November 29, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S[redacted] H[redacted] Mc[redacted], [redacted]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, S[redacted] H[redacted] M[redacted], [redacted], expatriated himself on May 23, 1960 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 at Manila, Philippines, before a consular officer of the United States. 1/

The Department of State approved the certificate of loss of nationality that was issued in this case on May 8, 1961. Twenty-two years later, on July 2, 1983, M[redacted] entered this appeal. As an initial matter, the Board must decide whether it has jurisdiction to consider an appeal so long delayed. It is our conclusion that the appeal is untimely, and that the Board is without jurisdiction to entertain it. The appeal will be dismissed.

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

I

Appellant was born at [redacted]
His mother is a United States citizen; his father (now deceased) was a citizen of the Philippines. In the summer of 1939 appellant's parents took him to the Philippines.

Appellant applied to be registered as a United States citizen at the Embassy in Manila in June 1957. 2/ It also appears that he registered for United States Selective Service.

According to an affidavit appellant's mother executed on June 13, 1983, her son assisted his father in the latter's political career. Therein she stated that during the 1960 Philippine congressional election campaign her husband's political opponents made an issue of the fact that appellant had retained his United States citizenship. As a consequence, appellant's mother continued, appellant's father pressed appellant to renounce his United States nationality. Appellant resisted his father's pressure for a while, his mother's affidavit continues, but later gave in and agreed to renounce his United States nationality. According to her, appellant's father accompanied him to the United States Embassy to ensure that appellant "carried out my husband's wishes."

2/ Since appellant sought to include his younger brother on the application, action was withheld on the registration application until appellant's mother could produce evidence of the younger brother's claim to United States citizenship. His mother had not submitted such evidence by the date on which appellant renounced his United States nationality.

The record shows that on May 23, 1960 appellant appeared at the Embassy in Manila. There he executed an oath of renunciation of United States nationality, swearing in part as follows:

> That I desire to make a formal renunciation of my American nationality, as provided by section 349(a)(6) of the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely renounce my nationality in the United States and all rights and privileges thereunto pertaining and abjure all allegiance and fidelity to the United States of America.

In compliance with section 358 of the Immigration and Nationality Act, the Embassy prepared a certificate of loss of nationality in appellant's name on May 23, 1960. 3/ The Embassy certified that appellant acquired United States citizenship at birth; that he made a formal renunciation of his United States nationality; and thereby expatriated himself under the provisions of section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act. The Department approved the certificate on May 8, 1961.

3/ 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 part III of this sub-chapter, 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.

Eighteen years later (in November 1979) appellant's mother, who was then living in Canada, wrote to the Department to inquire how he might recover his United States citizenship. After reviewing appellant's file, the Department instructed the Consulate General at Toronto in January 1980 to advise Mrs. M[redacted] that if her son wished to contest the Department's determination of loss of his citizenship, he should address a written request to the Board of Appellate Review.

Three years later appellant wrote to the Board on June 30, 1983, giving notice of appeal from the Department's holding of loss of his nationality. He rests his case for restoration of his citizenship on the grounds that he renounced his United States nationality under his father's pressure to do so.

The Board did not request that the Department submit a brief on the appeal but instead review the administrative record in appellant's case and submit it with appropriate comments for the Board's consideration. In submitting the administrative record, the Department made the following comments on the appeal by memorandum of May 21, 1984.

> ...This Office has reviewed this file as well as his recent submissions in support of his appeal. 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 has not provided any compelling reason why he waited twenty-three years before filing the appeal that would excuse the unreasonable delay.
>
> The Department has concluded that based on the evidence, Mr. M[redacted] had intended to relinquish his claim to his U.S. citizenship when he made a formal renunciation of his citizenship on May 23, 1960. He contends that he started his appeal in 1977 which was sixteen years after his loss of citizenship; this too is an unreasonable amount of time. Now twenty-three years later he has brought his current appeal.
>
> We have examined the case record and find that the holding of loss represents the Department's conclusion that [redacted] relinquishied his United States citizenship when he renounced his nationality in the Philippines. We see nothing in the record that causes us to question that conclusion.

II

We may not proceed in this matter until we have decided whether the Board has jurisdiction to consider the appeal. Our jurisdiction depends on whether the appeal was filed within the limitation prescribed by the applicable regulations. Since timely filing is mandatory and jurisdictional U.S. v. Robinson, 361 U.S. 220, 224 (1960), we will have no option but to dismiss the appeal unless we find it was timely.

We consider it inappropriate in this case to apply the current limitation of one year after approval of the certificate of loss of nationality prescribed by the current regulations. 22 CFR 7.5(b). Since the determination of loss of appellant's nationality was made prior to the effective date of the current regulations, it is our view that the limitation prescribed by the previous regulations or procedures should apply.

