August 13, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: G E M

This case comes to the Board of Appellate Review on an appeal brought by G E M from an administrative determination of the Department of State that he expatriated himself on January 9, 1969, 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 San Salvador, El Salvador. 1/

The Department approved the certificate of loss of nationality issued in this case on January 28, 1969. The appeal was entered on February 22, 1983. The first issue the Board must consider and decide is whether an appeal taken fourteen years after the Department's holding of loss of appellant's nationality was entered within the limitation prescribed by the applicable regulations. It is our conclusion that the appeal is untimely and therefore barred. Lacking jurisdiction to entertain the appeal, we will dismiss it.

I

Appellant acquired United States nationality by birth at . Both his parents were citizens of El Salvador. He thus also acquired the nationality of El Salvador at birth.

1/ Section 349(a)(6) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(6), provided:

> 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 --
>
> . . .
>
> (6) 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, renumbered section 349(a)(6) of the Immigration and Nationality Act as section 349(a)(5).

Appellant lived in the United States until he was about six months old when he was taken by his parents to El Salvador He lived there from infancy to at least **1969** when he formally renounced his United States nationality. The record discloses nothing of appellant's early life, but it does show that on January 9, 1969, two days after his eighteenth birthday he appeared at the United States Embassy where he made a formal renunciation of his United States nationality,

In his opening brief, appellant alleges that he was taken to the Embassy by his father. He further alleges that the consular officer who interviewed him said that appellant would have to choose between his United States and El Salvador nationalities. appellant also alleges that the consular officer stated that whether appellant renounced his United States nationality or not, he would still be subject to induction into the United States armed forces; no mention was made, appellant asserts, that he might request to be classified as a conscientious objector and perform alternate service, thus avoiding military service to which he was allegedly morally averse.

Appellant's brief continues:

> ...upon hearing the unfortunate material misrepresentations and omissions of the Consul, /appellant's father/ decided for himself what would be done for his son, a youth of 18 years and 2 days. Mr. M[redacted], Sr. had finished his studies in the U.S. and had no intention to return, However, he did not consult the appellant as to his future plans which now clearly appear to have included the U.S. Upon hearing of the "need" to choose between dual citizenship, and U.S. military service as the alternative, etc. he selected a course **€or** 'his son.
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> In truth, when appellant discussed the situation with his parents, he was told that if such was not done, he would lose all economic support of the family.

The contemporary record of what occurred on January 9, 19(is sparse, containing only the following documents:

1. Statement of Understanding signed and sworn to by appellant and attested by the consular officer. Therein, appel acknowledged that his renunciation of United States nationality made voluntarily; that he would become an alien in relation to

the United States; that renunciation might not affect his Selective Service status; that he did not choose to make a separate starement explaining his reasons for renouncing his United States nationality, and that the extremely serious nature of renunciation had been fully explained to him by the consular officer and that he understood the consequences of his act. Appellant swore that he had had read to him the statement of understanding in Spanish and that he understood its contents.

2. Oath of Renunciation of United States Nationality. Therein appellant "absolutely and entirely" renounced his United States nationality. The oath was signed by appellant an2 acknowledged by the consular officer;

3. Certificate of Loss of Nationality that was prepared in appellant's name.

On January 10, 1969, the Embassy prepared the certificate of loss of nationality immediately after appellant's renunciation in compliance with section 358 of the Immigration and Nationality Act. 2/ The Embassy certified that appellant acquired United States-nationality by birth in the United States: that he executed an oath of renunciation of United States nationality; and thereby expatriated himself under the provisions of section 349(a)(6) cf the Immigration and Nationality Act.

The Embassy forwarded the certificate to the Department apparently without transmittal memorandum: there are no notes by the consular officer in the record relating to or commenting on appellant's renunciation. The Department approved the certificate on January 28, 1969, approval constituting an administrative holding of loss of nationality from which an appeal, timely and properly filed, may be brought to this Board.

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 prescribe2 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.

In response to an inquiry by the Department, the Embassy reported that appellant had surrendered the United States passport issued to him by the Embassy in February 1968 and that the Embassy had destroyed it.

On January 28, 1969, the Department sent a copy of the approved certificate of loss of nationality to the Embassy to be forwarded to appellant, as required by section 358 of the Immigration and Nationality Act.

