January 24, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: S J C

This is an appeal from an administrative determination of the Department of State that appellant, S J C, expatriated herself on February 19, 1971, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining the citizenship of the United Kingdom and Colonies upon her own application. 1/

I

Appellant, S J C, was born at thus acquiring United Sta She married a United Kingdom citizen in 1970, and on January 25, 1971, applied to be registered as a citizen of the United Kingdom and Colonies. A certificate confirming Mrs. C registration as a British citizen under section 6(2) the British Nationality Act of 1948 was issued by the Home Office on February 19, 1971.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), reads:

Sec. 349. (a) Prom 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, . . .

Appellant executed an affidavit at the United States Consulate General at Hamburg, Germany, on December 10, 1971. in which she stated that she had voluntarily applied to be registered as a British citizen. 2/ She explained her reasons as follows:

> Firstly, I felt a natural desire to share the nationality of my husband. Secondly, I did not wish to hinder my husband in his pending application for employment in the Diplomatic Service of the United Kingdom. In the eventuality of such employment I would have been required to adopt British nationality....
>
> In addition, I should like to clearly emphasize that my declaration of allegiance /to Queen Elizabeth II/ did not involve—renunciation of United States citizenship nor do I feel that my innate allegiance to the United States has been in anyway compromised by my declaration.

On December 13, 1971, as required by section 358 of the Immigration and Nationality Act, the Consulate General prepared a certificate of loss of nationality in appellant's

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2/ It appea[redacted]er husband were residing in [redacted], at the time she applied to b[redacted] citizen. When her husband was transferred to [redacted] later in 1971, Mrs. C[redacted] citizenship record was transferred from the United States Embassy at Taipei to the Consulate General at Hamburg.

name. 3/ The Consulate General certified that appellant acquired the nationality of the United Kingdom and Colonies upon her own application, and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department of State approved the certificate on June 21, 1972, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be taken to this Board.

The record does not disclose when Mrs. C[redacted] received a copy of the approved certificate o[redacted]t she was advised of her right to appeal to this Board. She has not, however, contended that she did not receive notice of the holding of loss of her nationality; nor has she introduced the question whether she was informed that she had a right to appeal. On the latter point, we note that the Foreign Affairs Manual (8 FAM 224.21) requires that an expatriate be advised of his or her right of appeal when being informed of the Department's approval of the certificate of loss of nationality issued in his or her name. Absent eviden[redacted] the contrary, it is reasonable to assume that Mrs. C[redacted] was informed that she might appeal the Department's holding.

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

> See. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has Post 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 whish the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

In July 1981, the United States Embassy at Salisbury (now Harare), Zimbabwe (Mrs. C husband was then posted to the British High Com n at Salisbury) cabled the Department on behalf of Mrs. C to request a "reversal regarding Mrs. Cl loss of nationality and restoration of her citizenship." The Department replied to the Embassy some four months later, suggesting that Mrs. C should take an appeal to the Board of Appellate Review. The Department cryptically stated that it could not make an administrative review of her case because:

> FYI. Questions have arisen concerning procedures for administrative review by areas of the Department other than the Board of Appellate Review. Until definitive ruling has been made, CA/OCS/CCS has suspended administrative review of such cases as Mrs. C . End FYI. 4/

4/ The record shows that on November **2, 1981,** the Office of Overseas Consular Services considered Mrs. C 's citizenship file and found that no evidence could be adduced to support a determination that she intended to relinquish her United States citizenship, and thought it unlikely that such evidence could be found. **A** telegram was prepared so informing the Embassy at Salisbury and instructing them to inform Mrs. C that the certificate of loss of her nationality would be vacated. However, before the telegram was dispatched the informal procedure for reconsideration that had been developed in the Bureau of Consular Affairs in 1979 was, as the Department stated in its memorandum to the Bo f April 19, **1982,** "called into question", and Mrs. C was told her only recourse was to appeal to the Board f Appellate Review.

The Board finds it incongruous that the Department was on the point of vacating the certificate; changed its mind because of some unexplained confusion about the procedure for administrative review of expatriation determinations, and when the case was appealed to the Board, promptly requested remand for the purpose of doing precisely what they had been prepared to do initially.

Appellant initiated this appeal by letter to the Board dated November 30, 1981, nine years after the presumed notice of the Department's holding of loss of nationality. She gave the following reasons for her appeal:

> a) neither at the time of my loss of nationality nor at any time before or since have I had any intent of relinquishing or renouncing my US citizenship: b) my act 'of registration as British citizen was not wholly voluntary on my part but was taken to enhance the employment prospects of my husband, a British citizen: c) I have continued to maintain close links with the US.

Upon receipt of appellant's letter, the Board of Appellate Review on January 6, 1982, forwarded it to Passport Services and requested the submission of a brief setting forth the Department's position on this appeal, and the record upon which the loss of nationality was based. On April 19, 1982, Passport Services submitted the record and a memorandum in lieu of a brief on behalf of the Department, stating with particularity points of law and fact which in the judgment of the Department warranted that "the Board relinquish jurisdiction of this appeal for cancellation of the Certificate of Loss of Nationality." The memorandum summarized the Department's position as follows:

> Passport Services has examined the case file and has concluded that the Department cannot sustain its burden under Afroyim v. Rusk, supra /387 U.S. 253 (1967/ and Vance v. Terraaas, 444 U.S. 252 (1980) of showing by a preponderance of the evidence that Mrs. C[redacted] intended to relinquish her citizenship when she registered as British citizen in 1971. Her statement, contemporaneous with the Certificate of Loss, supports her contention that she did not have that intent at that time.
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> Because at the time the Certificate of Loss was issued insufficient attention was given to the case law of expatriation, i.e. the holding in

> the Supreme Court case of Afroyim v. Rusk, op. cit., requiring a showing of intent to abandon allegiance, the Board is requested to relinquish its jurisdiction in this case for further consideration by the Department of the facts and law.

