April 25, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This case is before the Board of Appellate Review on an appea taken by [redacted] from an administrative determinatior of the Department of State that she expatriated herself on March 1975, under the provisions of section 349(a)(1) of the Immigratior and Nationality Act by obtaining naturalization in the United Kinc dom upon her own application. 1/

The certificate of loss of nationality issued in this case wa approved by the Department in 1975. The appeal was entered in 198

The threshold issue presented is whether the appeal was brouc within the limitation prescribed by the applicable regulations, namely, within a reasonable time after appellant received notice c the Department's holding of loss of her nationality. It is our conclusion that, in the particular circumstances of this case, the appeal was timely filed. Having so decided, the next issue to be determined is whether appellant's acquisition of British national: which she concedes was voluntary, was accompanied by an intent to relinquish her United States citizenship. We find that appellant not intend to surrender her American nationality. The Department holding of loss of her nationality will therefore be reversed.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U. 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, . . .

I

Appellant became a United States citizen by birth at [redacted] on [redacted]. When she was about one year old, her parents took her to live in the United Kingdom. Appellant was documented on a passport issued to her mother by the United States Embassy at London in 1967. Thereafter she obtained passports of her own in 1970 and 1975.

Appellant studied law in London. According to an affidavit she executed on November 6, 1978, she was well into her university course when she learned that in order to qualify as a solicitor she would have to become a British citizen, and therefore she applied to be naturalized. On March 19, 1975, a certificate of naturalization as a citizen of the United Kingdom and Colonies was issued in appellant's name. She swore the following oath of allegiance to the Crown on April 19, 1935:

> I, [redacted] swear by almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors, according to law.

Having been informed of appellant's naturalization by the Home Office, the Embassy wrote appellant on June 16, 1975, to inform her that she might have expatriated herself. She was asked to fill out a brief questionnaire to facilitate the determination of her citizenship status. She completed the questionnaire, placing "X" in the box opposite a statement that read as follows:

> I was naturalized/registered as a citizen of the United Kingdom and Colonies on 19/3/75. I further state that this 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 without any reservation and with the intention of relinquishing my United States citizenship.

She indicated by so checking another box that she did not wish to present evidence or contest a decision that she had lost her citizenship "by obtaining naturalization,..with the intention of relinquishing my United States citizenship."

Appellant returned the questionnaire under cover of a letter dated August 11, 1975, that read as follows:

> I am very sorry that by becoming a British subject I lose my American nationality.

> I was born in America and many members of my family, such as my grandmother, uncles and aunts, with whom I am in close touch, live in America.
>
> I am enclosing the form which you asked me to complete.

On August 18, 1975, in compliance with the provisions of section 358 of the Immigration and Nationality Act, 2/ the Embassy prepared a certificate of loss of nationality in the name [redacted].

The Embassy certified that appellant acquired United States citizenship at birth; that she obtained naturalization as a citiz of the United Kingdom and Colonies upon her own application: and concluded that she thereby expatriated herself under the provisio of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on September 11, 197 approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may brought to this Board. The Embassy forwarded a copy of the certi cate to appellant by recorded delivery on November 3, 1975.

Three years later, in November 1978, appellant informed the Embassy that she wished to contest the Department's holding of lo of her nationality. After developing the case, the Embassy in December 1978 requested that the Department determine whether the certificate of loss of nationality might be vacated.

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 certif: cate to the person to whom it relates.

On April 23, 1979, the Department informed the Embassy that it found no basis to reverse the 1975 determination of loss of appellant's nationality. The Embassy was instructed to inform appellant of her right to appeal the Department's holding of loss of nationality to this Board and the procedures for taking an appeal.

A few months later appellant accompanied her mother, an American citizen, to the United States, entering on a preference immigrant visa. She has resided here since. She married a United States citizen in 1981.

On April 7, 1983, appellant entered the appeal through counsel.