On November 8, 1982, appellant applied for a United States passport at the Miami Passport Agency. 3/ On December 30, 1982 the Department informed appellant that his application had been denied on the grounds of non-citizenship, citing the fact that he had made a formal renunciation of his United States nationality on January 9, 1969. The Department added that if appellant believed the Department's 1969 determination of loss of nationality was erroneous as a matter of law or fact you may appeal the decision by contacting the Board of Appellate Review."

The appeal was received through counsel on February 24,

Appellant alleges that his renunciation was involuntary having been the product of duress exerted on him by his father and misrepresentations of law by the consular officer who took his renunciation. He further alleges that his act was invalid because under El Salvador law he was a minor at the time, and at no time subsequently did he ratify the act. He argues as well that he lacked the requisite intent to relinquish United States citizenship.

II

Before we may proceed we must determine whether appellant's appeal was filed within the time limit prescribed by the applicable regulations.

In 1969 when the Department approved the certificate of loss of nationality the regulations governing appeals to this Board provided that a person contending that the Department's holding of loss of nationality in his case was contrary to law or fact must appeal to the Board of Appellate Review within a reasonable time after receipt of notice of the Department's holding. 4/

3/ Appellant's brief states that he is presently living in Miami and has resided there with his wife and children for many years.

4/ Section 50.60, Title 22, Code of Federal Regulations (1967), 22 CFR 50.60, provided:

A person who contends that the Department's administrative finding 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.

In 1979 the regulations governing the Board's activities were revised and amended. The time limit on appeal is now within one year of approval of a certificate of loss of nationality. 5/

Since the current regulations came into effect long after appellant was held to have expatriated himself, we are of the view that the current limit on appeal should not govern in this case, but rather the limitation of "reasonable time" in effect in 1969 is properly applicable.

Under the limitation of "reasonable time," a person who contends that the Department's determination of loss of nationality in his case is contrary to law or fact must file his request for review within a reasonable time after notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be barred and the Board would lack jurisdiction to consider it. The reasonable time provision is mandatory and jurisdictional, 6/

5/ Section 7.5(b), Title 22, Code of Federal Regulations, (1979), 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 expatriation.

6/ 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 Attorney General, Washington, D.C. File: CO-349-P, February 7, 1973.

The Chairman of the Board of Appellate Review in a letter dated March 9, 1983, apprised appellant's counsel of the jurisdictional issue presented by his client's appeal,

The rule on reasonable time has been exhaustively defined

How long is a "reasonable time" depends on the facts of ea case. It is such length of time as may fairly be properly and reasonably allowed or required, having regard for the nature of the act or duty, or the subject matter, and the attending circu stances. It has been held to mean as soon as the circumstances of the parties will permit, but a person may not determine a ti suitable to himself. Whether an appeal has been filed within a reasonable time depends, among other things, on whether a legall 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 generall fatal.

The rationale for allowing a reasonable time to bring al appeal is that one should be permitted sufficient time to prepa a case showing that the Department's holding of loss of nationa is contrary to Paw or fact. At the same time, the rule presume that one will prosecute an appeal with the diligence of a reasonably prudent person. Reasonable time begins to run from time an appellant received notice (or may be presumed to have received notice) of the Department's holding of loss of nationality -- not sometime later when for whatever reason the perso is moved to seek restoration of his or citizenship.

In the notice of appeal counsel for appellant filed on February 22, 1983, he stated that the appeal was made from the Department of State's decision rendered on December 30, 1982 wh by the Department denied appellant's application for issuance of a United States passport on the grounds of non-citizenship.

7/ See generally Chesapeake and Ohio Railway v. Martin 293 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 Boar6 Emergency Fleet Corp., 9 F. 2d 733 (1926); Smith v. Pelton Wate Wheel Co., 151 Ca. 393 (1907); Appeal of Syby, 360 A, 2d 749 (1961); Black's Law Dictionary 5th Ed.; 36 Words and Phrases (1962).

The Chairman of the Board pointed out to appellant's counsel by letter dated March 9, **1983**, that the appeal would not lie from the December **1982** denial of a passport, but rather from the Department's determination made in January **1969** that appellant had lost his nationality. 8/

Thus, the calculation of reasonable time began to run after appellant's receipt of an approved copy of the certificate of loss of nationality, presumably sometime early in **1969**.

