citizen of Greece, In 1922 her parents took her to Romania where she resided until 1939. In 1939 she moved to Greece with her parents. On January 16, 1947, appellant sought registration as an American citizen at the

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1/ Section 401(d) of Chapter IV of the Nationality Act of 1940, 8 U.S.C. 801, reads:

> Section 401, A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
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> . . .
>
> (d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for whish only nationals of such state are eligible; . . .

U.S. Embassy at Athens, Her application was disapproved by the Department on June 28, 1948, because of her age, dual nationality status and long residence abroad. It does not appear that this action constituted a finding of loss of U.S. nationality.

On June 16, 1955, appellant, who states she is a microbiologist physician, applied at the U.S. Embassy at Athens for a passport to visit the United States for training. In an affidavit executed that same day, she stated that:

> On May 25, 1951 I was appointed assistant to the Microbiological Laboratory of the University of Athens and took the prescribed oath of allegiance to Greece.
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> I took this post, because there was a vacancy, in order to specialize in my branch. I could have tried to find such a post in a private hospital but I would not have been remunerated. Therefore, as I was in need of financial support, and training I accepted the position. I was not aware, however, that acceptance of such a position might jeopardize my American citizenship,

The same day appellant appeared at the Embassy, a consular officer prepared a certificate of loss of nationality in appellant's name, as required by section 358 of the Immigration and Nationality Act. 2/ The consular officer

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2/ 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 American 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 to be 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.

certified that appellant expatriated herself under the provisions of section 401(d) of the Nationality Act of 1940 by accepting a post under the National University of Athens, an institution controlled by the Greek State, for which only nationals of such state are eligible. 3/ The Department approved the certificate on October 18, 1955, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to this Board.

According to a handwritten notation on the certificate, the Department sent a copy of the approved certificate of loss of nationality to the Embassy on May 2, 1956, to be forwarded to appellant, as required by section 358 of the Immigration and Nationality Act. The official record does not show that appellant received a copy of the certificate of loss of nationality. However, since the record does not indicate otherwise, it may be presumed that the Embassy received the approved certificate from the Department and duly sent a copy to appellant, for a presumption of regulari attaches to the performance of official acts by public officials, in the absence of evidence to the contrary. Webster v. Estelle, 585 F. 2d 926 (1974).

3/ The record shows that the University is an entity of the Greek State. Other than the statement made by the consular officer in the certificate of loss of nationality, nothing in the record indicates that the position she accepted was one for which only nationals of Greece are eligible.

It is not unreasonable therefore to assume that appellant received a copy of the certificate of loss of her nationality sometime in 1956. She maintains, however, that she did not learn that such a certificate had been issued in her name until about 1965 when she sought a U.S. tourist visa in her Greek passport.

It does not appear from the record that appellant attempted to claim a right to United States citizenship, subsequent to the certificate of loss of nationality being approved, until May 27, 1982, when she applied for a U.S. passport at New York. A passport was issued to her on July 15, 1982, but the Department informed appellant on August 17, 1982, that the passport would have to be surrendered to the Department immediately, as it had been issued in ignorance of the fact that In 1955 she had Been found to have expatriated herself. She was also advised of her right to appeal to the Board of Appellate Review.

Appellant initiated this appeal through counsel on October 8, 1982.

Appellant maintains that she could not have brought an appeal until June 1981, at the earliest, and that she signed an oath of allegiance to Greece in the belief that it was a mere formality to comply with a requirement of obtaining a position with the University of Athens. She had subscribed to the oath, she maintains, without the intent of surrendering her American citizenship.

The Department contends that the appeal was not timely filed under the applicable regulations, and thus is time barred; accordingly, the Department argues, the Board lacks jurisdiction to entertain it. At the same time the Department takes the position, that under the criterion of Afroyim v. Rusk, 387 U.S. 253 (1967), a finding of loss of nationality cannot be sustained in this case, given the nature of appellant's employment under the Greek Government and the lack of any evidence that appellant intended to relinquish her U.S. citizenship. In brief, the Department believes that appellant's conduct was not expatriatfve; and it intends to vacate the certificate of loss of nationality that was issued in her name.