She argues that her delay in taking an appeal was not unreasonable under the circumstances of her case, and that she should be heard on the merits. She further contends that she became naturalized in the United Kingdom without any intention of giving up her United States citizenship.

A hearing, requested by appellant, was held on March 8, 1984.

II

Before we may proceed we must decide whether this Board has jurisdiction to consider an appeal brought more than seven years after the Department of State approved the certificate of loss of nationality that was issued in this case.

In 1975 when the Department approved the certificate of loss of nationality, the regulations in effect provided that an appeal from an adverse determination of nationality might be brought to the Board within a reasonable time after the affected person received notice of the Department's holding of loss of his nationality. 3/

3/ 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.

Where an appeal has been brought from a holding of loss of nationality made prior to November 30, 1979, 4/ the Board applie the limitation prescribed by the regulations in effect from the inception of the Board in 1967 until 1979.

To apply the current limitation on appeal of one year after approval of the certificate of loss of nationality which was promulgated in 1979 would, in our view, be contrary to the general accepted rule that a change in the regulations shortening a limitation period is prospective in operation; retrospective application of the new limitation would work an injustice by disturbing a right acquired under former regulations. Accordingly the standard of "reasonable time" will govern in the instant case. Thus, if we find that the appeal was not entered within a reasonab time after appellant had notice of the Department's holding of los of her nationality, the appeal would be time barred and the Board would be without jurisdiction to entertain it.

The rule on "reasonable time" has been exhaustively defined b the courts and commentators, 5/ and is generally considered to encompass the following elements:

What is reasonable time depends on the facts and circumstance of the particular case. It is such length of time as may be fairl and properly allowed or required, having regard for the nature of act or duty, or the subject matter, and the attending circumstance It has been held to mean as soon as the circumstances of the parti will permit, but a person may not determine a time suitable to hin self. 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.

4/ On November 30, 1979, new regulations were promulgated for the Board of Appellate Review. Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b) provides:

A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval by the Department of the certificate of loss of nationality or a certificate of expatri tion.

5/ See generally 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. Pelton Water Wheel Co., 151 Ca. 393 (1907); Appeal of Syby, 460 A. 2d 749 (1961 Black's Law Dictionary, 5th Ed.; 36 Words and Phrases (1962).

The rationale for allowing a reasonable time to take 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 an ordinary prudent person. Reasonable time normally begins to run from the time an appellant received notice of the Department's holding of loss of nationality.

Appellant received notice of the Department's holding of loss of her nationality in the fall of 1975.

In November 1978 appellant contested her loss of nationality by requesting reconsideration of her case through the United States Embassy in London.

She explained at the hearing that she had not acted sooner to assert a claim to United States citizenship principally for two reasons. First, she assumed that she had automatically expatriated herself and could do nothing to change that fact.

> I really didn't think there was anything I could do because I became British and there was no denying it, and the statute said if you take another nationality you lose your American citizenship." 6/

Second, she was too embarrassed and ashamed to discuss the loss of her nationality with anyone except her mother. She hid the certificate. "People who lose American citizenship have, from what I've seen, usually done some pretty horrendous crimes, and I just didn't want to bring it up." 7/

Asked whether she had read the instructions on the certificate of loss of nationality about appeal procedures, appellant simply replied: "I felt at the time that there was nothing that could be done. I had become British. Whatever my intent, if you became British that's that." 8/

6/ Transcript of Proceedings In The Matter of [redacted], Board of Appellate Review, March 8, 1984 (hereinafter referred to as "TR"). 18.

7/ TR 22.

8/ TR 35.

