DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E[redacted] N[redacted] (P[redacted])

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, E[redacted] N[redacted] (P[redacted]) expatriated herself on February 7, 1956 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 her United States nationality before a consular officer of the United States at Mexicali, Mexico. 1/

In 1957 the Department approved the certificate of loss of nationality in this case. The appeal was entered in 1983. The first issue th2 Board must consider and determine therefore is whether the appeal was filed within the limitation on appeal in effect in 1957.

It is our conclusion that the appeal is 'barred by the passage of time. Accordingly, it will be dismissed for want of jurisdiction.

I

Appellant became a United States citizen by birth at San [redacted]. She also acquired Mexican citizenship through her Mexican citizen parents. In 1935 she was taken to Mexico by her parents., returning to the United States in 1943. She married a Mexican citizen in 1946 and moved to California. In 1948 appellant and her husband went to Mexicali, Mexico. She obtained a United States passport in 1951. According to an affidavit she executed on June 9, 1983:

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. 1040, renumbered section 349(a)(6) of the Immigration and Nationality Act as section 349(a)(5)./

> While I was living with my husband and children in Mexicali, and while in the process of building a house, I was informed by the Mexican authorities that I had derivative Mexican citizenship and that I was required to assert that citizenship.

In the same affidavit appellant explained the circumstances surrounding her application for a certificate of Mexican nationality as follows:

> A mexican /sic/ attorney arranged all of the papers-for me. I signed an application but I did not appear before any official nor did I swear ailegiance to Mexico nor did I swear to renounce my U.S. citizenship. Shortly thereafter I received my certificate of Mexican citizenship.

On November 7, 1955 the Department of Foreign Relations granted appellant a certificate of Mexican citizenship. According to the copy of the certificate in the record, appellant had declared her allegiance to Mexico and renounce2 any right to United States citizenship.

Appellant's affidavit continues:

> About a year later while I was crossing the boarder /sic/, one of the officials saw my certificate of Mexican citizenship, I was taken into a back room and the official whose name was Mr. [redacted] told me that I had iost my U.S. citizenship. A Mr. Fox who was there in the office, and who I knew to be an attorney, confirmed the Immigration agents statement. I was not allowed to cross the border into the U.S., further I was told that I would not be allowed to cross the border again until I went to the U.S. Consulate in Mexicali and got an alien crossing permit and signed a formal renunciation.

> At that time my son was just a baby and he was being treated by a physician on the U.S. side, There were many other reasons why I needed to be able to enter the U.S., so I went to the Consulate and did as I was told.

The record shows that on February 17, 1956 appellant made a formal renunciation of her United States citizenship at the Consulate at Mexicali, before a consular officer of the United States. Appellant "absolutely and entirely" renounced her United States nationality and "all rights and privileges thereunto pertaining" and abjured "all allegiance and fidelity to the United States of America."

On February 17, 1956 the Consulate prepared a certificate of loss of nationality in appellant's name, as required by section 358 of the Immigration and Nationality Act. 2/ The Consulate certified that appellant acquired United States nationality by birth therein; and that she expatriated herself under the provisions of section 349(a)(6) of the Immigration and Nationality Act by making a formal renunciation of her United States nationality before a consular officer of the United States at Mexicali.

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

Section 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 certificate and appellant's oath of renunciation were forwarded to the Department apparently without any accompanying commentary by the consular officer on the circumstances of appellant's renunciation. The Department approved the certificate on April 3, 1957, approval constituting an administrative holding of loss of nationality from which a properly and timely filed appeal may be taken.

On April 17, 1957 the Consulate forwarded a copy of the certificate to appellant, and informed her by covering letter that she might appeal the Department's decision to the Board of Review of the Passport Office of the Department.

There is no further recorded contact between appellant and U.S. authorities for the next 19 years.

