September 13, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S[redacted] L[redacted] S[redacted]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, [redacted] expatriated herself on March 7, 1965 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Israel upon her own application. 1/

On December 30, 1966 the Department approved the certificate of loss of nationality that was issued in this case. The appeal was entered March 21, 1983. The first issue to be decided therefore is whether the appeal was taken within the applicable limitation. We find that the appeal was not timely and is therefore time barred. Lacking jurisdiction to entertain the appeal, we will dismiss it.

I

Appellant, who was born in [redacted] at [redacted] in what is now [redacted] emigrated to the United States in 1927, and in that year acquired United States citizenship through her father who had been naturalized as a United States citizen a few months earlier in [redacted] She married a naturalized United States citizen in 1932.

Appellant states that in 1955 she read about a shortage of nurses in Israel. "Not having small children anymore," she wrote to the Board, "my conscience has directed me to do what many humanitarians did centuries before me. Have sold my home and went to Israel."

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

(1) obtaining naturalization in a foreign state upon his own application, . . .

She arrived in Israel in August 1955, having travelled there on a passport issued in July of that year. On the passport application appellant listed her occupation as "vocational nurse."

In 1957 appellant, who then had temporary residence status in Israel, was registered as a United States citizen at the Consulate in Haifa. A consular officer recorded at that time that while it was improbable that she would return to the United States to live permanently in the near future, she had not, in his opinion, abandoned her allegiance to the United States. He noted, however, that section 354(5) of the Immigration and Nationality Act was applicable to her case. 2/

2/ Section 354(5) of the Immigration and Nationality Act, 8 U.S.C. 1485, read:

> Sec. 354. Section 352(a)(2) of this title shall have no application to a national --
>
> > ...(5) who shall have had his residence in the United States for not less than fifteen years subsequent to his naturalization and prior to the establishment of his foreign residence; or who prior to attaining the age of twenty-one years, shall have had his residence in the United States for not less than fifteen years subsequent to his lawful admission for permanent residence.

Section 354 was repealed by Public Law 95-432, approved October 10, 1978, 92 Stat. 1046.

Section 352(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1483, read:

> Sec. 352.(a) A person who has become a national by naturalization shall lose his nationality by --
>
> > ...(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.

Section 352 was repealed by the same act as section 354.

Appellant renewed her passport in 1958 at the Consulate in Haifa. In 1960 she obtained a new passport and was again registered at Haifa. At that time the consular officer handling her case wrote:

> ALthough applicant has the status in Israel of "permanent resident," she has declined Israeli nationality. She is employed as a nurse by the Ministry of Health in a Government hospital, but to the best of the Consular Officer's knowledge no oath, affirmation or declaration of allegiance has been required.

The consular officer expressed the opinion that appellant had not expatriated herself under any statutory provision.

Four years later, in April 1964, appellant was registered by the Embassy at Tel Aviv and received a passport valid until April 1965. According to a notation made on her application by a consular officer, appellant was then employed by the Israeli Government under a special contract and had not been required to take an oath of allegiance to Israel. It was again noted that section 354(5) of the Immigration and Nationality Act was applicable to her case.

Appellant has stated to the Board that "in the sixties" she received "a notice, advising me to go back to the United States or I will be stripped of my 'American citizenship'." She further states that she immediately responded, explaining that for financial reasons she could not afford to return to the United States, and "also have pleadet /sic/ for a special consideration, in my case on those grounds."

Neither the Embassy's letter nor appellant's reply is in the record. It seems possible, however, that the Embassy had written appellant to caution her that she might lose her citizenship under section 352(a)(2) of the Act were she to remain in Israel after 1965. 3/ There is no indication in the record what answer if any the Embassy made to appellant's alleged request that an exception be made in her case.

3/ On May 18, 1964 the Supreme Court held section 352 of the Immigration and Nationality Act, 8 U.S.C. 1484, unconstitutional Schneider v. Rusk, 377 U.S. 163 (1964).

On a date not disclosed by the record appellant applied to be naturalized as a citizen of Israel. There is no copy of appellant's naturalization application in the record. The Board notes, however, that applicants for naturalization in Israel at that date, as now, were required to specify their present citizenship and to declare that they renounced it, or request that the Minister of Interior exempt them from doing so.