It was not until appellant consulted a lawyer during a visit to the United States in 1978 that she discovered she might have grounds to contest the Department's determination of expatriation. As she said at the hearing, the lawyer

> ...mentioned to me the whole question of intent... which I had known nothing about because when the Embassy, having heard that I had taken out British nationality, sent me a copy of the Act marked up they did not send me a copy of the Afroyim decision /Afroyim v. Rusk, 387 U.S. 253 (1967)/ or make clear that intent to remain American could in any way affect my retaining the citizenship even though I had become British. 9/

At that point, appellant stated, "...all of a sudden I learned that intention is important, and I realized that I had bee sent inadequate information...and I wanted to come back and straig en this all out and really explain that my intention had never bee to give up the American citizenship. 10/

On her return to London she took up her case with a consular officer at the Embassy, who, as appellant put it, said "she was going to send the papers in to Washington and we were going to organize an appeal so I could be reinstated." 11/ Appellant stressed that she clearly got the impression from the consular officer that the latter was processing her appeal.

9/ Appellant's statement is confirmed by the Embassy officer who interviewed appellant in 1978. The officer stated in a report to the Department on appellant's case that the "fact sheet" on Afroyim had not been reproduced and sent to potential expatriates until 1977. It should be noted that all diplomatic and consular posts were under instructions from 1970 to make the gist of the Supreme Court's holding in Afroyim available to citizens who had performed an allegedly expatriating act. 8 Foreign Affairs Manual "Exhibit", 225.16 (April 10, 1970).

10 TR 15.

11/ TR 28.

In June 1981, having returned to the United States two years earlier, appellant called on the attorney who represents her on this appeal, to discuss a problem unrelated to her citizenship case. She explained at the hearing she had not taken any action to assert a claim to United States citizenship during the preceding two years because she assumed she had exhausted the appeal process. Although the Embassy informed appellant in 1979 of her right of appeal to this Board after the Department's negative reply to her request for reconsideration of her case, appellant was vague about whether she understood. Asked if she recalled whether the right of appeal had been communicated to her, appellant said; "I thought that that was the appeal. And really from what I remember the urgency was getting on with the green card application and just coming over here." 12/ Appellant, however, had kept the Embassy's letter, and conceded at the hearing that it had stated that she had the right of appeal.

Appellant related that she had confided in her counsel with great diffidence, first asking her husband to leave counsel's office - "I didn't want him to find out what a complete idiot I had been." 13/

Counsel stated at the hearing that there was no question in his mind that appellant knew her request in 1978 for reconsideration of her case was an "appeal." He had suggested, by way of trying to ease appellant's evident distress, that she authorize him to obtain the administrative record to see what the facts showed. He made a request for the record under the Freedom of Information Act, and in the Fall of 1982 received it. The appeal followed six months later.

12/ TR 28.

13/ TR 29.

In this case, on the face of the record, there was an aggregate delay of seven years in taking an appeal to the Board However, in 1978, three years after the Department's holding of loss of her nationality, appellant pressed for reconsideration of her case. The proceedings that ensued at the Embassy and in the Department were essentially ~~de novo~~. Even if such proceedi were not considered ~~de novo~~, the actions taken by the Embassy and the Department nevertheless led her to believe that an "appeal" was then in progress.

In 1975 when the Embassy issued the certificate of loss of nationality in this case, appellant had not been interviewed by consular officer and did not submit evidence on the critical issue of her intent, much less know of the requirement that an expatriating act to be valid must be accompanied by an intent t terminate United States citizenship. In 1978, her case was ful developed in London, the issue of intent raised for the first time and explored, and evidence submitted. Fairness requires t the proceedings of 1978-1979 be deemed to toll the running of reasonable time, and we so hold.

The issue of timeliness of the appeal thus narrows to whether appellant's further delay in bringing an appeal to this Board was unreasonable. Inasmuch as the Department conceded at the hearing that the Government's delay of one year in process- ing appellant's counsel's Freedom of Information Act request fc the record should not be computed, the length of the delay to k examined is a little over three years, that is, from 1979 through 1981.

Appellant was inattentive to the information she received in 1979 about her right of appeal. She deluded herself into thinking that she had exhausted her administrative remedies whe in fact she had not done so. It is, however, arguable it was h perception that she could do no more; her counsel's statements at the hearing bear her out.