According to a memorandum the Embassy at Mexico City sent to the Department on November 1, 1976, appellant had visited. the Embassy on January 28, 1976 to assert a claim to United States citizenship on behalf of one of her sons who had Seen born at Mexicali on November 10, 1955. The Embassy commented to the Department that the son did not have a claim to United States citizenship inasmuch as appellant could not establish that she had complied with the residence requirements of section 301(a)(7) of the Immigration and Nationality Act. 3/

3/ Section 301(a)(7) of the Immigration and Nationality Act, 8 U.S.C. 1401(a)(7) read in pertinent part as follows:

> Sec. 301(a) The following shall be nationals and citizens of tne United States at birth:
>
> . . .
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> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

Public Law 95-432, approved October 10, 1978, 96 Stat. 1046 amended section 301 of the Immigration and Nationality Act by striking out "(a)" after sec. 301 and redesignating paragraphs (1) through (7) as subsections (a) through (g), respectively.

Seven years later, in June 1983 appeliant applied for a passport at the New Orleans Passport Agency. On October 13, 1983, the Department informed appellant through her counsel that the documents she had submitted in connection with her application had Seen forwarded to this Board. On October 14, the Department sent a memorandum to the Board which read in part as follows:

> Ms. P[redacted] has apparently filed an application for a U.S. passport at the New Orleans Passport Agency and, at the same time, has requested reconsideration of the finding of loss of nationality in her case, After retrieving Ms. P[redacted]'s file and advising the New Orleans Passport Agency of the section of law under which she was held to have lost U.S. nationality, we instructed the passport agency to forward Ms. P[redacted]'s request for reconsideration to L/BAR /Board of Appellate Review/ and to advise Ms. P[redacted] or her—attorney to communicate directly with L/BAR to determine any further action necessary on their part to effect a proper request for appeal.

The Chairman of the Board wrote to appellant's counsel o: October 18, 1983 acknowledging receipt or" appellant's documen and informed counsel that if appellant wished to iodge an app she or counsel might do so by writing directly to the Board a: stating the grounds therefor in accordance with the Departmen regulations which were enclosed. On November 29, 1983 appellant's counsel informed the Board that her client wished to take an appeal.

The grounds for this appeal may be summarized as follows Appellant contends that she *is* a United States citizen and th she never intentionally renounced that citizenship. She was under economic duress in 1955 when she applied for a certific of Mexican nationality. Appellant's formal renunciation of United States nationality was done on the advice and insisten of a United States official and *is* therefore void.

The Board did not request that the Department submit a legal brief in this case, but asked the Dspartment to review appellant's file and submit any pertinent comments thereon together with the record for the Board's consideration. By memorandum to the Board dated January 23, 1984 the Department stated as follows:

> This Office has reviewed the copy of the administrative record in the case of E[redacted] N[redacted]. We believe that Mrs. N[redacted]s appeal is barred by the reasonable time requirements of the Board's regulations: 22 C.F.R. 50.60 (1967). She has not provided any compelling reason for bringing her appeal 26 years after her renunciation that would excuse such an unreasonable delay, particularly as she visited the Embassy in Mexico in 1976 on a citizenship matter.
>
> We have examined the case record and find that the holding of loss represents the Department's conclusion that Mrs. N[redacted] relinquished her United States citizenship when she took the oath of renunciation in Mexico, We see nothing in the record that would cause us to question that conclusion.

II

The Board nay not proceed without first deciding whether it has jurisdiction to consider an appeal entered 26 years after appellant received notice of the Department's holding of loss of her United States citizenship.

In 1957 when the Department approved the certificate of loss of nationality in this case the rules of procedure of the Board of Review of Loss of Nationality of the Passport Office (predecessor of the Board of Appellate Review) had no provision for a time limit on appeal. Where no limitation is specified, however, it is customary to apply the common law rule, namely that the right of appeal from an adverse decision should be exercised "within a reasonable time" after receipt of notice of such holding.

