October 22, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: G[redacted] F[redacted] W[redacted]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, G[redacted] F[redacted] W[redacted] expatriated himself on January 9, 1959 under the provisions of section 349(a)(3) of the Immigration and Nationality Act by serving in the armed forces of Canada. 1/

The Department approved the certificate of loss of nationality issued in this case on February 24, 1959. Twenty-five years later appellant entered an appeal. At the outset, the Board is required to determine whether an appeal so long delayed may be entertained. It is our conclusion that inasmuch as appellant has presented no legally sufficient excuse for not seeking earlier relief, the appeal is barred and the Board lacks jurisdiction to consider it. Accordingly, the appeal will be dismissed.

1/ Section 349(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(3) provides as follows:

. . .

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 --

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: Provided, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or . . .

I

Appellant was born on [redacted] of a [redacted] father and [redacted] mother. Through his mother he acquired United States citizenship under section 201(g) 2/ of the Nationality Act of 1940. He has lived all his life in Canada.

On May 29, 195.6, at the age of 15, appellant enlisted in tne Royal Canadian Corps of Signals (Militia) as a bandsman. It appears that upon attaining the age of 18 appellant intended to continue an army career, for on January 9, 1959 he took an oath of allegiance to the British Crown, as attested by officers of the regiment in which he was serving. He was discharged on October 6, 1959.

According to an affidavit appellant executed on January 10, 1984, he visited the United States Embassy at Ottawa around the middle of January 1959. In the affidavit he explained the reason for his visit as follows:

2/ Section 201(g) of the Nationality Act of 1940, 8 U.S.C. 601(g), read in pertinent part:

Sec. 201. The following shall be nationals and citizens of the United States...

(g) a person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien....

> When I was 18, I considered joining the Royal Canadian Mounted Police (which I subsequently did at age 19) and I felt dual citizenship might be an impediment.... I had heard that having served in the Canadian Armed Forces would cause me to lose my U.S. citizenship. I reported to the U.S. Embassy, filled out some forms testifying to the fact that I had served in the Can. /sic/ Armed Forces, and was subsequently advised that I had in fact been deprived of my U.S. citizenship.

The record shows that on January 15, 1959 appellant executed an affidavit of expatriated person in which he swore that on January 9, 1959 he enrolled in the Royal Canadian Corps of Signals and on the same day swore an oath of allegiance to Queen Elizabeth II. He further swore that he had performed the Act freely and voluntarily.

In compliance with section 358 of the Immigration and Nationality Act, the Embassy drafted a certificate of loss of nationality in appellant's name on January 16, 1959. 3/ The

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3/ Section 358 of the Immigration and Nationality 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 1950, 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.

Embassy certified that appellant acquired United States nationality through birth in Canada to a United States citizen mother; that he had served in the armed forces of Canada; and thereby expatriated himself under the provisions of section 349(a)(3) of the Immigration and Nationality Act.

The Department approved the certificate on February 24, 1959.

Twenty-two years later in January 1981 the Embassy at Ottawa informed the Department that appellant had made inquiries about his citizenship status, and had stated that he had been informed in 1958 /sic/ that he had "technically" lost his United States citizenship. The Embassy asked the Department whether there was a record of approval of a certificate of loss of nationality in appellant's name.

The Department advised the Embassy that appellant had been found to have expatriated himself in 1959, and instructed the Embassy that if appellant applied for documentation as a United States citizen, he should submit evidence of his intent in 1959 regarding relinquishment of United States citizenship.

It appears that appellant did not pursue the matter until late in 1983 when he submitted various documents regarding the issue of intent.

The Department informed the Embassy on February 9, 1984 that after reviewing all the evidence of record, it had concluded that appellant intended to relinquish his United States citizenship in 1959. The Department instructed the Embassy to inform appellant that if he wished to contest the determination of loss of citizenship, "he may pursue the matter by appealing to the Board of Appellate Review."

He entered an appeal on February 23, 1984, contending in the main that he did not join the Canadian Armed Forces with the intention of relinquishing his United States citizenship.

Given appellant's long delay in taking this appeal, the Board did not request that the Department submit a brief on all the issues; it did, however, request that the Department review the record in appellant's case and submit it with appropriate comments for consideration by the Board. On May 10, 1984 the Deputy Assistant Secretary for Consular Affairs submitted a memorandum which states in relevant part as follows:

> ...We believe that his appeal is barred by the reasonable time requirement of the Board's regulations: 22 C.F.R. 50.60 (1967). He had not provided any compelling reason why he waited twenty-four years before filing the appeal that would excuse the unreasonable delay.
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> The Department has concluded that based on the evidence, Mr. W[redacted] had intended to relinquish his claim to his U.S. citizenship when he swore allegiance to Queen Elizabeth II in January 1959. Now twenty-four years later, when he is eligible for a pension from the *RCMP,* thinking of starting a second career and circumstances have generally changed, he has decided to come to the United States. With that in mind, he has made his current appeal.
>
> We have examined the case record and find that the holding of loss represents the Department's conclusion that Mr. G[redacted] F[redacted] W[redacted] relinquished his United States citizenship when he naturalized in Canada. We see nothing in the record that causes us to question that conclusion.