Even granting that appellant was negligent in not making inquiries about possible recourse until 1981 when she consulted counsel, we do not believe that appellant's lapses should bar h appeal. Two salient features of her case distinguish it from others where the Board has found delays unreasonable, and dismi the appeal as time barred.

First, the Department suffers no prejudice by appellant's delay after 1979. Thanks to the meticulous care with which an obviously conscientious consular officer at London developed th case in 1978, the record before the Board is replete with detai information about appellant's naturalization, distant by only a few years from that event. The consular officer saw appellant was able to evaluate her credibility. Her evaluation of appell is an integral part of the record. There is thus ample documer pertinent to the only substantive issue presented by the appeal appellant's intent or lack of intent in 1975 to relinquish her States citizenship.

Secondly, it is apparent that appellant has not suddenly discovered it convenient or advantageous to assert a belated claim to United States Citizenship. The record and her testimony at the hearing disclose that her chagrin and anxiety about losing-her nationality were constant, not ephemeral, although her efforts to seek redress were admittedly somewhat uneven.

In sum, none of the paramount considerations that would bar a stale appeal are present here. It is our judgment that on balance the appeal was taken within a reasonable time in light of the circumstances of the case. Appellant, therefore is entitled to be heard on the merits, and we now proceed to consider them.

III

Since appellant has conceded that she obtained naturalization in the United Kingdom voluntarily, the decisive issue is whether her acquisition of British citizenship was accompanied with an intent to relinquish her United States nationality.

Our determination of this issue is guided by the rule in Vance v. Terrazas. 14/ Therein the Supreme Court held that even though a party fails to prove that he or she performed an expatriating act involuntarily, the question remains whether on all the evidence the Government has satisfied its burden of proof that the act was done with the requisite intent to relinquish citizenship. With respect to the standard of proof required by the Government, the Court said that under section 349(c) of the Immigration and Nationality Act 15/, the

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14/ 444 U.S. 252 (1980).

15/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481, provides in pertinent part:

Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence.

Government must establish intent by a preponderance of the evidence. Intent to surrender citizenship, the Court further said, may be ascertained from a person's words or found as fair inference from proven conduct. Citing its decision in Nishikawa v. Dulles, 16/ the Court noted that obtaining naturalization in a foreign state, like performance of the other enumerated expatriating acts may be highly persuasive evidence of an intent to relinquish United State citizenship. An oath of allegiance to a foreign sovereign while also substantial evidence of intent, is insufficient, without more to prove intent. King v. Rogers, 463 F. 2d 1188 (1972).

It is well settled that intent is to be determined as of the time the act of expatriation was done. 17/ Evidence of intent contemporaneous with the performance of the act is, of course, most probative of the party's intentions regarding United States citizenship. However, a United States Court of Appeals has said that "a party's specific intent to relinquish his citizenship rarely will be established by direct evidence. But, circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship." 18/

16/ 356 U.S. 129 (1958).

17/ Terrazas v. Haig, 653 F. 2d 285 (1981).

18/ Id., 288.

The Department submits that appellant's intent to relinquish her United States citizenship is demonstrated by: obtaining naturalization in a foreign state; swearing an oath of allegiance to a foreign sovereign; travelling to the United States on a British passport; and the statements she made in August 1975 when she responded to the Embassy's letter informing her that she might have expatriated herself.

Appellant concedes that she voluntarily became a British citizen and swore a non-renunciatory oath of allegiance to the Crown. These acts, as noted above, may be evidence of an intent to divest herself of United States citizenship. Standing alone, however, they are insufficient as a matter of law to prove intent.

We do not consider appellant's use of a British passport indicative of an unequivocal intent to cut her ties to the United States. When the Embassy asked her in June 1975 to surrender her passport, she did so. It was returned to her uncancelled but with the warning not to use it. She did not, and obtained a British passport. It is as fair and reasonable to construe appellant's use of a British passport as a matter of convenience as it is to regard it as a sign that appellant considered herself no longer to be an American.