In 1966 the Federal Regulations promulgated for the Board! of Review on the Loss of Nationality provided that an appeal

from an adverse determination of nationality might be taken "within a reasonable time" after receipt of notice of the holding. 4/ When the Board of Appellate Review was established in 1967 the limitation of "within a reasonable time" was incorporated in the regulations promulgated for the Board of Appellate Review. 5/ In 1979 the regulations were revised and amended. They provide that an appeal from an adverse determination of nationality may be brought within one year after approval of the certificate of loss of nationality. 6/

They further provide that an appeal filed after the stipulated time limit shall be dismissed unless the Board, for good cause shown, determines that the appeal could not have been filed within one year. 7/

Believing that the current regulations as to the time limit on appeal of one year after approval of the certificate of loss of nationality should not be applied retroactively, we are of the view that the standard of "reasonable time" should govern in the appeal now before the Board.

4/ ection 50.60, Title 22, Code of Federal Regulations (1966), 22 C.F.R. 50.60, 31 Fed. Reg, 1353% (1966).

5/ See. 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 C.F.R. 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 a notice of such holding, to appeal to the Board of Appellate Review,

6/ Section 7.5(b), Title 22, Code of Federal Regulations, 22 C.F.R. 7.5(b).

7/ 22 CFR 7.5(a).

Under the limitation of "reasonable time" a person who contends that the Department's determination of loss of his citizenship is contrary to law or fact must file his request for review within a reasonable time after receipt of notice of such determination. If a person did not file an appeal within a reasonable time after receipt of notice of the Department's determination of loss of his nationality, the appeal would be barred and the Board would lack jurisdiction to consider it. The reasonable time provision is thus mandatory and jurisdictional. 8/

The rule on reasonable time has been extensively defined. 9/

How long is a "reasonable time" depends on the facts of each case. It is such length of time as may fairly be properly and reasonably allowed or required, having regard

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8/ 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 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-340-P,** February **7, 1973.**

9/ 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).

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 a reasonably prudent person. Reasonable time begins to run from the time an appellant receives 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.

Through her counsel appellant argues that her appeal should be considered as timely filed. Her arguments therefor are as follows:

> Ms. N[redacted] received notification and certificate of loss of citizenship in 1957. Had she appealed within two years or even within ten years of the date of the certificate, the then existing case law would have required that the State Department's action be affirmed. Ms. N[redacted] had on numerous occasions after the incident contact /sic/ several attorney's /sic/ who advised her that the decision was final and correct.
>
> Although we assert that Ms. N[redacted] is a United States Citizen and that she never actually lost her citizenship, we recognize that if she had appealed within the time frames presently in force, the Department would certainly have affirmed the issuance of the certificate of loss of citizenship.

The courts, recognizing the importance of American Citizenship, have retroactively applied the constitutional decisions affecting expatriation. The same considerations that argue for retrospective application argue for a lenient time span in which to assert such application. In United States v. Lucienne D'Hotelle, 558 F. 2d 37 (1st Cir. 1976) The /sic/ Court reviewed the theory of retroactivity. "Equitable principles control in deciding whether cases should be applied retrospectively... in equity as nowhere else courts eschew rigid absolute /sic/ and look to the practical realities..." (Id, at 41). Later the Court said: "The rights stemming from American Citizenship are so important that absent special circumstances they must be recognized even for years past." (Id, at 42). How would equity justify retroactive application on the one hand and on the other frustrate the application because of the time span involved?

in the alternative, but still relying on the above, we assert the following ground for justification: In June 1983 Ms. N[redacted] completed and submitted a reqcest for a passport along with an affidavit and other related documents. She fully intended to apply for and receive a passport so that she could travel as a United States Citizen. The passport agency did not grant her passport application. The passport agency, rather than denying the application and following the usual appellate procedures, chose to refer the matter directly to the Board of Appellate Review. We consider this action to be in substance equivalent to a denial of application and wish to follow whatever appeal procedure is indicated. As an appeal from the denial of a passport application Ms. N[redacted]'s request is well within the present time frames.