II

At the outset, the Board must decide whether it has jurisdiction to consider an appeal taken twenty-five years after appellant was informed that he had lost his United States nationality. Whether the Board has jurisdiction depends on our finding that the appeal was filed within the limitation prescribed by the regulations that are applicable in this case. Timely filing is mandatory and jurisdictional. U.S. v. Robinson, 361 U.S. 220, 224 (1960). Thus, if we find that the appeal was not timely filed, we will have no option but to dismiss it.

From 1959 to date, there was a process which afforded appellant a means to challenge the holding of loss of his nationality. A Board of Review on Loss of Nationality existed in 1959; in 1967 it was succeeded by the Board of Appellate Review. Constructively or explicitly by regulation, the

limitation on appeal from 1959 to 1979 (the regulations governing this Board were amended and revised in 1979 to provide for a one-year limit on appeal) was within a reasonable time after receipt of notice of the Department's holding of loss of nationality. 4/

It is our view that the limitation of "reasonable time" is more properly and fairly applicable to the case before the Board than the current limitation cf one year after approval of the certificate of loss of nationality. The dispositive question therefore is whether appellant took his appeal within a reasonable time after he received notice of the Department's holding of loss of his United States citizenship, notice he concedes he duly received.

What constitutes reasonable time depends on the facts of a particular case, taking into account the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. Ashford v. Steuart, 657 F. 2d 1053, 1055 (1981). Similarly, Lairsey v. The Advance Abraisives Company, 542 F. 2d 928, 930, quoting 11 Wright & Miller, Federal Practice and Procedure, Sec. 2866, at 228-29:

4/ Until 1966 there was no specified limit on appeal to the Board of Review on Loss of Nationality. Constructively, however, the limit would have been "reasonable time," under the general common law rule. From 3.966 to 1979 the limitation on appeal to the Board of Review on Loss of Nationality and subsequently to the Board of Appellate Review was "reasonable time."

Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60 (1966) and 22 CFR 50.60 (1967-79).

> What constitutes reasonable time must of necessity depend upon the facts in each individual case." The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.

Appellant concedes that a delay of twenty-five years "may seem somewhat peculiar," and that he was made aware of appeal procedures in 1959 when he was sent the approved certificate of loss of his nationality, although, he notes, no limitation of action period had been specified. He submits, however, that the following considerations warrant the Board excusing the del.

> In 1959, I was but 18 years of age. My recollection of events, is that the Vice Consul was a very unpleasant, abrasive individual who cpenly berated me for having done something (served with the Canadian Armed Forces) to cause the relinquishing of my American citizenship. I recall that he felt that if any choice had to be made, I should have opted to forfeit my Canadian citizenship and retain my U.S. status. I am sure the hostile reception which I received from this public official unnerved me, and influenced any thought of appeal. Indeed, I gained the impression from the Vice Consul that while appeal procedures were possible, any such attempt would probably be futile as I had served with the Canadian Armed Forces, automatically causing loss of citizenship.
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> As I previously indicated, at the age of 18 years my consuming interest was to join the Royal Canadian Mounted Policy (RCMP) which I subsequently did in 1960. I have served with this distinguished organization continually since that time. I felt that any attempt to engage with the RCMP might be jeopardized by my having U.S. citizenship, and this of course also provided some impetus not to pursue appeal procedures. A

> few years ago, I learned that service in an Allied Armed Forces no longer was cause to lose U.S. citizenship and this is what provoked my enquiry with the U.S. Consul in Ottawa about three years ago.
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> My personal circumstances have changed quite markedly over the past twenty-five years and I am older and wiser. 1 now find myself in a position where having over 20 years service, I have the option of obtaining an immediate pension from my employer, and am contemplating a second career. I have renewed contacts with my relatives residing in the United States, and the possibility exists of residing there at some time in the future, and seeking employment. This is one factor which triggered my request for reinstatement of U.S. citizenship.

For the reasons stated below the Board does not consider that appellant has offered legally sufficient reasons for sitting on his right of appeal for twenty-five years.

Although appellant may have been discouraged by a U.S. official from pursuing an appeal and at age 18 might have been unlikely to challenge such an authority, there is no evident reason why, a few years later when more mature, he could not have initiated an appeal had he been genuinely concerned about loss of United States citizenship. But, as he stated above, ne appears to have considered United States citizenship an impediment to joining the RCMP. He made the same concession in two affidavits he executed in 1983 and 1984.

It seems evident that for all practical purposes appellant exercised a choice in 1959 between retaining United States citizenship or taking a course of action that might jeopardize citizenship. While we take no position on the issue of his intent in 1959 at this point in our analysis, we note that he himself made quite clear that from 1959 onwards he had little interest in retaining American citizenship and that it was only recently that he began to think that its recovery might be to his advantage.

Furthermore, we find prejudice to the Department's case in appellant's long delay in appealing. At this distance from the events of 1959 the Department would plainly be handicapped in attempting to carry its statutory burden of proving the issue of appellant's intent.

Appellant has not demonstrated, as it is his burden to do, that any factor beyond his own control prevented him from taking an earlier appeal. The delay was manifestly of his own making. Were we to assert jurisdiction, after passage of so many years, the dignity and finality of the Department's determination of loss of nationality would be undermined.

Appellant permitted twenty-five years to elapse before filing an appeal in 1984. 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 conveneient 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

Edward G. Misey, Member

Howard Meyers, Member