February 17, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

[redacted] has brought this appeal from an administrative determination of the Department of State that he expatriated himself on September 29, 1971, 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 citizenship before a consular officer of the United States at London, England. 1/

The Department of State on October 29, 1971, approved the certificate of loss of nationality that was prepared by the Embassy at London. More than ten years later, on February 26, 1982, appellant's counsel gave notice of appeal.

As an initial matter we must decide whether the Board has jurisdiction over ,this matter. It is our conclusion that since the appeal was not brought within the limitation prescribed by the applicable regulations, it is time barred. Lacking jurisdiction, we will dismiss the appeal.

1/ Section 349(a)(5) 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 --

. . .

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Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph 5 of section 349(a) of the Immigration and Nationality Act and re-designated paragraph (6) of section 349(a) as paragraph (5).

I

Born at [redacted], California, on [redacted], of a British father, appellant acquired United States and United Kingdom nationality at birth. He lived in the United States until 1962 when his mother took him abroad. Thereafter he lived and went to school in England and on the Continent. From 1953 to 1971, appellant was documented with a United States passport. He obtained a British passport in 1969.

According to appellant, his formal education ended at age sixteen. At seventeen he left home.

On September 29, 1971, appellant, accompanied by wife and baby, appeared at the United States Embassy at London, stating that he wished to renounce his United States citizenship. He was then eighteen years old.

The record shows that appellant accomplished renunciation that same day. He was interviewed by a consular officer about his contemplated act of renunciation. Thereafter he executed a statement of understanding, attesting that he was acting voluntarily, that the consequences of renunciation had been explained to him by the consul, and that he understood the consequences of his act. This done, he signed the oath of renunciation, and subsequently executed an affidavit of expatriated person.

As required by section 358 of the Immigration and Nationality Act, 2/ the consular officer prepared a certificate of loss of nationality in appellant's name on September 29, 1971.

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 certificate to the person to whom it relates.

The consular officer certified that appellant acquired United States and British nationality at birth; that he made a formal renunciation of his United States nationality before a consular officer of the United States at London, England: and thereby expatriated himself under the provisions of section 349(a)(6) of the Immigration and Nationality Act.

The Embassy dispatched the certificate to the Department without any account of or commentary on the circumstances surrounding appellant's execution of the oath of renunciation.

On October 29, 1971, the Department approved the certificate, an action that constitutes an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to this Board.

Acting through counsel, appellant gave notice of appeal on February 26, 1982. A brief was submitted in November 1982 An oral hearing was requested, and held on December 2, 1983.

Appellant argues that he renounced his United States citizenship because he understood that upon attaining the age of eighteen he would have to choose between his American and British nationalities. Because of this mistaken belief and because the consular officer who took his renunciation allegedly failed to comply with Departmental regulations regarding handling of renunciation cases, appellant contends that his act was involuntary. He further argues that since he lacked full awareness of the grave consequences of renunciation, he did not have the requisite intent to relinquish citizenship. In his brief it is also contended that the Department's guidelines on disposition of formal renunciation of citizenship cases violate the due process clause of the Fifth Amendment because they inadequately guarantee the voluntariness of an individual's action, and

that section 351(b) of the Immigration and Nationality Act 3/ is unconstitutional because it violates the fundamental right of citizenship guaranteed by the Fourteenth Amendment.

II

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

3/ Section 351(b) of the Immigration and Nationality Act, 8 U.S.C. 1481, reads:

. . .

(b) A national who within six months after attaining the age of eighteen years asserts his claim to United States nationality, in such manner as the Secretary of State shall by regulation prescribe, shall not be deemed to have expatriated himself by the commission, prior to his eighteenth birthday, of any of the acts specified in paragraphs (2),(4) and (5) of section 349(a) of this title.

In October 1971 when the Department approved the certificate of loss of nationality, the regulations in effect at that time 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. 4/

Where an appeal has been brought from a holding of loss of nationality made prior to November 30, 1979, 5/ it is the practice of the Board to apply the limitation prescribed

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4/ 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.

