March 1, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This is an appeal from an administrative determination of the Department of State that appellant, [redacted] (a.k.a. [redacted], expatriated herself on December 15, 1975, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

This appeal was filed on September 29, 1982, more than six years after appellant was notified of the Department's holding of loss of her United States citizenship. Thus, the initial issue presented for determination is whether the appeal was filed within the time limitation prescribed by applicable regulations. We find that since the appeal was not filed within the applicable limitation, it is barred by time. Thus lacking jurisdiction to entertain the appeal, we will dismiss it.

I

Appellant was born at [redacted], Canada on [redacted] and thus acquired Canadian citizenship by virtue of her birth therein. Appellant acquired the nationality of the United States by naturalization before the Supreme Court of New York, at Rochester, on April 5, 1966. Under Canadian law, she lost her Canadian citizenship when she acquired United States nationality. According to the record, appellant lived in the United States from April 1, 1958, until October 16, 1974, when she moved to Canada to join her mother.

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, . . .

During her period of residence in the United States, she married an American citizen on December 22, 1972. The marria was terminated by divorce on December 12, 1973, upon appellar application. Thereafter appellant joined her mother in Canad and sought employment. On November 21, 1975, appellant appli to the Canadian authorities for the reestablishment of her Canadian citizenship; on December 2, 1975, she took an oath c allegiance; and on December 15, 1975, she was issued a certificate of Canadian citizenship. She stated that she reacquired Canadian citizenship in order to obtain a job with the Canadian government, which did not materialize, as well a to be more secure and have better possibilities for promotion with a private company.

A consular official, by memorandum dated April 20, 1976, stated that a few days after she was granted a Canadian Certi cate of Citizenship, appellant came to the Consulate General discuss her case. According to that memorandum, appellant "said she had been unable to sleep because of worry that a step she had taken to qualify for employment might result in an inability to resume residence in the U.S. eventually." She was invited to complete a questionnaire to assist the Department of State in making a citizenship determination in her case, which she did on March 31, 1976. On the same date, she executed a pre-printed Affidavit of Expatriated Person, wl stated, ~~inter alia,~~ that:

> I further swear that the act mentioned above /obtaining naturalization in Canada, upon her own application/ was my free and voluntary act and that no influence, compulsion, force or duress was exerted upon me by any other person, and that it was done with the intention of relinquishing my United States citizenship.

Appellant crossed out the words "no influence, compulsion and "intention of relinquishing my United States citizenship" and added a parenthetical "See Questionnaire for Purposes" at the end of the sentence. In the questionnaire appellant state that she applied for Canadian citizenship to enhance her employment possibilities in Canada. She further stated her intention to move to New York State "within the next few years .../and/ regain my American citizenship."

In compliance with sec ion 358 of the Immigration and Nationality Act, the Embassy prepared a certificate of loss of nationality in appellant's name on April 20, 1976. 2/

The Embassy certified that appellant had acquired the nationality of the United States by naturalization; that she had obtained naturalization in Canada, upon her own application; and thereby expatriated herself under the provisions of section 349(a) (1) of the Immigration and Nationality Act.

The Department approved the certificate of loss of nationality on May 28, 1976, and sent a copy to the Embassy to deliver to appellant. This the Embassy did by letter dated June 22, 1976, which informed appellant of her right to take an appeal to the Board of Appellate Review.

Appellant visited the Consulate General on September 18, 1978 and inquired about appealing her loss of nationality. She was advised of the procedures for appealing and as the Embassy records show, informed of the "need for new evidence." Again on August 25, 1982, appellant inquired at the Consulate General about appealing her loss of nationality.

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

Section 358. Whenever a diplomatic or consular officer of the United States ha5 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.

Appellant filed this appeal on September 29, 1982.

Appellant maintains that there were physical, psychological and emotional circumstances which prevented her from appealing earlier than she did.

The Department contends, inter alia, that the appeal was not timely filed under applicable regulations, and thus is tin barred; accordingly, the Department argues, the Board lacks jurisdiction to entertain it. After all briefs were filed, the Department submitted a supplemental memorandum in which it stated that, upon further review, there is insufficient evider for it to meet its burden of proving by a preponderance of the evidence that appellant intended to relinquish U.S. citizenshi at the time she re-acquired Canadian citizenship. In brief, the Department believes that appellant's conduct was not expatriative; and it intends to vacate the certificate of loss of nationality that was issued in her name.

II

Before proceeding we must determine whether the Board has jurisdiction to consider the appeal. Our jurisdiction is dependent upon a finding that the appeal was filed within the limit prescribed by the applicable regulations. If we find th the appeal was not timely filed, we would lack jurisdiction an would have no alternative but to dismiss it.

Under the current regulations of the Department the time limitation on appeal is one year after approval of the certifi of loss of nationality. 3/ The regulations further provide t an appeal filed after the time limit shall be denied unless th Board, for good cause shown, determines that the appeal could have been filed within the prescribed time. The current regulations were, however, promulgated on November 30, 1979, more than three years after the certificate of loss of nationality had been approved in appellant's name. In May 1976, when the Department approved the certificate that was issued in this case, the 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 within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 4/

3/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 7.5 (a).