The Minister of Interior issued a naturalization certificate in appellant's name on February 3, 1965. On March 7, 1965 appellant appeared before an Immigration and Registration official and declared: "I shall be a loyal citizen of Israel." She became an Israeli citizen as from that date.

Sometime thereafter the Embassy at Tel Aviv learned of appellant's naturalization. There is no record of a communication from the Embassy to appellant, but the latter stated to the Board that:

> A few months later /presumably after she had exchanged correspondence with the Embassy about the applicability of sections 352(a)(2) and 354(5) to her case/ have received another letter; demanding I come to the Embassy in person. I did; and was confronted with a letter; stating that I am voluntarily renouncing my citizenship. And was asked to sign my name, to that contrary to the fact statement.

The "statement" to which appellant refers is undoubtedly the affidavit of expatriated person which she signed at the Embassy on October 5, 1966. In it she stated that she obtained naturalization in Israel upon her own application and that the act was her free and voluntary act and that no undue influence, force or duress was exerted on her.

On October 12, 1966, the Embassy prepared a certificate of loss of nationality in appellant's name, in compliance with

section 358 of the Immigration and Nationality Act. 4/

The Embassy certified that appellant acquired United States citizenship through the naturalization of her father; that she obtained naturalization in Israel upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on December 30, 1966, approval constituting an administrative holding of loss of nationality from which an appeal, properly and timely filed, may be taken to this Board. A copy of the approved certificate was sent to the Embassy for forwarding to appellant, who has not contended that she did not receive it. Appellant states that she returned to the United States in February 1976 and has remained here since.

4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, provides:

> 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.

On December 17, 1982, appellant applied for a United States passport. On March 9, 1983, her application was denied on the grounds of non-citizenship. In denying her application, the Department advised appellant that she had the right to appeal her loss of nationality to this Board. The appeal was entered on March 21, 1983.

Appellant rests her case primarily on her assertion that she did not intend to relinquish her United States citizenship by obtaining naturalization in Israel.

The Board did not ask the Department to file a brief, but did request that the case record be reviewed and any relevant comments thereon be submitted with the record for the Board's consideration. By memorandum dated January 13, 1984, the Department commented as follows:

> This Office believes that Mrs. S[redacted] appeal is barred by the reasonable time requirement of the Board's regulations: 22 C.F.R. 50.60 (1967). She has not provided any compelling reason for bringing her appeal seventeen years after the holding of loss was made that would excuse the unreasonable delay.
>
> We have examined the case record and find that the holding represents the Department's conclusion based upon a preponderance of all the evidence that Mrs. S[redacted] intended to relinquish her citizenship when she naturalized in Israel upon her own application. We see nothing in the record that would cause us to question that conclusion.

After all written submissions had been made, the Board requested that the Department state the basis upon which it had concluded that the preponderance of the evidence showed that appellant intended to relinquish her United States citizenship when she obtained naturalization in Israel. On June 19, 1984, the Department sent a memorandum to the Board, reading in pertinent part as follows:

> In response to the Board's inquiry about Mrs. S[redacted] intent, attached is a copy of the application for Israeli naturalization which provides that the

> applicant either renounces former nationalities or requests to be exempt from renouncing former nationalities. It does not appear from the file that Mrs. S[redacted] requested exemption from renouncing her U.S. citizenship.

The Board invited appellant to comment on the Department's contention. Although she contested the Department's position, she offered no hard evidence to refute it.

II

Before proceeding, we are required to determine whether the Board has jurisdiction to consider and determine an appeal which was taken more than 16 years after the Department held that appellant had expatriated herself. The Board's jurisdiction depends on our finding that the appeal was entered within the limitation prescribed by the applicable regulations.

In 1966 when the Department approved the certificate of loss of nationality issued in appellant's name, the regulations governing appeals to the Board of Review on Loss of Nationality (predecessor of this Board) provided that:

> 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 Review on Loss of Nationality. 5/

5/ Section 50.60, of Title 22, Code of Federal Regulations, (1966), 22 CFR 50.60.

