March 24, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: E[redacted] M[redacted] M[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, E[redacted] M[redacted] M[redacted], expatriated herself on May 27, 1954, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Liberia upon her own application. 1/

Appellant, Esther M[redacted] M[redacted], was born on January 14, 1918, at Atlanta, Georgia, thereby acquiring United States nationality at birth. She married T[redacted] N[redacted] a citizen of Liberia, on February 3, 1949, at Elkton, Maryland. On August 18, 1952, Mrs. M[redacted] obtained a passport on which she travelled to Liberi[redacted]h her husband in November 1952. On arrival in Liberia Mrs. M[redacted] registered at the United States Embassy at Monrovia.

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 --

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

The records of the United States Embassy show that on August 16, 1954, Mrs. M[redacted]: "forwarded statement that /she/ had acquired Liberian citizenship." She subsequently informed the Embassy that she had surrendered her United States passport to the Liberian authorities in connection with her naturalization.

Mrs. M[redacted] executed an affidavit concerning her acquisition of Liberian citizenship before a justice of the peace at Monrovia on September 22, 1954. She averred that on May 27, 1954, "after having filed intention, she was admitted as a citizen of the Republic of Liberia." In that affidavit she also stated that she had sworn before a clerk of the Circuit Court to support and defend the constitution of Liberia and to renounce all allegiance to any foreign power, particularly the American Government.

A year and a half later on March 26, 1956, in accordance with the requirements of section 358 of the Immigration and Nationality Act, the Embassy prepared a certificate of loss of nationality in the name of Mrs. Major.

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 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 certified that appellant expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act "by acquiring Liberian citizenship on May 27, 1954, before the Clerk of the Circuit Court, Montserrado County, Republic of Liberia." The Embassy attached to the certificate the affidavit she had executed before the Justice of the Peace and forwarded both to the Department on September 22, 1954.

The Department approved the certificate on July 15, 1957, approval constituting an administrative determination of loss of nationality from which a properly filed and timely appeal may be taken to this Board. The Embassy forwarded a copy of the approved certificate to *Mrs.* M[redacted] on August 21, 1957.

The record reveals no further information about Mrs. M[redacted] until November 27, 1981, when she applied for a passport at the Washington Passport Agency. On February 18, 1982, the Assistant Director for Passport Services informed Mrs. Major that her application had been denied because it had been determined in 1957 that she had expatriated herself.

On April 2, 1982, counsel for appellant gave notice of appeal on her behalf.

Counsel stated that *Mrs.* M[redacted] had informed him she did not apply for Liberian citizenship, adding: "Under Liberian law at that time Liberian citizenship was automatically conferred upon her as a consequence of her marriage to a Liberian citizen." Counsel requested leave to file appellant's brief sixty days after receipt of a copy of her administrative record. The Board granted this request.

The Department's administrative record concerning Mrs. M[redacted] contained only two documents concerning her alleged naturalization in Liberia: the certificate of loss of nationality and the affidavit she executed before the Justice of the Peace at Monrovia. The Department therefore undertook to obtain more information about appellant's naturalization through the Embassy at Monrovia. The Department was in communication with the Embassy about the matter from the end of April until early November 1982.

On November 29, 1982, the Deputy Assistant Secretary for Passport Services sent the administrative record to the Board under cover of a memorandum. The Department's memorandum stated that the Embassy's final response to the Department's inquiries had been received. The Department

asserted that there was no evidence Mrs. M[redacted] performed an effect[redacted] patriating act; no official Confirmation of Mrs. M[redacted] "naturalization" had ever been obtained. Thus, there[redacted] evidence that she complied with any of the requirements for naturalization or that a certificate of Liberian citizenship was[redacted]r issued to her. Moreover, the Department added, Mrs. M[redacted] automatically acquired Liberian citizenship by virtue of her marriage to a Liberian citizen as provided by section 70 of the Liberian Law of February 8, 1922, which was in effect at the time of her marriage and arrival in Liberia. 3/ Therefore, the Department's memorandum concluded, her alleged naturalization on May 27, 1954, was a nullity. Accordingly, the Department requested that the Board remand Mrs. M[redacted] case for the purposes of vacating the certificate of [redacted]f nationality issued in her name.

