DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This case has been brought to the Board of Appellate Revie by [redacted] who is appealing from an administrative determination of the Department of State that he expatriated himself on November 17, 1975 under the provisions of section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a consular officer of the United States at Caracas, Venezuela. 1/

The Department approved the certificate of loss of nationality in this case on December 15, 1975. The appeal was entered on February 16, 1983.

The initial issue to be determined is whether the appeal was entered within the limitation prescribed by the applicable regulations, namely, within a reasonable time after appellant had notice of the holding of loss of his United States citizenship. It is our conclusion that appellant's delay in bringing the appeal was unreasonable. The appeal is therefore time barred. Lacking jurisdiction to entertain the appeal, we will dismiss it.

I

Appellant was born at [redacted] on [redacted], thus acquiring United States citizenship at birth. Through his parents, both citizens of Venezuela, he also acquired the nationality of that country. Appellant resided in the United States only a few months after his birth; it appears that early in 1950 he was taken to Venezuela by his parents.

1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5) reads:

Sec. 349. (a) From and after the effective date of this Ac a person who is a national of the United States whether by birt or naturalization, shall lose his nationality by --

. . .

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the secretary of State; . . .

Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph 5 of section 349(a) of the Immigration and Nationality Act and re-designated paragraph (6) of section 349(a) as paragraph (5).

Appellant apparently made numerous visits subsequently to the United States with his mother. He obtained a United States passport in 1965 at the Embassy in Caracas.

According to appellant he received a degree in marketing from the Venezuelan Central University. He married in 1975, at which time he was employed by the Union Bank in Caracas as Vice President for Operations.

On November 17, 1975, appellant went to the Embassy with his father, according to his own and his father's sworn statements. The record, however, does not indicate that the senior [redacted] was present. The record does show that appellant made a formal renunciation of his United States nationality on that day. He was then 26 years old. He signed three documents:

(1) A sworn statement hand-written in Spanish declaring that he wished to renounce his United States citizenship for family, social and professional reasons.

(2) A statement of understanding in English detailing the legal consequences of formal renunciation. Appellant declared therein that the serious nature of his act had been fully explained to him by the consular officer and that he fully understood its consequences. The acknowledgment clause signed by appellant reads as follows:

> I (swear, affirm) that I have (read, had read to me) the contents of this statement in the Spanish language and fully understand its contents.

The inapplicable words were not deleted.

The attestation signed by the Consul reads as follows:

> [redacted] appeared personally and read this statement in the Spanish language in the presence of these witnesses and after my explanation before them of its meaning and of the consequences of renunciation of United States citizenship (signed, refused to sign) the Statement (under Oath, by affirmation) before me this 17th days of November 1975.

The inapplicable words were not deleted.

(3) An Oath of renunciation in the form prescribed by the Secretary of State, which read in operative part as follows:

> I, Victor Anthony Luongo,....solemnly swear ... That I desire to make a formal renunciation of my American nationality, as provided by Section 349(a)(6) of the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

There is no indication in the record that the Consul prepared a commentary on appellant's renunciation. The only contemporary record of what transpired on November 17th consis of the three foregoing documents and form FS-558 (the standard Foreign Service record of a post's official contacts with citizens), recording the fact of appellant's renunciation and that the documents relating threto were sent to the Department on November 19th.

On the day appellant renounced his citizenship the consul officer prepared a certificate of loss of nationality, as required by section 358 of the Immigration and Nationality Act. 2/

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

Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a forign 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 Consul certified that appellant acquired the nationality of both the United States and Venezuela at birth; that he made a formal renunciation of his United States citizenship before a consular officer of the United States at Caracas in the form prescribed by the Secretary of State; and thereby expatriated himself under the provisions of section 349(a)(6) of the Immigration and Nationality Act.

The Department approved the certificate on December 15, 1975, and, as prescribed by section 358 of the Act, sent a copy thereof to the Embassy to forward to appellant. The Embassy's records show that on February 20, 1976, it sent a letter to appellant enclosing a copy of the approved certificate of loss of his nationality.

