October 28, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M I R

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, M I R expatriated herself on Mar 1948, d t visions of section 401(f) of Chapter IV of the Nationality Act of 1940 by making a formal renunciation of her United States nationality before a consular officer of the United States at Mexico, D.F., Mexico. 1/

The appeal was brought through counsel on July 28, 1983. In his submission, counsel for appellant stated that the appeal was taken from "the denial /In March 1983 of her passport application based upon loss-of United States nationality."

The basis of the appeal, however, is the Department's determination of June 28, 1948, that appellant had expatriated herself. This Board has no jurisdiction to hear an appeal from the denial of a passport on the grounds of non-citizenship, 22 CFR 51.80

The initial question presented is whether the appeal has been timely filed. We conclude that appellant's insufficiently explained delay of thirty-five years in requesting a review of the holding of loss of her nationality is excessive by any objective standard. The appeal is barred by the passage of time and not properly before the Board. Accordingly, we will dismiss it.

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

> 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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> . . .
>
> (f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

I

Appellant became a United States citizen by birth at [redacted]. She states that she in xas and in 1931 moved with her parents to Mexico. After living four years in Mexico, the family returned to Texas. In 1941 appellant again moved with her parents to Mexico. In 1946 it appears that she was hired by the Coca Cola Bottling Company at Mexico City as a bilingual secretary.

Appellant alleged in an affidavit executed on December 17, 1982, that **she** was subjected to "intense and unceasing" pressure from the manager of the legal department at the Coca Cola Bottling Company to obtain Mexican citizenship or lose her job. 2/ Appellant further stated that had she lost her position with Coca Cola, she would not have been able to support her widowed mother and her two brothers. She allegedly tried to find employment in the United States Embassy at Mexico City where she would have been able to work free of quotas on non-Mexican citizens and retain her American citizenship, "but no vacancies developed." Having been told by her lawyers, **who**, she maintains, tried but failed **to** obtain **Mexican** working papers for her, that it would be impossible to get working papers without

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2/ Counsel for appellant explained in the brief he submitted in support of the appeal that in 1946 United States Companies in Mexico, "could, under applicable Mexican law, only staff 16% of their work force with non-Mexican nationals. Not surprisingly, all American companies **had** their quota for foreign employees filled with executives not secretaries."

renouncing her American citizenship, appellant renounced her United States nationality at the Embassy at Mexico City on March 10, 1948. Appellant alleges that she became a naturalized citizen of Mexico on November 29, 1948.

On the day appellant renounced her United States nationality, the Embassy prepared a certificate of loss of nationality in the name of Margaret Ibarra 3/ as required by section 501 of Chapter V of the Nationality Act of 1940, 4/

3/ The record shows that appellant married one Luis Robina in 1955.

4/ Section 501 of the Chapter V of the Nationality Act of 1940, 8 U.S.C. 901, read:

> Sec. 501. 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 IV of this Act, 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 Department of Justice, for its 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 certified that appellant acquired United States citizenship by virtue of her birth in the United States; that she made a formal renunciation of her United States nationality; and thereby expatriated herself under the provisions of section 401(f) of Chapter IV of the Nationality Act of 1940.

On June 30, 1948, the Department informed the Officer in Charge at the American Mission, Mexico City, that the Department had approved his action in submitting the certificate of loss of nationality prepared in appellant's name, The Officer in Charge was instructed to deliver a copy of the approved certificate to appellant. By letter to appellant dated July 12, 1948, the Embassy did so. Appellant does not dispute that she received a copy of the certificate.

According to the record, thirty-four years passed before appellant had any further business with the United States Government. On December 17, 1982, she applied at the Houston Passport Agency for a United States passport. Her application was denied by the Department on the grounds that she had expatriated herself in 1948: and she was so informed by letter from the Department dated March 25, 1983.

On July 28, 1983, appellant brought this appeal through counsel.

Appellant argues that she did not expatriate herself because her renunciation was an involuntary act performed under economic duress,

The Board did not ask the Department to submit a brief, but did request that the case record be reviewed and any comments the Department might deem appropriate be submitted for consideration by the Board. By memorandum dated August 29, 1983, the Department informed the Board that after reviewing the record it found no basis for excusing the delay in bringing the appeal, adding: "...it seems that the appellant hardly exercised due diligence in this matter." The Department further observed: "It would be virtually impossible for the Department to gather evidence to confirm or counter assertions made by appellant...Apart from the timeliness question, we see nothing improper in the loss finding."

