May 17, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This case is before the Board of Appellate Review on an appeal brought by [redacted], a member of the Institute of the Sisters of Charity of Montreal, from an administrative determination of the Department of State that she expatriated herself on August 14, 1946, under the provisions of section 401(a) of Chapter IV of the Nationality Act of 1940 by obtaining naturalization as a British citizen in Canada upon her own application. 1/

The Department approved the certificate of loss of nationality that was issued in this case on April 15, 1949. The appeal was entered on March 11, 1983, approximately thirty-foul years later. The basic issue to be determined is whether this Board has jurisdiction to consider an appeal filed after such a long delay. We conclude that the appeal is barred by the passage of time. Lacking jurisdiction to entertain the appeal, we will dismiss it.

1/ Section 401(a) of Chapter IV of the Nationality Act of 1940, 8 U.S.C. 801, provided:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person:. ...

I

Appellant became a United States citizen by birth at [redacted], Michigan, on [redacted]. She lived in the United States until 1934 when she joined the Institute of the Sisters of Charity of Montreal ("Grey Nuns"), and moved to Canada. She took her final vows in 1940. Appellant has stated that she joined the Grey Nuns because of her religious convictions and her wish to do missionary teaching. She was assigned to teaching duties in the Canadian northwest, and taught there for four years on the strength of a high school diploma.

In 1944, appellant was informed by the Department of Education of the Province of Alberta that she might not continue teaching without a proper certificate. To qualify for a certificate she was required to take additional courses in education and submit proof of British citizenship. It appears that appellant discussed these requirements with her religious superiors who instructed her to comply with them. After successfully completing the courses in education at the Alberta Normal School, Edmonton, appellant applied for naturalization. On August 14, 1946, after swearing an oath of allegiance, she became a British subject. 2/ She obtained an interim teaching certificate in November 1946.

2/ The oath that appellant was required by law to write out in longhand and swear to, read as follows:

"I, Sister Blandine Isabelle Levesque, ...swear by Almighty God that I will be faithful and bear true allegiance to His Majesty King George VI, his Heirs and Successors according to law. So help me God."

On a date not indicated in the record, the Canada Gazette, official publication of the Federal Government of Canada, reported that appellant had been naturalized.

Thereafter the United States Consul at Edmonton wrote to appellant on March 11, 1948, and asked her to complete a citizenship questionnaire. 3/ On March 29, 1948, the Consul acknowledged receipt of the questionnaire she had completed, and requested that she sign an affidavit that had been prepared for her signature. The affidavit declared in part that appellant obtained British citizenship, "having neither the intention nor desire to preserve my allegiance to the United States," and that "I have voluntarily expatriated myself as an American citizen in conformity with law by my naturalization in Canada as a British subject." Appellant signed the affidavi and returned it to the Consul.

On April 12, 1948, the Consul prepared a certificate of loss of nationality in appellant's name, as required by sectior 501 of Chapter IV of the Nationality Act of 1940. 4/ The Consul certified that appellant had acquired the nationality of the United States by birth therein; that she had obtained naturalization in a foreign state, Canada; and concluded that she thereby expatriated herself under the provisions of sectior 401(a) of Chapter IV of the Nationality Act of 1940.

3/ Neither the original questionnaire nor a copy of it is in t record. Apparently appellant did not retain a copy.

4/ Section 501 of Chapter IV of the Nationality Act of 1940, 8 U.S.C. 901, provided as follows:

Sec. 501. Whenever a diplomatic or consular officer of th United States has reason to believe that a person while in a foreign state has iost his American nationality under any provi of chapter IV of this Act, he shall certify the facts upon whic such belief is based to the Department of State, in writing, ur regulations to be 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 forwarde to the Department of Justice, for its information, and the diplomatic or consular office in which the report was made shal be directed to forward a copy of the certificate to the person whom it relates.

The Department approved the certificate on April 15, 1949. The Consul sent a copy thereof to appellant by letter dated April 21, 1949.

It does not appear that appellant raised any question about her loss of nationality until sometime in 1966 when she applied for and obtained a Canadian passport. One of the questions on the passport application was whether she had any other nationality. This, she states, led her to consider whether there might be some way to regain her American citizenship. There is, however, no record of her having taken any steps at that time to request that her case be re-examined.

Between 1977 and 1980 appellant allegedly inquired at the United States Consulate General at Montreal how she might reopen her case. She allegedly received a "non-encouraging response," and took no further action at that time.