In December 1975 appellant travelled to the United States on a tourist visa issued by the Embassy.

After his return to Caracas, appellant wrote a letter to the Consul in Spanish on May 13, 1976, stating that he had renounced his United States citizenship due to family reasons and "being wrongly advised by my parents, and in spite of the influence of my parents....I am very much repentant because I consider that was a mistake on my part...." Appellant requested reconsideration of his case.

On May 21st appellant filled out a questionnaire to assist the Department to re-evaluate his case and swore to the truth of the statements he had made in the letter he wrote to the Consul. The Consul forwarded appellant's request to the Department on June 16, 1976. In his covering memorandum the Consul stated in part as follows:

> As in all renunciations, Consul carefully explained the serious consequences of this act and then had [redacted] read, in Spanish, the statement of understanding. [redacted] signed that document and took the oath of renunciation.
>
> ...Consul must reiterate that this case was meticulously developed in accordance with Departmental guidelines. No force or coercion was used. Rather, it sounds as if [redacted] was under some family pressure to renounce.

The Department informed the Embassy on July 16, 1976, that it would consider any evidence appellant might offer to establish that his renunciation was involuntary. 3/

There is no indication in the record that the Embassy communicated with appellant after receiving the foregoing memorandum. But its FS-558 bears the following notation dated September 20, 1976:

> TS /transmittal slip/ to Department enclosing letter written by applicant's father discussing renunciation.

Neither the foregoing letter nor a copy of it is in the record. Meanwhile, three days earlier, on September 17th, the Department had informed the Embassy that since appellant had presented no new evidence to justify an administrative review of his case, the Department considered that he had abandoned hi request. Whether the Embassy so informed appellant is not a matter of record.

The Embassy's FS-558 shows that on November 29, 1976, the Department instructed the Embassy to "contact subject and advise him to contact the Immigration and Naturalization Service for information regarding naturalization as a U.S. citizen

On December 9, 1976, the Embassy records that it sent a letter to appellant informing him of the above; it addressed it letter to appellant at the Language Center, St. Petersburg, Florida.

Nearly a year later the Embassy recorded on August 18, 1977, that it had sent a letter to "Mr. L. residing now at...Pinellas Park, Florida...informing him that the Department had ruled that the pressures which caused him to renounce his citizenship were not sufficient to justify reconsideration of his case."

On February 16, 1983, acting through counsel, appellant lodged an appeal with this Board from the Department's holding of loss of his nationality, such holding being an administrativ determination from which an appeal, properly and timely filed, may be brought before us.

3/ It appears that appellant went to Florida in July 1976 wher he entered a course in English language instruction.

Appellant contends that his renunciation was made under the duress of his nationalistic and politically minded father, and therefore involuntary. He further contends that he did not intend to relinquish his citizenship when he involuntarily performed an act of expatriation. He also asserts that his appeal was timely filed in light of the fact that he never received a copy of the certificate of loss of nationality issued in his name, and his inability until 1981 to obtain evidence from his father that the latter had exerted pressure on him to renounce his American nationality.

Appellant requested an oral hearing which was held January 27, 1984.

II

We may not proceed in this matter until we determine the threshold issue: the Board's jurisdiction to entertain the appeal. The Board may not assume jurisdiction unless it finds that the appeal was filed within the time limit prescribed by the applicable regulations. Thus, if the appeal was not filed within the operative limit, the appeal would be time barred and the Board would lack jurisdiction to consider it. We 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 certificate of loss of nationality. 4/ The Regulations further

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4/ Section 7.5(a) of Title 22, Code of Federal Regulations, 22 CFR 7.5(a).

provide that an appeal filed after the prescribed limit shall be denied unless the Board, for good cause shown, determines that the appeal could not have been filed within the prescribed time. The current regulations were, however, promulgated on November 30, 1979, four years after the certificate of loss of nationality had been approved in appellant's name. In December 1975 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. 5/

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 December 1975 should apply in the appeal before us.