In 1961, when the Department approved the certificate of loss of nationality that was issued in this case, the Board of Appellate Review did not exist, but there was in the Department of State a Board of Review on Loss of Nationality to which expatriated citizens might appeal loss of their nationality. Until 1966 there was no specified time limit on appeal to that Board. Constructively, however, under the general common law rule, the limit on appeal may be considered to have been within a reasonable time after receipt of notice of the Department's holding of loss of nationality. In 1966 Federal Regulations were promulgated prescribing a time limit on appeal to the Board of Review on loss of nationality, namely, "within a reasonable time after receipt of notice of the determination of loss of nationality." 4/ When the Board of Appellate Review was established in 1967 and assumed the appellate functions of the old Board of Review, Federal Regulations promulgated for the new Board also prescribed a limitation of "reasonable time." 5/

The issue presented in this appeal therefore is whether appellant has taken his appeal within a reasonable time after receipt of notice of the Department's determination of loss of his nationality, notice he does not dispute he duly received.

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

5/ Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60 (1967-1979).

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, Lairsley v. The Advance Abraisives Company, 542 F. 2d 928, 930 (1976), quoting 11 Wright & Miller, Federal Practice and Procedure, sec. 2866, at 228-29:

> 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.

In rebuttal to the Department's contention that his appeal is time barred, appellant maintains that his appeal should be considered because his delay in appeal was "not of my own making."

> In my previous communications, I have stated that I have appealed my loss of nationality with the U.S. Embassy in Manila shortly after my father's death on February 22, 1977; that my appeal was not given proper action nor due consideration; that I was told that nothing could be done in any case since I have renounced my citizenship even if it was made under duress which it was; and that since there is no U.S. Government agency in Manila where I could appeal my case aside from the U.S. Embassy in Manila who had negative attitude over my case, I have no choice but to accept their ruling.
>
> When my mother learned of the denial of my appeal she wrote direct on my behalf to the U.S. Ambassador in Manila in 1979 and, likewise, her appeal in my case was just an exercise in futility.
>
> After my mother's return in Toronto, Canada in November, 1979 she was advised by friends to write to the Consulate General of the United States about my case and, in reply to her inquiry, she was informed that her letter would be forwarded to the Department of State and that she would be further advised.

> Sometime in 1982, my mother was informed that my loss of United States nationality could be appealed by writing to Mr. Edward G. Misey of the Board of Appellate Review of the Department of State for reconsideration. And, the subsequent actions are, probably, known to you by now.
>
> ...the intervening 23 years ... was not of my own making nor was the delay caused by inaction on my part to appeal my case on time. My appeal was held in estoppel because of my unwareness /sic/ where to appeal and the U.S. Embassy's negative attitude to assist me. The recent knowledge where to do so broke that long delay.

We find the foregoing explanation insufficient to excuse such a long delay in taking the appeal.

By his own admission, appellant did not register any protest against the Department's determination of loss of his United States nationality until 1977 -- sixteen years after that determination had been made. Why he waited so many years to seek recourse he has not explained. We note, however, that he has stated he "appealed" to the Embassy at Manila shortly after his father's death. If he is implying that until his father died he did not feel free to try to undo the act of renunciation he allegedly performed on his father's insistence, such a reason is patently an inadequate excuse for so protracted a delay in asserting a claim to citizenship.

Six more years passed before appellant sought relief from this Board. Even if he had been told by the Embassy in 1977 that nothing could be done in his case because he had renounced his nationality, he could have inquired about further recourse by writing to the Department, which, as he well knew, had approved the certificate of loss of his nationality. He therefore did not, it seems to us, act prudently or diligently in light of his (latterly) professed concern for loss of his citizenship. This view is reinforced by the fact that an additional three years passed after the Department informed his mother of the possibility of an appeal to this Board before appellant entered an appeal. Appellant alone is responsible for the long delay in asserting a claim to United States citizenship - not the Embassy at Manila.

The limitation of "reasonable time" is a flexible standard. It has a two-fold purpose: to allow an aggrieved party sufficient time to prepare a case showing that the Department erred in fact

or law in making a determination of loss of nationality; and to compel the exercise of the right of appeal while the recollection of the events surrounding performance of the expatriating act are still fresh in the minds of those involved - appellant and the government officials.

Appellant had ample time to prepare an appeal. His taking it now when memory of the events of 1960 has assuredly faded from the minds of everyone involved (save, perhaps, appellant's), is prejudicial to the rights of the Department and its ability to carry its burden of proof. Furthermore, absent the most extraordinary mitigating circumstances, due regard must be paid to the stability and finality of the Department's administrative decisions.

Whatever length of time is contemplated by the limitation of reasonable time, we do not believe it countenances a delay of twenty-two years.

III

It is our conclusion that appellant's delay in taking this appeal was unreasonable under the circumstances of his case and accordingly is time barred. Lacking jurisdiction to consider the appeal, it is hereby dismissed.

Alan G. James, Chairman

Edward G. Misey, Member

Mary E. Hoinkes, Member