We are not persuaded that the foregoing explanations are sufficient to excuse the delay involved in taking this appeal.

First, appellant could, at any time, have challenged the Department's holding of loss of nationality by submitting that she had not acted voluntarily when she renounced her United States citizenship. It is well settled that performing a statutory expatriating act will not result in loss of citizenship unless the act be proved to have been done voluntarily. Nishikawa v. Dulles, 356 U.S. 129 (1958); Perkins v. Elg, 307 U.S. 325 (1938).

After the Supreme Court decided Afroyim v. Rusk, 387 U.S. 253 (1967) and the Attorney General issued his Statement of Interpretation in 1969, of that decision, 42 Op. Atty. Gen. 397 (1969), appellant could have delayed the argument that she lacked intent in 1956 to relinquish citizenship. 10/

Second, Lucienne D'Hotelle is inapposite. Tha case stands for the proposition that constitutional decisions do not automatically apply retrospectively but rather are to be applied in accordance with general equitable principles. In Lucienne, the court qualifiedly applied constitutional holdings of the Supreme Court retrospectively in order to determine the status of the decedent's citizenship on certain dates for the purpose of assessing her estate's income tax liability. It does not follow that because the court there said "rights stemm from American citizenship...must be recognized even for years past," the Board may disregard its jurisdictional mandate and waive an extensive, insufficiently explained delay in asserting a claim to United States citizenship. It is for the Board itself to determine the threshold question of whether it has jurisdiction to hear the merits of an appeal, in accordance with the Department's regulations. Only if it be found that the appeal was timely filed within the applicable limitation, may the Board proceed to consider the substantive issues presented. Furthermore, appellant here had not performed any statutory expatriating act that was later declared unconstitutional.

10/ We are not required to decide whether an appeal entered in 1969 would have been timely.

Third, because appellant claimed the right to a U.S. passport in 1383 and, in effect, was denied issuance of one, does not make the appeal timely. The proper basis for an appeal in this case is not the denial of a passport but rather the underlying determination of loss of appellant's citizenship. The Board lacks jurisdiction to consider an appeal from the denial of a passport on grounds of non-citizenship. 22 CFR 51.80. Thus the limitation of "reasonable time" began to run in 1957 not 1983.

At no time between 1957 and 1983 did appellant take any steps of record to dispute the Department's holding of loss of her citizenship. As we have seen, in 1976 she attempted to assert a claim to United States citizenship on behalf of one of her sons who had been born prior to the date of her expatriation. The record does not, however, show that appellant, at that time, challenged the Department's decision in her own case, although that would have Seen a logical if belated moment for her to have done so. Seven years after unsuccessfully attempting to establish a claim by her son to United States citizenship, appellant asserted her own claim to United States citizenship.

Twenty-six years after the event, the Department cannot but be seriously prejudiced in its ability, given the meager record, to controvert appellant's allegations that she renounced her citizenship because she felt she had been misled into doing so by U.S. officials.

The essential purpose of a limitation on appeal is to compel the timely exercise of the right while recollections of the events surrounding performance of an expatriating act are still fresh in the minds of the parties involved. That is not the situation here. And there must be an end to litigation at some point.

Here, there has Seen no showing of a requirement for an extended period of time to prepare an appeal, or any obstacle beyond appellant's control to take one in timely fashion. It is, therefore, obvious that the delay of 26 years is unreasonable.

III

Upon consideration of the foregoing, we conclude that the appeal was not brought within a reasonable tine after

appellant received notice of tne Department's holding of loss of her United States citizenship and her right tc take an appeal accrued. Accordingly, the appeal is barred, and the Board thus lacks jurisdiction to entertain it. The appeal is hereby dismissed.

Given our disposition of the case, we are unable to reach the other issues presented.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member