Nor can we attach decisive weight to the fact that appellant checked a box on the questionnaire sent her in June 1975 indicating that she had voluntarily obtained naturalization with the intention of relinquishing United States citizenship. As she explained to the consular officer who interviewed her in 1978, in her submissions, and at the hearing, she had checked that box because it was true that she had obtained naturalization voluntarily; she had thought she must therefore answer "yes" to the entire statement, even though she had not performed the expatriating act with the intention of relinquishing her American citizenship.

The form, which appellant thought did not sum up her feelings, "had boxes like a multiple choice exam.. .I ticked the box that seemed the most typical....I just wasn't a gutsy or a comfortable enough person to start marking up American Embassy forms....I ticked and I filled it in to be obliging." 19/ Rather than cross anything out, she attached a letter she hoped "would explain the way I felt."

Appellant's dilemma does not seem to have been uncommon, for we note that the citizenship questionnaire form has been revised, and since 1977 the two issues of voluntariness and intent are now treated as separate matters. 20/ In any case, hex completion of the form is too equivocal to support any serious contention that she thereby demonstrated an unmistakable intent to give up American citizenship.

19/ TR 19.

20/ 8 Foreign Affairs Manual, Exhibit, 224(b).

On the contrary, the record abundantly documents appellant's lack of the requisite intent to relinquish her American citizenship.

On January 21, 1975, only a few months before she became a British citizen, appellant applied for and received a United States passport, the second issued to her in London.

When she returned the questionnaire to the Embassy in August 1975 she wrote on a covering note:

> I am very sorry that by becoming a British subject I lose my American nationality.

This is the sentiment of one whose intent is to retain citizenship (not give it up) but who had resigned herself to the fact that she had lost it by operation of law.

In 1978 a Member of Parliament and junior minister, and two of her law professors submitted evidence to the consular officer, who handled appellant's case, that they had discussed with appellant the requirement that she become British to qualify as a solicitor. All stated that appellant made clear to them before obtaining British citizenship that she did not want to lose her United States citizenship and was reluctant to take any action that would jeopardize her citizenship status.

As the Member of Parliament put it in his letter of November 1978, to the consul:

> I recall telling her...she would have to become a naturalized Briton /to become a solicitor/. She then expressed her anxiety about her United States citizenship, and I expressed the view that it might be possible for her to retain both nationalities.

The opinion of the consular officer who examined appellant's case in November 1978 is, in our opinion, highly persuasive. The consul was the only United States official to talk with appellant either at the time of her naturalization or at a time fairly close to it, and had ample opportunity to assess appellant's credibility at first hand during what apparently were several personal interviews. We attach great weight to the consul's conclusion, cogently and objectively expressed in her report to Washington, that appellant lacked intent to relinquish her citizenship.

Nothing in the record shows unambiguously that appellant conducted herself in a manner derogatory of United States citizenship. She has sought to establish (successfully in our judgment) that her sole purpose in seeking British citizenship was to enter a profession that would give her economic independence. As she expressed it at the hearing:

> ...I would have to have a job in case of the strong likelihood that I might have to help my mother out when she retired. I wasn't banking on getting married. I was determined to stand on my own feet, and I chose law and stuck to that despite the fact that it was blatantly clear I wasn't fitted for it. 21/

The preponderance of the evidence is that appellant wished and intended to retain her American citizenship when she acquired that of the United Kingdom. The Department has not proved otherwise.

IV

In light of the foregoing analysis and our examination of the entire record, we conclude that although appellant voluntarily became a citizen of the United Kingdom and Colonies, she did not do so with the intention of relinquishing her United States citizenship. The Department's holding of loss of appellant's nationality is reversed.

Alan G. James, Chairman

Edward G. Misey, Member

James G. Sampas, Member

21/ TR 13.