This "reasonable time" provision was adopted in the Department's regulations promulgated for the Board of Appellate Review when it was established in 1967, and remained in effect until the regulations were revised and amended on November 30, 1979. The revised regulations require that an appeal be filed within one year after approval by the Department of the certificate of loss of nationality. 6/ Believing that the current limitation on appeal should not apply retrospectively, we are of the view that the limitation in effect in 1966 should govern in this case. Accordingly, if we should determine that the instant appeal was not filed 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 consider it. The reasonable time provision is thus jurisdictional. 7/

6/ Section 7.5(a) of Title 22, Code of Federal Regulations, (1979), 22 CFR 7.5(b).

7/ 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 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.

Appellant has not contended that she did not receive a copy of the approved certificate of loss of nationality after the Department approved it in December 1966 and sent a copy to Tel Aviv to forward to her. She was therefore aware of the holding of loss of her nationality in 1967, and the limitation of "within a reasonable time" began to run in that year. Appellant took no action as a consequence of that notice until December 1982 when she applied for a United States passport.

The question of reasonable time depends, of course, on the facts in the case. "Reasonable time" has been held to mean as soon as circumstances will permit, and with such promptitude as the situation of the parties and the circumstances of the case will allow. In the case of Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931), the Supreme Court said, "what constitutes a reasonable time depends upon the circumstances of a particular case." "Reasonable" means reasonable under the circumstances, and that insufficiently explained, unnecessary delay, or lengthy delay, should not be tolerated. It does not mean that a party be allowed to determine a time suitable to himself. In re Roney, 139 F. 2d 175, 177 (1943). Nor should the term "reasonable time" be interpreted to permit a protracted and unexplained delay which is injurious to another party's rights.

Invited by the Board to explain why she did not take an appeal until 1983, appellant stated.

> (1)...That I as a nurse at my work, was always under great stress, not having any chance to about /sic/ myself. Because we were constantly under attack and bombardment by our neighbors from all sides:...

She further stated that for a number of years after she returned to the United States in 1976 she was constantly preoccupied with litigation over her brother's estate. Appellant's justification for her delay in appealing, in a word, seems to be that she did not have time to think about an appeal until many years after she had been informed of her expatriation.

The Board appreciates that the years 1967 and 1976 were difficult ones for citizens of Israel, and we sympathize with her evident dedication to humanitarian service. We do not, however,

understand why appellant could not at least have found time in a quiet interlude to make inquiries of United States officials in Israel about how she might contest loss of her nationality. Had she done so she would have learned that an appellate process was available to her any time after 1966. Likewise, after she returned to the United States in 1976 she could merely by making a telephone call to the Department have ascertained that she had a right of recourse. It appears that not until she contemplated a trip outside of the United States did she assert a claim to United States citizenship when she applied for a passport at New York. We are not convinced that appellant lacked either the opportunity or the time to find out how she could bring an appeal long before she did so. In brief, appellant has submitted no legally sufficient justification for a delay in coming before this Board of over sixteen years.

The rationale for giving a reasonable time to take an appeal from an adverse holding on nationality is to afford an appellant sufficient time to assert his or her contentions that the decision is contrary to law or fact. It is intended to compel one to take such action when the recollection of events upon which the appeal is grounded in fresh in the minds of the parties involved; that certainly is not the situation here after so many years have passed. Appellant permitted a period of sixteen years to elapse before taking an appeal in 1983. The period "within a reasonable time" commences to run with appellant's notice of loss of nationality (presumably in 1967) not years afterwards when appellant, for whatever reason, considers it appropriate to enter an appeal. In our opinion, appellant's delay of sixteen years in taking an appeal was unreasonable in the circumstances of her case.

IV

Upon consideration of the foregoing, we conclude that the appeal was not taken within a reasonable time after appellant received notice of the Department's holding of loss of United States citizenship. The appeal is time barred, and as a consequence the Board is without jurisdiction to consider the case. The appeal is hereby dismissed.

Given our disposition of the matter, we are unable to reach the other issues that may be presented.

Alan G. James, Chairman

Edward G. Misey, Member

Howard Meyers, Member