II

The Board may assert jurisdiction over this appeal only if it is determined that the appeal was filed within the applicable time limitation,

At the time the Department approved the certificate of loss of nationality in 1948, the Board of Appellate Review did not exist. There was in existence then a so-called Board of Review in the Passport Division, established on November 1, 1941, to review "all cases" involving the loss of nationality under the nationality laws of the United States. The Board of Review provided "a forum for hearings and discussions in order to obviate as far as may be practicable hardships and inequities in the application of the new Nationality Act of 1940...." 5/ It was not strictly an appellate review body to hear and decide appeals. Relatively little information is available regarding the early functioning of the Board of Review, and apparently no formal rules or procedures were ever published by the Department.

The first formal procedures of the Board of Review were set forth in an intra-Department communication in 1949. 6/ The document simply stated that persons, who did not accept a Department's holding of loss of nationality, "may be informed that appeal may be made to the Board of Review of the Passport Division." No formal application or petition for reconsideration of a case was required to be made; an appellant, however, was required to submit at least a statement indicating the grounds of appeal. There was no prescribed time limitation. 7/

5/ Departmental Order 994, Department of State, October 31, 1941.

6/ Foreign Service Serial No. 1019, September 13, 1949, Department of State.

7/ In the absence of a specified time limit on appeal the common law rule of "reasonable time" would govern. Thus an appeal to the Board of Review from a holding of loss of nationality would have to have been brought within a reasonable time after receipt of notice of the Department's holding.

The first mention of a time limitation on entering an appeal from a holding of loss of nationality appeared in the regulations of the Department promulgated on October 30, 1966, with respect to the Board of Review on Loss of Nationality within the Passport office, The regulations provided that an appeal to the Board of Review on Loss of Nationality be made "within a reasonable time." 8/ This "reasonable time" provision was adopted in the Department's regulations 9/ promulgated in 1967 for the then newly established Board of Appellate Review and remained in effect until the regulations were revised and amended on November 30, 1979.

The regulations promulgated in 1979 prescribe that the time limit on appeal is one year after approval of the certificate of loss of nationality. 10/ They further provide that an appeal filed after the stipulated time limit shall be dismissed unless the Board, for good cause shown, determines that the appeal could not have been filed within one year,

Believing that the current regulations as to the time limit on appeal of one year after approval of the certificate of loss of nationality should not be applied retroactively, we are of the view that the standard of "reasonable time" should govern in the appeal now before the Board.

8/ Section 50.60, Title 22, Code of Federal Regulations (1966), 22 C.F.R. 50.60, 31 Fed. Reg, 13539 (1966).

9/ See 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 C.F.R. 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 a notice of such holding, to appeal to the Board of Appellate Review,

10/ Section 7.5(b), Title 22, Code of Federal Regulations, 22 C.F.R. 7.5(b).

Under the limitation of "reasonable time" a person who contends that the Department's determination of loss of his citizenship is contrary to law or fact must file his request for review within a reasonable time after receipt of notice of such determination. If a person did not file an appeal within a reasonable time after receipt of notice of the Department's determination of loss of his nationality, the appeal would be barred and the Board would lack jurisdiction to consider it, The reasonable time provision is thus mandatory and jurisdictional. 11/

The rule on reasonable time has been extensively defined.. 12/

How long is a "reasonable time" depends on the facts of each case. It is such length of time as may fairly be properly and reasonably allowed or required, having regard for

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11/ United States v. Robinson, 361 U.S. 220 (1960).

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. 50.60, 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.

12/ See generally Black's Law Dictionary, 5th Ed.; 36 Words and Phrases(1962); Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); Ashford v. Steuart 657 F. 2d 1053 (1981); In re Roney, 139 F. 2d 175 (1943); Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F. 2d 733 (1926); Smith v. Pefton Water Wheel Co., 151 Ca. 393 (1907); Appeal. of Syby, 460 A. 2d 749 (1961).

the nature of the act or duty, or the subject matter, and the attending circumstances. It has been held to mean as soon as the circumstances of the parties will permit, but a person may not determine a time suitable to himself. Whether an appeal has been filed within a reasonable time depends on whether a legally sufficient reason has been presented for any delay. A protracted and unexplained delay, particularly one that is prejudicial to the interests of the opposing party, is fatal.

The rationale for allowing a reasonable time to bring an appeal is that one should be permitted sufficient time to prepare a case showing that the Department's holding of loss of nationality is contrary to law or fact. At the same time, the rule presumes that one will prosecute an appeal with the diligence of a reasonably prudent person. Reasonable time begins to run from the time an appellant received notice of the Department's holding of loss of nationality -- not sometime later when for whatever reason a person is moved to seek restoration of his or her citizenship.