3/ Section 70 of the Liberian Law of February 8, 1922, provides in pertinent part:

Section 70. Wife of citizen. Any woman of Negro descent married to a citizen of the Republic of Liberia is a citizen thereof.,..

"Laws Concerning Nationality", United Nations Legislative Series, United Nations, New York, 1954.

According to information given the Embassy in the Fall of 1982 by Leroy Urey, Legal Counsel, Liberian Ministry of Foreign Affairs, the Liberian nationality law of 1922 was in effect until 1956 when it was amended.

Urey told the Embassy he agreed it appeared Mrs. M[redacted] would have automatically been entitled to Liberian citizenship when she entered Liberia in 1952. When asked, Urey could think of no reason why, if she had automatically acquired such citizenship, Mrs. M[redacted] would have applied for naturalization. Urey further advised the Embassy that he thought it highly unlikely a record of Mrs. Major's Liberian naturalization could be located,

Telegram No. 11112, November 2, 1982, from the U.S. Embassy at Monrovia to the Department.

On receipt of the Department's memorandum, the Board forwarded a copy to counsel for appellant, along with copies of documents in the administrative record which counsel had not previously received from the Department. The Board set a date for submission of appellant's brief. Counsel informed the Board that in view of the Department's request for remand he saw no need to submit a brief, but undertook to submit a memorandum of law on the question of the timeliness of the taking of the appeal. This he did by letter to the Board dated December 21, 1982. Counsel argues that the Department has not been prejudiced by the elapse of time in appellant's taking an appeal and that since the certificate of loss of nationality was based on a misunderstanding of the law, it was a legal nullity. The certificate of loss of nationality being deficient on purely legal grounds, counsel contends that the case should be remanded for further administrative proceedings pursuant to section 7.2 of 22 CFR. 4/

II

Before the Board may properly act on the Department's request for remand we must determine whether we have jurisdiction to consider the appeal. We must, therefore, first reach a judgment on whether the appeal was timely filed. If the appeal was not filed within the time prescribed by the applicable regulations, the Board would lack jurisdiction over the ease and would have no authority to remand it as the Department has requested.

In 1957 when the Department approved the certificate of loss of nationality in this case the Board of Appellate Review did not exist. At that time there was in existence a Board of Review on Loss of Nationality in the then Passport Division of the Department of State. That Board had jurisdiction over all cases where the Secretary of State had made an administrative determination of loss of United States citizenship or nationality which had occurred under laws administered by the Secretary of State. Prior to 1966 no prescribed time limit on taking an appeal from an administrative determination of loss of United States citizenship was specified in the rules of procedure of the Board of Review.

4/ Section 7.2(a), Title 22, Code of Federal Regulations (1981), 22 CFR 7.2 provides in part:

> ...The Board shall take any action it considers appropriate and necessary to the disposition of the cases appealed to it.

The first mention of a time limit on entering an appeal from a determination 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 Division. The regulations provided that an appeal to the Board of Review on Loss of Nationality be made "within a reasonable time." 5/ This "reasonable time" provision was adopted in the Department's regulations 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. 6/

5/ Section 50.60, Title 22, Code of Federal Regulations (1966), 22 CFR 50.60, 31 Fed. Reg. 13539 (1966).

6/ Section 50.60, 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 current revised regulations require that an appeal be filed within one year after approval of the certificate of loss of nationality. Believing that the current regulation as to the time limit on appeal should not apply retrospectively, we are of the view that the Department's regulations on time limitation which were in effect prior to November 30, 1979, should govern in this case.

Under the "reasonable time" provisions, a person who contends that the Department's determination of loss of nationality is contrary to law or fact must file his request for review within a reasonable time after he has received 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 time barred and the Board would lack jurisdiction to consider it. In brief, the reasonable time provision presents a jurisdictional issue. 7/ The Chairman of the Board advised counsel for appellant in the foregoing sense by letter dated April 13, 1982.

7/ 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 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 reasonabble 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-349-P, February 7, 1972.

