October 28, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF D[redacted] P[redacted] B[redacted]

This case is before the Board of Appellate Review on an appeal brought by D[redacted] P[redacted] B[redacted] from an administrative determination of the Department of State that she expatriated herself on April 10, 1978, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

The threshold issue presented is whether the Board has jurisdiction to entertain an appeal brought almost four 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 [redacted].

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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 June 1969 appellant married a Canadian citizen, moved to Canada and obtained landed immigrant status (admitted for permanent residence.) In May 1973 appellant, teacher by training, received her interim teaching certificate. Under regulations of the Province of Ontario, which came into effect September 1, 1973, in order to obtain a permanent teaching certificate, which was apparently necessary to continue teaching in Ontario, Canada, appellant had to provide evidence of Canadian citizenship. Appellant states that she was first informed of this requirement in 1976, although she had been able to obtain limited extensions of her interim certificate through June 1978. Moreover, by letter dated October 27, 1976, appellant was informed by an official of the Ontario Ministry of Education that if she did not hold Canadian citizenship by June 1978, she might apply for an extension of her interim certificate.

On October 6, 1976, appellant wrote to the Consulate General at Toronto stating:

> I do not want to forfeit my U.S. citizenship. Is there any way I can become a Canadian without losing U.S. citizenship? If not, can you recommend alternative action I can take in order to be able to pursue my teaching career?

The consul, in response, on October 14, 1976, sent her a publication (not otherwise identified) "which we believe will answer your question."

On an unspecified date appellant applied for naturalization in Canada, as she later explained, doing so "solely to be able to teach." After swearing the prescribed oath of allegiance, appellant was granted a certificate of Canadian citizenship on April 10, 1978. In August of that year she again queried the Consulate General at Toronto reqarding her United States citizenship, noting that she had become a Canadian citizen.

Upon learning of appellant's naturalization, the Consulate General wrote to appellant on August 21, 1978, requesting that she complete a citizenship questionnaire and sign a form authorizing the Consulate General to obtain information about her naturalization from the Canadian authorities. There is no evidence of record that appellant completed the questionnaire, but apparently she signed the release, for the Canadian authorities responded to the Consulate General's request on October 19,

1978, confirming her acquisition of Canadian citizenship and her subscription to the Oath of Citizenship on April 10, 1978. The Consulate General wrote to appellant on November 9, 1978, to advise her that she might have thereby lost her United States citizenship. She was invited to fill out a short questionnaire to provide information regarding her case. The record does not show that appellant filled out the questionnaire or in any other way replied to that communication. On June 14, 1979, the Consulate General again wrote to appellant, advising her that a preliminary finding of loss of her United States nationality had been made, and inviting her to submit evidence to rebut that finding. Appellant acknowledged receipt of that letter but did not submit evidence Accordingly, on June 13, 1979, the Consulate General prepared a certificate of loss of nationality in appellant's name, as required by section 358 of the Immigration and Nationality Act. 2/

The Consulate General certified that appellant expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada on April 10, 1978, upon her own application. The Department approved the certificate on August 6, 1979, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to this Board.

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 an 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

Appellant states that she received a copy of the certificate in August 1979. She gave notice of appeal on June 13, 1983.

Appellant maintains that in March 1983, she became "aware of the 1980 Vance v. Terrazas decision 3/ and immediately resumed correspondence with the U.S. Consul to begin procedures to appeal my loss of U.S. nationality." She later states that "my reasons for delay, then, were due to the fact that my /earlier/ questions to the U.S. Consul prompted no Appellate Review Board direction."

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 Vance v. Terrazas, a finding of loss of nationality cannot be sustained in this case, given the lack of any evidence that appellant intended to relinquish her U.S. citizenship. Should the Board decide it is without jurisdiction to entertain this appeal, the Department states 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 nearly four years after appellant's right to appeal the Department's holding of loss accrued.

In August 1979 when the Department approved the certificate of loss of nationality the regulations then in effect required that an appeal be made within a reasonable time after receipt of notice of the Department's holding of loss of nationality. 4/

3/ 444 U.S. 252 (1980).

4/ 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 amended and revised in November 1979, and require that an appeal be filed within one year of approval of the certificate of loss of nationality. 5/

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 6/ The Chairman of the Board of Appellate Review advised appellant of the foregoing jurisdictional considerations by letter of June 24, 1983.

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

6/ 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.

III

Applying well settled judicial standards, we must determine whether appellant's delay of nearly four years in bringing her appeal was reasonable in the circumstances of her case.

The rule on reasonable time is firmly established. 7/ 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 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.

Here, appellant acknowledged that she received a copy of the approved certificate of loss of nationality in August 1979. The procedure for bringing an appeal to this Board is clearly spelled out on the reverse of the certificate, and includes advice on how to obtain further information about appeals.

Appellant did not, however, dispute the finding of loss of nationality at that time. It was only in March 1983 when, she states, she chanced to hear about the Supreme Court's decision in Terrazas that she was moved to act. 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 or she may have a basis for claiming restoration of his or her nationality, or when he

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7/ 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).

or she finds it convenient and propitious to do so. To follow appellant's theory that reasonable time should run from the date on which she discovered that she 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.

Appellant has shown no good cause why the appeal could not have been brought until she wrote to the Board on June 13, 1983, to lodge this appeal. Whatever the reason, it is beyond dispute that appellant had ample opportunity to take an appeal to the Board well before that time.

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, the norm of "reasonable time" cannot extend to a delay of nearly four 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 properly before the Board. The appeal is hereby dismissed. 8/

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member

8/ The fact that the Board of Appellate Review has dismissed 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.