Appellant asserts that she "did not protest /presumably she means "appeal"/ only because she was not aware of any right of protest." Counsel elaborates on appellant's reason by stating that only after she consulted his firm /presumably in 1982/ "did she realize she could challenge this involuntary expatriation." He continues:

> Given the applicability of the "reasonable time" criteria, such a standard is most sensibly interpreted to mean a "reasonable time" after the subject's awareness that the expatriation decision was fatally flawed. /We ,assume counsel means "flawed" because of alleged economic duress/. In this context, it would seem "reasonable" that this appeal taken more than three decades after the fact would still be legitimate and timely,

Counsel urges the Board to exercise administrative discretion and to consider appellant's case on the merits. He contends that she should not be judged guilty of neglect for failing to file an earlier appeal if, as she asserts, she did not realize until much later that she was entitled to petition for redress.

We are unable to find in appellant's or her counsel's arguments a valid basis for determining that her delay of thirty-five years was justified and thus for finding that the appeal was lodged within a reasonable time after she had notice of the Department's holding of loss of her nationality.

As noted above, there was a process for hearing appeals from holdings of loss of nationality of which appellant could have availed herself, at least from 1949 onwards.

There were no published regulations on notice of right to appeal prior to 1979. 13/ There were, however, internal procedures in the Department regarding the matter. Pursuant to such procedures, consular officers were instructed to inform persons who received adverse citizenship determinations of their right of appeal.

We do not consider that the fact that appellant may not have been informed of her right of appeal constitutes denial of due process.

Due process does not contemplate the right of appeal. District of Columbia v. Calwans, 300 U.S. 617 (1936). While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process. National Union of Cooks and Stewards v. Arnold, 348 U.S. 37 (1954).

13/ Section 50.52, Title 22, Code of Federal Regulations, 22 C.F.R. 50.52, effective November 30, 1979, reads as follows:

When an approved certificate of loss of nationality or certificate of expatriation is forwarded to the person to whom it relates or his or her representative, such person or representative shall be informed of the right to appeal the Department's determination to the Board of Appellate Review [Part 7 of this Chapter) within one year after approval of the certificate of loss of nationality or the certificate of expatriation.

In the case now before the Board, appellant had a right of appeal, although she contends that she was never informed of that right until many years later,

It is firmly settled that implied notice of a fact is legally sufficient to impute actual notice to a party. The law imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it. U.S. v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F. 2d 952 (1939).

Here appellant performed the most unequivocal act of expatriation, formal renunciation of her United States citizenship. She knew on March 10, 1948, that she had probably lost her American nationality, a fact that was officially confirmed when she received notice of the Department's holding of loss. She had ample cause therefore to have been put upon inquiry, And the opportunity to find out what right of redress she might have was readily at hand, as appellant could have ascertained by inquiring at any United States diplomatic or consular establishment in Mexico. In failing to make any inquiries until years later, she cannot be said to have exercised reasonable care or shown interest in recovering her United States citizenship.

Counsel for appellant urges the Board to exercise administrative discretion and consider appellant's case on its merits.

22 C.F.R. 7.2(a) does provide that "the Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it." We do not, however, construe the Board's authority under section 7.2(a) so as to nullify other preconditions established by 22 C.F.R. Bart 7 for the Board to exercise jurisdiction over the merits of an appeal, including the requirement that an appeal be timely filed under section 7.5(b), or comparable provisions of predecessor regulations. Once the Board determines, as we have done here, that it lacks jurisdiction over an appeal as time barred, then the only proper course would be to dismiss the appeal. 14/

14/ Opinion of Davis R. Robinson, Legal Adviser, Department of State, December 27, 198%. See American Journal of International Law, Vol. 77 No. 2, April 1983.

We are also of the view that a defense of laches would have been well taken by the Department in this case. Because the Department bears the overall burden of proving expatriation, appellant's insufficiently unexplained delay of thirty-five years in bringing an appeal to this Board has seriously prejudiced the Department's ability to meet is burden of proof.

A limitation provision is, of course, not designed to serve administrative convenience. Its essential purpose is to compel the exercise of a right of action within a reasonable time so as to protect the adverse party against belated appeals that could more easily have been resolved when the recollection of events upon which the appeal is based is fresh in the minds of the parties involved. This is not the situation here, Furthermore, there must be an end to litigation at some point.

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" may not extend to a delay of thirty-five years.

III

Upon consideration of the foregoing, we conclude that the appeal was not brought within a reasonable time after appellant had notice of the Department's holding of loss of her United States citizenship and her right to appeal accrued. Accordingly, we find the appeal barred by the passage of time and not properly before the Board. The appeal is hereby denied.

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

Alan G. James, Chairman

Edward G. Misey, Member