The record shows that the Embassy sent a copy of approved certificate of loss of nationality to Mrs. M[redacted] in August 1957. In the absence of evidence to the contrary, it is reasonable to assume that she received a copy of the certificate and thus had notice of the determination of loss of her na[redacted]ality. It is also reasonable to assume that Mrs. M[redacted] was also informed of her right to take an appeal from the Department's determination of loss of her citizenship; for all diplomatic and consular posts were then under standing instructions to inform an expatriate of his or her right of appeal. 2 Foreign Service Manual 238.1. We therefore proceed on the premise that Mrs. M[redacted] was on notice of the determination of loss of her citizenship and of her right to take an appeal.

Appellant did not dispute her loss of United States citizenship until nearly twenty-five years had passed after he presumed receipt of the certificate of loss of nationality. The initial question we must address is whether a delay of twenty-five years in taking an appeal is or is not reasonable in her case.

Whether an appeal has been filed within a reasonable time depends on the circumstances of a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). Unlike a fixed determinate limitation, it would not depend upon the fact that a specified period of time elapsed,

Generally, reasonable time means reasonable under the circumstances. It has been held to mean as soon as circumstances will permit, and with such promptitude as the situation of the parties and the circumstances of the case 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).

The rationale for giving a reasonable time to appeal an adverse decision is to allow an appellant sufficient time upon receipt of such decision to assert his or her contentions of law or fact against the Department's holding of loss of nationality. Further, it should be noted that the period of a "reasonable time" begins to run with the receipt of notice of the Department's holding of loss of nationality, and not at some subsequent time, years later, when appellant, for whatever reason may seek belatedly to restore his citizenship.

Although appellant has not submitted a brief due to the fact that the Department pre-empted her from doing so by finding that appellant's expatriating act was void ab initio, it seems clear from her counsel's submissions of April 2 and December 21, 1982, that appellant is unable to contend she was prevented by circumstances beyond her control from taking a timely appeal. In the premises, the Board cannot consider that a delay of twenty-five years is reasonable. In the absence of a showing of good cause, the Board may not exercise its discretion to enlarge the time for the taking of this appeal. 8/ It is time barred.

8/ Section 7.10, Title 22, Code of Federal Regulations (1981), 22 CFR 7.10, reads in part:

> ...The Board, for good cause shown, may in its discretion enlarge the time prescribed by this part for the taking of any action.

The Board's authority under section 7.2(a) of 22 CFR cannot be construed to nullify other conditions established by the same regulations for the Board to exercise jurisdiction over the merits of the appeal, including the requirement that the appeal be timely filed under section 7.5(b) of 22 CFR, or comparable provisions of predecessor regulations, i.e., 22 CFR 50.60. 9/ Section 7.2(a) does not confer jurisdiction over an appeal where it is otherwise lacking. 10/ Once the Board has found an appeal time barred, it has no authority to remand the case. 11/ The accepted rule is that a review court which does not have jurisdiction may only dismiss the appeal. 12/

9/ Memorandum of the Legal Adviser of the Department of State, Davis R. Robinson, to the Chairman of the Board of Appellate Review, "Requests for Remand by the Department of State of Cases Before the Board of Appellate Review," December 27, 1982.

10/ Id.

11/ Id.

12/ 2 Davis, Administrative Law Treatise, 546 (1958).

III

Since the appeal before the Board was not taken within a reasonable time after appellant may be presumed to have received notice that she had been found to have expatriated herself by obtaining naturalization in Liberia, the appeal is time barred and the Board lacks jurisdiction to consider it. The appeal is dismissed. 13/

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member

13/ With respect to possible further administrative review, the Legal Adviser of the Department of State has held:

> ...where the Board of Appellate Review has dismissed an appeal in a citizenship case as time barred, that fact standing alone does not preclude the Department from taking further administrative action to vacate a holding of loss of nationality. This continuing jurisdiction should be exercised, however, only under certain limited conditions to correct manifest errors of law or fact, where the circumstances favoring re-reconsideration clearly outweigh the normal interests in the repose, stability and finality of prior decisions. Such circumstances usually would involve cases where the Supreme Court had declared unconstitutional the particular section of law under which a loss was thought to have occurred. In other circumstances, where evidentiary questions of "voluntariness" or "intent" are raised, an applicant's unreasonable delay in seeking relief generally will impair the Department's ability clearly to establish the facts and circumstances necessary to resolve those questions. In such cases, further administrative consideration should be denied under the doctrine of laches.
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> Note 9, supra.