II

The basic issue raised at the outset is whether this Board has jurisdiction to entertain an appeal entered thirty one years after a statutory act of expatriation occurred and twenty-six years after appellant's right to appeal the Department's holding of loss may be considered to have accru

In 1955 when the Department approved the certificate of loss of nationality issued in appellant's name, the Board of Appellate Review did not exist, There was then in existence the Board of Review on Loss of Nationality within the Passport Office to which appeals might be brought. Guidelines for informing a person of his right of appeal were set forth in the Foreign Service Manual as Chapter 2, section 238.1 "Advice on Making Appeals." There was no specified time limitation. 4/

In 1966 Departmental regulations were promulgated prescribing that an appeal to the Board of Review on Loss of Nationality be made "within a reasonable time." 5/ When the Board of Appellate Review was established in 1967, regulations promulgated at that time adopted the "reasonable time" limitation, 6/

4/ Where no time limit is specified, the common law rule governs. The limitation on appeal was therefore within a reasonable time after the expatriate received notice of the Department's holding of loss of his nationality,

5/ Section 50.60, Title 22, Code of Federal Regulations (1966), 22 CFR 50.60, 31 Fed. Reg. 13535 (1966).

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

> 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,

The regulations of the Board of Appellate Review were further revised in November 1979, and require that an appeal be filed within one year of approval of the certificate of loss of nationality. 7/

Believing that the current regulations as to the time limit on appeal should not apply retroactively, we are of the view that the standard of "reasonable time" should apply in the case now before the Board.

Under the limitation of "reasonable time", a person who contends that the Department's determination of loss of nationality in his case is contrary to law or fact must file his request for review within a reasonable time after notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be barred and the Board would lack jurisdiction to consider it. The reasonable time provision is jurisdictional. 8/ The Chairman of the Board of Appellate Review advised counsel for appellant of the foregoing jurisdictional considerations by letter of October 18, 1982.

7/ Section 7.5(b), Title 22, Code of Federal Regulations, 22 CFR 7.5(b).

8/ The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

> The Secretary of State did not confer upon The Board /of Appellate Review/ the power to...review actions taken long ago. 22 C.F.R. 50.66, the jurisdictional basis of the Board, requires specifically that the appeal to the Board be made within a reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expatriation.

Office of Attorney General, Washington, D.C. File: CO-340-P, February 7, 1973

III

.Applying well settled judicial standards, we must determine whether appellant's delay of approximately twenty-six years at most, or seventeen years at least, in bringing her appeal was reasonable in light of her principal contention that "if she contested her loss of nationality /earlier/ she would most certainly have lost her position at the University of Athens and would have forfeited all her pension and other vested rights that she had accumulated over the years." The appellant retired from her position at the University in June, 1981.

The rule on reasonable time is firmly established. 9/ Whether an appeal was lodged 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

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9/ 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 (1907); Appeal of Syby, 66 N.J. Super. 460, 160 A. 2d 749 (1961).

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.

.Counsel for appellant maintains that:

> When the Appellant realized the possible consequences of her action, she was faced with the difficult choice of hurting her loved ones and losing everything that she worked for in her entire life; or on the other hand, waiting until some appropriate time in the future where she could assert her rights.
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> It is respectfully submitted that it was not until June of 1981, at the earliest, when the Appellant could bring this appeal. Even, then, she had to be sure that she was doing the right thing, ie, /sic/ possible loss of pension and hurting other family members.

Although appellant maintains that it would have been difficult for her to have brought an appeal earlier than 1981, the mere difficulty of deciding whether or not to appeal may not excuse her failure to file an appeal before twenty-six years had elapsed. Granted, she may have been concerned lest she jeopardize her University position and pension rights, and not wished to bruise the feelings of her Greek husband. But it is obvious that she made a free and conscious choice not to appeal until many years after she performed. the allegedly expatriating act. The causes of her delay were clearly self-generated, and she may not invoke them to justify not filing an appeal until a time that appeared convenient and advantageous to her.

This appellant's situation seems little different from that of the petitioner in Ackermann v. United States, 340 U.S. 193 (1950). Therein the Supreme Court stated:

> Petitioner made a considered choice not to appeal...His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was wrong...There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

The Board is of the view that however sincere appellant may be, she has not presented a sufficient excuse fox a delay of twenty-six years at most, or, if one were to accept her contention that she did not learn that a certificate of loss of nationality had been issued in her name until 1965, of seventeen years at least.

In the circumstances of this case where there has been no showing of a requirement for an extended period of time to prepare her case, or any obstacle beyond appellant's control in taking a timely appeal, it is obvious that the norm of "reasonable time" cannot extend to a delay of either seventeen or twenty-six years.

IV

On consideration of the foregoing, we conclude that the appeal was not taken within a reasonable time after: appellant received notice of the Department's holding of loss of her United States citizenship. Accordingly, we find the appeal barred by the passage of time and not proper: before the Board. The appeal is hereby dismissed. 10/

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member

10/ The fact that the Board of Appellate Review has dismiss the appeal on the grounds that it lacks jurisdiction does not in itself bar the Department from taking such further administrative action as may seem appropriate in the premises. Opinion of the Legal Adviser of the Department of State, Davis R. Robinson, December 27, 1982.