5/ 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 expatriat under Subpart C of Part 50 of this chapter is contrary tc law or fact, shall be entitled to appeal such determinati to the Board upon written request made within one year af approval by the Department of the certificate of loss of nationality or a certificate of expatriation.

by the regulations that were in effect at the time of the holding of loss. To apply the present limitation on appeal of one year after approval of the certificate of loss of nationality would be contrary to the general rule that a change in the regulations shortening the limitation period should be 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 reasonable time after appellant had notice of the Department's holding of loss of his nationality, the appeal would be time barred and the Board would be without jurisdiction to entertain it.

The "reasonable time" provision is mandatory and jurisdictional. 6/

6/ United States v. Robinson, 361 U.S. 220 (1960).

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 Review7 the power to...review actions taken Tong 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 Attorney General, Washington, D.C. File: CO-340-P, February 7, 1973.

The rule on "reasonable time" has been exhaustively defined by the courts and commentators, 7/ and is generally considered to encompass the following elements.

Reasonable time 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 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.

7/ See generally Black's Law Dictionary, 5th Ed.; 36 Words and Phrases (1962); 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).

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 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 argues that his delay in entering an appeal is not unreasonable in the circumstances of his case. He asserts, on the one hand, that he does not recall receiving a copy of the approved certificate of loss of nationality,

The record shows that the Department sent a copy of the approved certificate of loss of nationality to the Embassy at London on Ocotber 29, 1971, for delivery to appellant, as required by section 358 of the Immigration and Nationality Act. 8/ It may be assumed, in the absence of evidence to the contrary, that the certificate reached London and that the Embassy duly complied with the mandate of the Act by delivering, or attempting to deliver, it to appellant. 9/

8/ Note 2, supra.

9/ A presumption of regularity attaches to the performance of the public duties of sworn Government officials, evidence to the contrary being absent. Boissonnas v. Acheson, 101 F. Supp. 138 (1951).

Even if appellant did not receive formal notice of the Department's holding of loss of his nationality (and he has not rebutted the presumption that such notice was sent to him), he can have been in no doubt that he had lost his citizenship by formally renouncing it. As the Attorney General said in 1973 in his opinion in the citizenship case of one Claude Cartier:

> Cartier lost his nationality not as the result of any action of the Department of State, but directly by virtue of his own act of renunciation. Section 349(a)(6), 8 U.S.C. 1481(a)(6). The subsequent proceedings of the Department of State were merely in the nature of reports, which, in the case of renunciation, are purely ministerial. 9/

Appellant had sufficient notice of his loss of nationality to permit him to bring a timely appeal, had he wished to do so.

Appellant also seeks to excuse his delay in bringing an appeal by stating that he does not recall having been informed of his right of appeal. In 1971 Departmental guidelines provided that consular officers should inform an expatriate of his right of appeal when forwarding a copy of the approved certificate of loss of nationality. 11/

It may be presumed that the Embassy at London duly complied with these internal guidelines, absent evidence to the contrary. The guidelines did not, however, have the force of law, 12/ and it would not be material error if appellant had not been informed of his right of appeal, when he was sent a copy of the approved certificate. Appellant, in fact, had a right of appeal, and could so have ascertained from any U.S. consular office in the United Kingdom or elsewhere. There is no indication that he attempted to find out about his appeal rights until a good many years later.

10/ Note 6, supra.

11/ 8 Foreign Affairs Manual 224.21.

12/ It was not until 1979 that Federal Regulations provided that an expatriate must be informed of the right of appeal. Section 50.52 of Title 22, Code of Federal Regulations, 22 CFR 50.52, November 30, 1979.

Appellant submits that he perceived U.S. authorities to be hostile to him and his family because his mother, an internationally known personality, had been the subject of severe criticism in the American press and official circles. He therefore believed he could not get a sympathetic hearing if he were to approach U.S. officials.

We find this contention without merit. Had he felt deterred from approaching a U.S. consular office, he could surely have drawn on the ample resources of his mother to find competent legal counsel to advise him how he might protest his loss of citizenship. There is no evidence that appellant considered seeking legal counsel until a good many years later.

Appellant's mother stated in an affidavit that had she been in England when her son renounced, she would have insisted that he seek competent advice before acting. If, as appears likely, appellant's mother reproached him after the event, it would not be unreasonable to assume that appellant might have been moved to find out how he could challenge his expatriation, if he had then been serious about wanting to reverse the Department's determination of loss of his citizenship.