The Chairman of the Board advised appellant's counsel by letter dated July 14, 1983, that since timely filing is mandatory and jurisdictional the Board would have to determine at the outset whether it had jurisdiction over the appeal.

What constitutes reasonable time is a matter of interpretation, but countless judicial decisions offer objective guidelines to determine that issue. 6/ It is generally accepted that reasonable time embraces the following elements:

5/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60.

6/ See, for example, 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).

It is such period of time as may be fairly and properly allowed or required, having regard for the nature of the act or duty, or the subject matter, and the attending circumstances. It has been held to mean as soon as the circumstances of the parties will permit, but a person may not determine a time suitable to himself. 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.

The rationale for allowing a reasonable time to bring 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 usually begins to run from the time an appellant received notice of the Department's holding of loss of nationality -- not sometime later when for whatever reason a person is moved to seek restoration of his or her citizenship.

Appellant submits that his delay in bringing the appeal was not unreasonable in the circumstances of his case. He argues that he did not receive a copy of the approved certificate of loss of his nationality when it was sent to him by the Embassy. The certificate was mailed to his father not to him, he asserts; only in 1981 did his father give it to him.

Section 358 of the Immigration and Nationality Act prescribes that the diplomatic or consular office concerned shall forward a copy of an approved certificate of loss of nationality to the person to whom it relates. The record shows that the Embassy forwarded a copy of the approved certificate to appellant on February 20, 1976, addressing it, we may presume to the address in Caracas that appellant had left with the Embassy on November 17, 1975, the day he renounced his United States citizenship. 7/ It is thus clear that the Embassy properly discharged its legal duty. Moreover, the Embassy benefits from the legal presumption that public officers execute their official duties in accordance with law and their instructions, evidence to the contrary being absent. 8/ It is appellant's burden to show that the Embassy failed to act correctly, not the Department's. Appellant has presented no evidence to support his claim, save a latter day statement to that effect.

7/ Both the Department and appellant's counsel have incorrectly assumed that the Embassy mailed the certificate of loss of nationality to appellant in Florida. The FS-558 maintained by the Embassy says nothing about the certificate having been sent to a Florida address, and it must be assumed that it was in fact mailed to a Caracas address. It was not until December 1976 that the Embassy wrote any letter to appellant in Florida.

8/ Boissonnas v. Acheson, 101 F. Supp. 138 (1951).

But whether appellant received a copy of the certificate of loss of nationality in 1976 is not determinative here.

It can scarcely be doubted that appellant knew he had performed an act of renunciation of citizenship on November 18, 1975. 9/ He maintains that all the proceedings at the Embassy that day were conducted in English, a language he did not then understand, and that neither the Consul nor his father explained to him in Spanish the serious consequences of his act. Yet, as we have seen, before appellant took the oath of renunciation, he signed a statement, handwritten in Spanish, declaring his wish to renounce his United States nationality fo family, social and professional reasons. Whether he wrote the statement himself or, as he states, his father did so, is immaterial. He signed it. We find it improbable that an educated man of 26 years, and vice president of a bank, would not understand the connotation and implications of the words "renounce" and "renunciation."

Moreover, only seven months after appellant renounced his citizenship, the consul who had processed the case informed the Department on June 16, 1976, that he had carefully explained the serious consequences of the act to appellant and then had appellant read, in Spanish, the statement of understanding. The statement of understanding makes crystal clear that formal renunciation of United States citizenship leaves the renunciant in all legal respects in an alien status vis-a-vis the United States.

9/ We take no position at this point whether his act of renunciation was voluntary or involuntary, and whether it was performed with the intention of relinquishing his United States citizenship. Those issues remain for consideration, if, and only if, the Board finds it has jurisdiction to entertain the appeal.