In October 1982 the Consulate General at Montreal informed the Department that appellant was seeking reconsideration of her case, and requested instructions. In response, the Department pointed out that in April 1949 appellant had sworn that she neither intended nor desired to preserve her allegiance to the United States as a result of her naturalization in Canada, and that she had obtained naturalization voluntarily. The Department further instructed the Consulate General to inform appellant that if she wished to take an appeal from the Department's holding of loss of nationality, she "may address her appeal to the Board of Appellate Review." 5/

5/ In the Board's opinion, the Department's instruction to the Consulate General with respect to appellant's filing an appeai was misleading, if not improper, and was given without, apparently, an appreciation of the consequences that might ensue. The Board finds it inexplicable that the Department should give instructions to the effect that appellant here might file an appeal approximately thirty-four (34) years after the Department's holding of loss of nationality, knowing full well that the Board's jurisdiction does not include appeals not filed within a prescribed time. Moreover, it may be argued that by inviting appellant in 1982 to take an appeal, the Department in effect waiver? its right to seek dismissal of the appeal on the ground that it was not timely filed with this Board. In any event, it falls within the exclusive competence of the Board of Appellate Review to determine whether it may exercise jurisdiction in a particular case.

Appellant filed the appeal on March 11, 1983, and subsequently retained counsel. Appellant contends that the Department must prove that she voluntarily obtained naturalization in Canada. 6/ She further contends that in acquiring

---

6/ Appellant maintains that the statutory presumption of voluntariness in section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c) should not apply in appellant's case since it was enacted in 1961 after the determination of appellant's loss of nationality; to apply section 349(c) would be to give it retroactive effect. This, she asserts, would be contrary to the language of both the statute and the House Committee Report cited in the Department's brief, and would be unconstitutional. The rule to be applied, appellant argues, is that of Nishikawa v. Dulles, 356 U.S. 129 (1958) under which the Government must prove the voluntariness of an expatriating act by clear, convincing and unequivocal evidence. This rule, appellant states, has been applied retroactively to expatriative acts performed prior to the Nishikawa decision in proceedings commenced prior to the enactment of section 349(c) in 1961.

foreign citizenship she did not intend to surrender her United States citizenship. Although she concedes that her delay in appealing was lengthy, she submits that such delay should not bar the Board from exercising its jurisdiction to consider and determine the appeal.

II

The instant case presents a jurisdictional issue that must be determined before we may proceed. The Board has been asked to consiaer and determine an appeal that was brought approximately thirty-four years after the Department held that appellant expatriate6 herself. The question is whether the Board has authority to entertain such an appeal.

In April 1949, when the Department approved the certificate of loss of nationality that was issued in this case, there was a Board of Review (on loss of nationality). Although not strictly an appellate body at that time, by September 13, 1949, it clearly had become one. Procedures were published on that date in an intra-departmental communication stating that persons who did not accept a holding of the Department of loss of their nationality "may be informed that appeal may be made to the Board of Review of the Passport Division." 7/ There was no specified time limitation on appeal. 8/

7/ Foreign Service Serial No. 1019, September 13, 1949.

8/ In the absence of a specified time limit on appeal, the common law rule of "reasonable time" governs.

By 1954 the procedures for bringing an appeal to the Board of Review on Loss of Nationality within the Passport Office had been made more precise. Internal guidelines for consular officers to inform a person of the right of appeal were incorporated into the Foreign Service Manual as Chapter 2, section 238.1 "Advice on Making Appeals." 9/

In 1966 Departmental regulations were promulgated prescribing that an appeal to the Board of Review on Loss of Nationality be made "within a reasonable time." 10/ When the Board of Appellate Review was established in 1967, , regulations promulgated at that time adopted the "reasonable time" limitation. 11/

9/ It was not, however, until 1979 that the Code of Federal Regulations (22 CFR 50.52) prescribed that an expatriate must be informed of the right of appeal when an approved certificate of loss of nationality is forwarded to him or her.

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

11/ 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.

The regulations of the Board of Appellate Review were further revise6 in November 1979, and now require that an appeal be filed within one year of approval of the certificate of loss of nationality. 12/

Since it is generally accepted that a change in regulations shortening the time limit on appeal should not apply retrospectively, the standard of "reasonable time" will govern here.

Timely filing is mandatary and jurisdictional. 13/ Thus, if we find that the appeal was not entered within a reasonable time *after* appellant had notice of the Department's holding of loss of her nationality, the appeal would be time barred and the Board would lack jurisdiction to entertain it.

12/ Section 7.5(b), Title 22, Code of Federal Regulations, 22 CFR 7.5(b).

13/ United States v. Robinson, 361 U.S. 220 (1970).

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 /of Appellate Review/ 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 reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expatriation.

Office of the Attorney General, Washington, D.C. File: Co-340-P, February 7, 1973.

The rule on reasonable time has been extensively cited and discussed. It is an indeterminate period to be defined in each case in accordance with generally recognized principle These include the following elements: 14/

Reasonable time depends on the facts and circumstances of each particular case. It is such length 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 him or herself. 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 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

---

14/ See, inter alia, Ackerman v. United States, 340 U.S. 193 (1950); 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 Emergenc Fleet Corp., 9 F. 2d 733 (1926); Smith v. Pelton Water Wheel C 151 Ca. 393 (1907); Appeal of Syby, 460 A. 2d 749 (1961).