4/ Section 50.60 of Title 22, Code of Federal Regulations (196 1979), 22 CFR 50.60.

It is generally recognized that a change in regulations shortening a limitation period is presumed to be prospective, not retrospective, in operation, since retrospective application would disturb a right acquired under former regulations. We are therefore of the view that the limitation in effect in 1976 should apply in the appeal before us.

The rule on reasonable time is well settled. 5/ Whether an appeal was taken 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.

In the case before the Board the Department approved the certificate of loss of nationality on May 28, 1976. Appellant brought her appeal more than six years later.

5/ 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, 169 A. 2d 749 (1961).

The record shows that the Embassy sent a copy of the approved certificate to appellant on June 22, 1976, noting in the covering letter that "your attention is invited to the appeal procedures described on the reverse of the Certificate /of Loss of Nationality7." Appellant has not contended that she did not receive a copy of the certificate, or that she was not on notice from some time close to June 22, 1976, that the Department had determined that she had expatriated herself. In her reply brief of October 21, 1983, her counsel merely argues that the "Department of State has failed to prove the date upon which appellant received the decision of expatriation."

In any event, appellant visited the Consulate General on September 18, 1978 and inquired about appealing her loss of nationality. As shown by the records of the Consulate General, appellant was then advised of the procedures for taking an appeal and the "need for new evidence." There is, however, no indication that she took any action to initiate an appeal at that time. Appellant waited four more years before further pursuing this matter and lodging her appeal. We have no reason to doubt that appellant had actual notice of her loss of citizenship and right of appeal in 1976. It is certain that she had such information since 1978.

Counsel in his reply brief also argues that:

> There were physical, physchological /sic7 and emotional circumstances which intru- ded themselves into the functional in- ability of the appellant to act earlier than she did.

In support of that allegation, Peter Forbes, M.D. stated in a letter to the Consulate General dated August 30, 1982, that appellant was first "assessed" in September 1979 "for chronic anxiety and minor situational depression", and under- went individual psychotherapy until January 1980. Alan Morton, M.D., in a statement dated February 7, 1983 writes that he has attended appellant since January 1976 for recurri migraines dating back to 1964. He states that:

> In the past, her headaches have been severe and incapacitating but they have been much better controlled over the past two months.

The medical evidence, as presented, however, is insufficient to establish that appellant was unable to appeal earlier than she did.

However sympathetic we may be to appellant's circumstances, her case, as presented, fails to demonstrate why she could not have lodged an appeal within a reasonable time after she received notice of her loss of nationality. Indeed, we do not know why appellant did not initiate this appeal in 1978 after she made inquiries at the Consulate General.

The period of "reasonable time" begins to run from the date an expatriate receives notice of the Department's holding of loss of his or her nationality -- not sometime later when the person finds it convenient and propitious to appeal.

The rationale for allowing appellant a reasonable time to take an appeal is to permit him or her an adequate period within which to prepare a case to support his contention that the Department's holding of loss of citizenship was contrary to law or fact, 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.

Indeed, as counsel for appellant has stated:

> The passage of time has taken its toll. Memories of the circumstances have become vague or dimmed entirely amongst her friends and former employees. Others cannot be traced, or refuse to become involved. She has no surviving relatives.

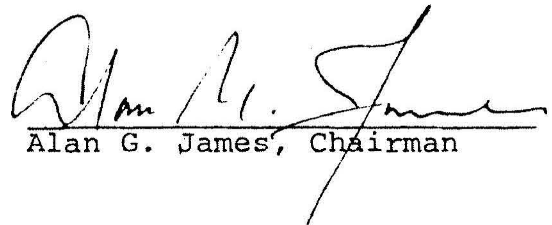
In our view appellant had ample time to prepare an appeal. Nothing in the record indicates that appellant was prevented by forces beyond her control from taking a timely appeal. The Board is therefore of the opinion that appellant's delay of six years in bringing this appeal to the Board is unreasonable.

III

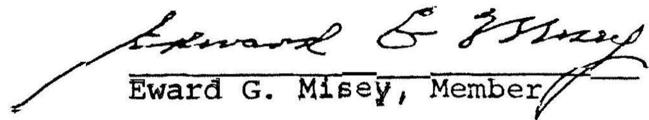
On consideration of the foregoing and our review of the entire record, we are unable to conclude that the appeal was

filed within the time limitation of the applicable regulations
Accordingly, we find it barred, and the Board lacks jurisdicti
to consider it. The appeal is dismissed. 6/

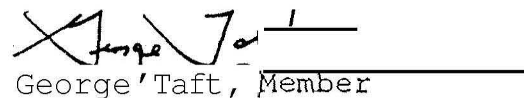
Given our disposition of the case, we are unable to reach the other issues presented.



Alan G. James, Chairman



Eward G. Misey, Member



George Taft, Member

6/ 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. See American Journal of International Law, Vol. 77 No. 2, April 1983.