The Department's memorandum continued:

> ...if the Board determines to retain jurisdiction, it must consider the question whether the present appeal has complied with the procedural rule governing timely filing.
> Since it has been demonstrated that there is a reasonable explanation for the ten-year delay in taking this appeal, the Board is requested to assert its jurisdiction and remand the case for vacating the Certificate of Loss....
>
> Alternatively, if the Board does not find that good cause was shown excusing the delay in appealing, the Board is invited to exercise its discretion under Section 7.2(a) of its regulations and waive the time requirement on the ground that equity is served by asserting jurisdiction and remanding for cancellation of the Certificate. 5/

5/ Section 7.2(a), Title 22, Code of Federal Regulations (1982) 52 CFR 7.2(a), provides in part:

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

The Board does not have authority under this section to disregard the other preconditions established by the same regulations for the Board to exercise over the merits of an appeal, including the requirement that an appeal be timely filed. If the Board determines that it lacks jurisdiction to consider an appeal, the Board has no alternative but to dismiss it.

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. Therefore, we must 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 case and would have no authority to remand it as the Department has requested.

The current regulations prescribe that the time limitation on appeal shall be one year after approval by the Department of the certificate of loss of nationality. An appeal filed after the prescribed time shall be denied unless the Board, for good cause shown, determines that the appeal could not have been filed within the stipulated time. 6/

To apply the current time limitation retrospectively in this case would, however, in our opinion be inequitable. We therefore believe that the appropriate time limitation is that stipulated in the regulations which were in effect on June 21, 1972, the date on which the Department approved the certificate of loss of nationality which was issued in appellant's name. Those 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 made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate. Review. 7/

Under the "reasonable time" standard, a person who conte[nds] that the Department's holding of loss of nationality is contra[ry] to law or fact is required to appeal such holding to the Boar[d] within a reasonable time after receipt of notice of the holding of loss of nationality. If a person does not initiat[e]

6/ Section 7.5(a) and (b) of Title 22, Code of Federal Regulations (1982), 22 CFR 7.5(a) and (b).

7/ Section 50.60 of Title 22, Code of Federal Regulations (1972), 22 CFR 50.60.

his or her appeal to the Board within a reasonable time, the appeal would be barred and the Board would be without authority to entertain it. The reasonable time limitation is clearly jurisdictional. 8/

Whether an appeal was taken within a reasonable time depends upon the circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). 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 be allowed to determine "time suitable to himself." In re Roney, 139 F. 2d 175, 177 (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 United States citizenship status.

8/ The Attorney General of the United States 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. 5Q.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-349-P, February 7, 1972.

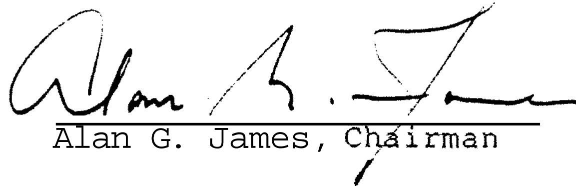
In the appeal before the Board appellant has not explained why she did not appeal within ten years after the date on which the Department approved the certificate of loss of nationality issued in her name; she did not, in fact, even address the issue in her submissions. The Department, in its memorandum asserts, however, that "the explanation, it seems to us., appears in the case record." In brief, the Department contends that Mrs. C[redacted] appeared to accept fully the Department's and the Consulate General's interpretation of the law of expatratiation, "bowing to the inevitable and expressing appreciation for the consideration shown." The Department added:

> Since she knew that the Consulate was in consultation with the Department on the matter, she relied on their very reasonable sounding determination.
>
> The question why she finally did appeal may be explained by her contacts with the U.S. missions abroad and the fact that Vance v. Terrazas, supra, directed the Department's emphasis in expatriation cases to its affirmative burden of showing the person's intent to relinquish citizenship before a holding of loss could be made. This was no doubt a subject of conversation at Embassy functions.

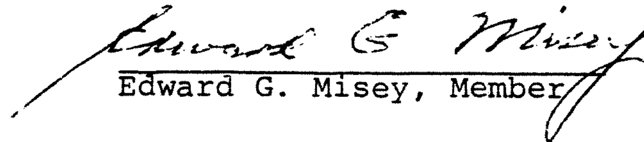
Since appellant herself has offered no explanation for her delay in taking this appeal, it seems somewhat anomalous for the Department to present one on her behalf, particularly one which does not appear to rest on any facts established by the record. We are unable to consider that the Department's largely speculative reasons for appellant's delay constitute "good cause."

In our opinion, appellant's unexplained delay of nine years in taking an appeal is, by any fair standard, unreasonat Not having been filed within a reasonable time after receipt of notice of the Department's holding of loss of her nationali

the appeal is time barred and the Board is without jurisdiction to consider it. The appeal is dismissed. 9/



Alan G. James, Chairman



Edward G. Misey, Member

Howard Meyers, Member

9/ Whether, in the premises, further administrative action may appropriately be taken in this case is a matter that rests with the competent authorities of the Department. In that regard, the Legal Adviser of the Department of State, in an opinion dated December 27, 1982, has stated:

> ...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 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 has 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.

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 Cases Before the Board of Appellate Review", December 27, 1982.