It seems obvious that appellant was indifferent to his loss of citizenship until a number of years after he renounced it.

Appellant further argues that inasmuch as he renounced his citizenship without full awareness of its grave consequences, he did not know until he consulted counsel years later than he might have a continuing claim to United States citizenship. This unawareness, he asserts, should toll the limitation. Appellant analogizes his case to those of petitioners in Perri v. Dulles, 206 F. 2d 586 (1953) and Matter of Chatty-Suarez, 9 I&N 670 (Atty. Gen. 1962).

We consider the "unawareness" doctrine inapposite here.

The cases cited by appellant involved an interpretation of the time limit prescribed by statute within which persons with derivative citizenship of the United States might assert such a claim. In both Perri and Chatty-Suarez, petitioners were totally unaware that they had any claim to United States citizenship. In both it was ruled that the limitation prescribed by statute should not begin to run until such time as the petitioner actually became aware of his claim to citizenship.

Appellant here did not acquire his citizenship derivatively. He was born in the United States and seems to have known from boyhood that he was a citizen of the United States. He also knew that he had made a formal renunciation of his American nationality. His failure to bring a timely appeal may not be excused on the grounds that he did not, until years later, discover that he might have grounds for appeal based, as his counsel argued, on lack of the requisite intent to relinquish his citizenship. By exercise of timely diligence he could have ascertained years earlier that he might arguably have a cause of action.

Appellant contends that inasmuch as the record in his case is well documented, the Department has not been prejudic by his delay which, accordingly, is excusable. We disagree.

The consul who took appellant's renunciation is dead. Accounts of what transpired on September 29, 1971, when appellant renounced his nationality do not exist; the record of that day contains only his oath, statement of understanding and affidavit of expatriated person. The Embassy employees, who witnessed appellant's renunciation and assiste in the preparation of documents, recently submitted affidavit but their present recollections of the events of September 29 1971, are less than precise, Furthermore, at the hearing appellant himself was extremely vague about what actually occurred that day. 13/

13/ Cross examination by counsel for the Department elicited following responses from-appellant regarding-his recollection the events at the Embassy on the day he renounced his citizen

> He did not recall to which office he had been directed when he went to the reception desk to state that he wanted to renounce his citizenship. "It's very vague in my memory...." He remembered signing "a lot of papers and taking an oath," and felt "very uncomfortable because I didn't like what I had said about renouncing citizenship. That's basically all I remember." He did not think it was suggested to him by the consul that he stop and think about it and return another day. He did not recall anything that the consul said to him. Nor did he recall whether any of the consular employees might have cautioned him against renouncing. He did "not exactly" recall how many papers he signed, or what they were. He knew they were "all to do with my renouncing my citizenship." He was not sure that he had read them; he had probably skimmed over them. He did not recall whether any of the papers he signed advised him as to the consequences of renunciation. He did not recall whether the consul had explained the consequences of renunciation.

Transcript of Proceedings in the Matter of Michael Howard Wil Board of Appellate Review, December 2, 1983. 18-21.

Finally, appellant suggests that the Board should consider the limitation period flexible and designed to serve the interests of justice. In effect, he contends that because he believes he has a meritorious cause of action, the Board should waive his delay. This we may not do.

22 C.F.R. 7.2(a) provides that "the Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it." 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, as we have done here, that it lacks jurisdiction over an appeal as time barred, then the only proper course is to dismiss the appeal.

A limitation provision is 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 adjudicated when the recollection of events upon which the appeal is based is fresh in the minds of all parties directly involved. This is not the situation here. Furthermore, there must be an end to litigation at some point.

It is clear that appellant allowed a considerable period of time to elapse before taking an appeal. There is no record that he showed any interest in the restoration of his citizenship until 1979, eight years after his expatriation, when he applied for a United States passport. We find his failure to take any action until then clear evidence that his delay was unreasonable. Whatever definition may be given to the term "reasonable time", we do not believe that such language contemplated a delay of over ten years. The period of "within a reasonable time" commences with appellant's receipt of notice of the Department's holding of loss of nationality and not at a moment in time when he deems it propitious to assert a claim to his lost citizenship.