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.

The essential purpose of a limitation on appeal - whether it be fixed or indeterminate - is to compel the exercise of a right of action within a span of time that will 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.

There is no dispute that appellant knew of her loss of nationality in 1949. She did not contest that loss until more than thirty years had passed. The sheer length of the time between her receipt of notice of the holding of loss and entering the appeal would, in our view, be sufficient grounds to bar the appeal.

It may be noted that since 1949 an administrative appellate process has been available to expatriated citizens. Appellant could have easily ascertained the procedure for taking an appeal by making inquiries of a United States diplomatic or consular office in Canada. Unfortunately, there is no indication that she even contemplated asserting a claim to United States citizenship until 1966 when, as she has stated, her filling out an application for a Canadian passport made her reflect on whether there might be some way she could regain her citizenship. But by then nearly twenty years had passed after she had been found to expatriated herself. Even at that late date she did not act.

Ten more years passed without appellant's attempting to assert a claim to her lost nationality. Between 1977 and 1980, according to her submissions, she inquired at the Consulate General at Montreal about the possibilities of a reconsideration of her case, but allegedly received discouraging responses, and therefore did not press her case. Appellant's conduct does not demonstrate a consistent concern to contest the Department's holding of loss of nationality.

Further, we find unpersuasive appellant's argument that not until the Supreme Court's decision in Afroyim v. Rusk, 387 U.S. 253 (1967) had been rendered was she afforded a basis for an appeal on the ground that her expatriating act was not accompanied by an intent to relinquish her United States citizenship. This, in our view, has no bearing on the question

of whether her appeal, filed in 1983, thirty-four years after h naturalization in Canada, was filed within a reasonable time. The issue is one of the Board's jurisdiction, which precludes appeals not made within the prescribed time; in this case, within a reasonable time.

It may be observed in this connection that appellant could have taken an appeal at any time after the Department's 1949 holding of loss of nationality if she believed such holdir was contrary to law or fact, provided, of course, that the appeal was taken within a reasonable time. If she believed, for example, that her act of naturalization was not voluntarily performed or that the certificate of loss of nationality' issuec by the Consulate at Edmonton in 1948 was based on error or recited mistaken facts, she doubtless could have had grounds fc appeal.

Appellant's long delay in filing an appeal has also prejudiced the Department's ability to meet its burden of proof and to respond to appellant's allegations. 15/

To prevail, the Department must, of course, be able to prove by a preponderance of the evidence that appellant intende to relinquish her United States citizenship when she obtained naturalization in Canada. 16/ Appellant would also have the Department carry an additional burden of proving by clear, convincing and equivocal evidence that she did the expatriating act voluntarily. 17/ If appellant's theory that the Depart-

---

15/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481, places the overall burden of proof on the Government. It provides that:

Sec. 349(c). 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. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

16/ Vance v. Terrazas, 444 U.S. 252 (1980).

17/ See note 6, supra.

ment must prove that appellant acted voluntarily without benefit of a presumption were valid (and we are not required to take a position on the point), the Department's task in now going forward, thirty-seven years after appellant obtained British nationality, would be virtually impossible.

Appellant may well remember the events of thirty or more years ago, and has submitted some documents relevant to, but not necessarily conclusive on, the issues of voluntariness and intent. The Department has no such memory. The Consul who handled appellant's case in 1948 left no explanatory notes or commentary. Even if he were available now to give evidence (which is improbable), it is hardly conceivable that he would have any recollection of appellant's case. Furthermore, a crucial piece of evidence is missing from the record - the questionnaire that appellant purportedly completed at the request of the consul in 1948. The absence of this document is illustrative of the kinds of evidentiary problems that bedevil long delayed appeals.

Furthermore, the trier of fact cannot do justice at such a remove from the date of the expatriating act. Given the state of the record in this case, any decision on the merits would rest so heavily on conjecture that it could not represent a fair and reasoned weighing of the claims of the parties.

Appellant's right to a due process determination of her nationality does not exist in isolation from the requirement that a request for a review of a holding of loss of that nationality be timely filed. 18/ Reasonable diligence must be shown to call into action the powers of this Board. Furthermore, there must be an end to litigation someday.

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

We are of the view that the defense of laches asserted by the Department is well taken in this particular case. Not only has appellant shown no good cause why she did not enter an appeal many years earlier, but the Department's right to make a fair presentation of its case has been compromised by appellant's failure to bring a timely appeal.

III

We conclude that appellant's delay of thirty-four years in bringing an appeal from the Department's holding of loss of her nationality was clearly unreasonable. The appeal is barred, and is hereby dismissed.

Alan G. James, Chairman

Edward G. Misey, Member

Warren E. Hewitt, Member