The fact that appellant wrote to the Embassy six months later on May 13, 1976, to request reconsideration of his case, because he had made a mistake and wished to regain his citizenship, simply confirms that appellant had not been unaware in 1975 that he had lost his citizenship.

Alternatively, appellant argues, he could not have brought an appeal before 1982 because it was not until 1981 that he was able to persuade his domineering father to relent and admit that he had forced his son to renounce his United States citizenship. We find this explanation of the delay without merit.

It is understandable that if appellant believed the best evidence he could submit to support a claim of duress was an affidavit from his father, he would have wished to secure and submit such evidence. Furthermore, given appellant's characterization of his father as one whose will no one in his family dared brook, it might have taken him a long time to persuade his father to execute one. Nevertheless, we are unable to agree that appellant did not arguably have a prima facie case to bring to this Board in 1977. The Department found the evidence he presented upon administrative review insufficiently probative. Whether the Board also would have found it insufficient, is a question that could only have been answered if he had filed an appeal within a reasonable time after 1977.

He could at least have given notice of appeal, explained the problems he was having in securing evidence of involuntariness, and asked for a continuance. In 1977, as now, the Board had authority, for good cause shown, to grant a continuance. Why he did not or could not take such a simple precautionary step has not been explained.

In appellant's reply brief, his counsel states that: "Where the most basic of all rights, the right of citizenship is at issue, there cannot be a statute of limitation." 10/

10/ But see section 360 of the Immigration and Nationality Act, 8 U.S.C. 1503, which limits actions by persons seeking judgments in Federal Court declaring them to be citizens of the United States to five years after the final administrative denial of a right or privilege as a national of the United States.

In effect, counsel urges the Board to find a remedy for what he alleges was a wrongful deprivation of appellant's citizenship.

The Board is empowered to "take any action it considers appropriate and necessary to the disposition of cases appealed to it." 22 CFR 7.2(a). The Board's authority under section 7.2(a), however, may not be construed so as to nullify other preconditions established by 22 C.F.R. Part 7 for the Board to exercise jurisdiction over the merits of an appeal, including the requirement that an appeal be timely filed under section 7.5(b), or comparable provisions of predecessor regulations. Once the Board determines that it lacks jurisdiction over an appeal as time barred, the regulations require dismissal of the appeal.

The essential purpose of a limitation provision 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 adjudicated when the recollection of events upon which the appeal is based is fresh in the minds of all parties directly involved. That is not the situation here. The consul who took appellant's oath of renunciation stated in an affidavit executed in 1984, that he did not recall appellant's case. At this late date the Department would be hard pressed, for example, to contest appellant's allegations that the proceedings at the Embassy on November 17, 1975, were carried out in a manner prejudicial to his interests, or to respond to appellant's and his father's sworn statements made six years after the event that the act was done under duress.

The period of "within a reasonable time" usually commences with appellant's receipt of notice of the Department's holding of loss of his nationality. Here, however, inasmuch as appellant had petitioned for an administrative review, we believe the period "reasonable time" should be deemed to have commenced to run when he was notified in 1977 that his request for a Department review of his case had been denied.

It is clear that appellant allowed a substantial period of time to elapse before taking an appeal. Whatever definition may be given to the term "reasonable time", we do not believe that such language contemplated an inadequately explained delay of over five years.

In the circumstances of this case where there has been no persuasive showing of a requirement for an extended period of time to prepare his case, or any insuperable obstacle in bringing a timely appeal, it is obvious that appellant's delay was unreasonable.

III

Upon consideration of the foregoing, we conclude that the appeal was not brought within a reasonable time after appellant received notice in 1977 that the Department had found the evidence appellant had submitted insufficient to justify reconsideration of his case. The appeal is thus barred by the passage of time and not properly before the Board. It is hereby dismissed.

Given our disposition of the case, we do not reach the other issues presented.

Alan G. James, Chairman

Gerald A. Rosen, Member

James G. Sampas, Member