By his counsel, appellant makes the following argument in support of his contention that his appeal should be deemed to have been timely filed:

> ISSUES A. TIME OF FILING BRIEF AND APPEAL OF APPELLANT
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> This Appeal is taken from the refusal of the Department of State to grant *Mr.* M[redacted] a Federal Right: to issue him a U.S. Passport showing citizenship. The Appellant denies knowledge of the notice allegedly sent him by the State Dept. in **1969**, and has filed the instant Appeal as soon as he received knowledge of the refusal to grant the above-mentioned Federal Right. It is clear that this Appeal became ripe only when such a denial of a Federal Right was denied on December 30, **1982**. Furthermore, no prejudice attaches to the State Dept by its **1983** filing.
>
> **CONCLUSION**
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> Appellant, realizing that a Federal Right had been denied him, only at that time could have concluded that an Appeal of that decision was necessary. Therefore, this Appeal is certainly timely in nature. No prejudice arrises /sic/ in the State Deptartment as a result of the alleged failure to file this Appeal in **1969**. Indeed, no prejudice has ever been claimed by that Agency.

8/ The Board's regulations make clear that it does not have jurisdiction to entertain an appeal from a denial of a passport on grounds of non-citizenship. 22 CFR 50.80.

We attach no weight to appellant's unsupported contention that he did not receive notice in 1969 or close to that time of the Department's determination of loss of his nationality;' espy of the approved certificate was sent to the Embassy at San Salvador in January 1969 to be forwarded to appellant. Absent evidence to the contrary, there is a legal presumption that the officials of the Department and the Embassy duly complied-with their instructions, that the certificate arrived in San Salvador and was forwarded in the correct manner to appellant. Boissonnas v. Acheson, POP F. Supp. 139 (1951).

Even if appellant did not receive the certificate (and he has offered no evidence *to* overcome the legal presumption that the U.S. officials involved did not correctly perform their assigned responsibilities), he can hardly have been in doubt that. he had taken an action in 1969 that. would effectively terminate his; United States citizenship.

Thus, only a few weeks before the Department held that appellant had lost his nationality, appellant by his own act - not the Department's expatriated himself. As the Attorney General held in his opinion in the citizenship case of Claude Cartier (note 6, supra):

> 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 Deparrment of State were mereiy in the nature of reports, which, in the case of renunciation, are purely ministerial.

So we are unable to accept appellant's assertion that he did not until 1982 **know** a holding of loss of nationality had bee made in **his** case and only then realize he had been denied the right of citizenship from which he might bring this appeal.

Nor can we agree with appellant's contention that the Department suffers no prejudice by the long-delayed filing of th appeal.

Fourteen years have passed since the Department determined that appellant expatriated himself. **As** the record shows, only after appellant had been denied a United States passport in 198 did he take any action to assert a claim **to** United States citiz ship, He has not demonstrated, even alleged, that he was impede by any force outside his control from contesting in timely fashi

the holding of loss of nationality. With the passage of so many years, the Department's ability to carry its burden of overall proof has been seriously compromised. As noted above, the contemporary evidence surrounding his performance of the statutory expatriating act is scant. The consul left no notes or commentary on what transpired on January 9, **1969** when appellant formally renounced his nationality. It is extremely unlikely that this consui would, if now available, have any recollection **of** the case. The Department would therefore be hard pressed to refute appellant's allegations that the consular officer made misrepresentations to appellant: or that appellant was subjected to duress by his father to perform the expatriating act. The trier of fact simply cannot, after passage of so many years, make a fair and reasoned decision on the basis of a skimpy record and unproved, unsupported allegations by appellant that his renunciation was invalid and that he lacked an intent to surrender United States citizenship.

Appellant permitted fourteen years to elapse before filing an appeal in 1983. His failure to take any action until then persuades **us** that his long delay was unreasonable. The principal reasons for granting a reasonable time within which to appeal a Department's holding of loss of nationality are to afford an appellant sufficient time to assert his or her contentions that the decision is contrary to law or fact, and to compel an appellant to take such action when the recollection of events upon which the appeal is grounded is fresh in the minds of the parties involved. The limitation period of "within a reasonable time" commences to run with appellant's notice of the Department's holding of loss of nationality not many years thereafter when appellant considers it convenient to take an appeal.

III

On consideration of the foregoing, we conclude that the appeal was not taken within a reasonable time after appellant had notice of the Department's holding of **loss** of United States citizenship. Accordingly, the appeal **is** barred by the passage of time. It is hereby dismissed.

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

Alan **G.** James, Chairman

Mary E. Hoinkes, Member

Howard Meyers, Member