August 10, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P[redacted] S[redacted] H[redacted]

This case comes to the Board of Appellate Review on an appeal taken by P[redacted] S[redacted] H[redacted] from an administrative determination of the Department of State that she expatriated herself on August 8, 1972 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Austria upon her own application. 1/

The certificate of loss of nationality that was prepared in this case was approved by the Department on August 20, 1973. The appeal was entered on April 27, 1983. The first issue the Board must consider and decide is whether the appeal was taken within the limitation prescribed by the applicable regulations. It is our conclusion that the appeal was not timely filed and is therefore barred. Consequently, since the Board lacks jurisdiction to entertain the appeal, it will be dismissed.

I

Appellant became a United States citizen by birth at [redacted] She apparently lived in the United States until 1971 when she obtained a passport and travelled to Austria. On November 9, 1972 she informed the Department that "three months ago /on August 7, 1972, as she later told the Department/ I married an Austrian citizen in Austria and became an Austrian citizen." She added that she had been issued an Austrian diplomatic passport; accordingly, she returned the passport issued to her at New York City in 1971.

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, . . .

As instructed by the Department, the Embassy at Vienna requested confirmation of appellant's naturalization from the provincial authorities at Wiener Neustadt. The latter certified to the Embassy that on August 8, 1972 appellant had signed a declaration in accordance with section 9 of the Austrian Citizenship Law of 1965, and acquired Austrian citizenship as from that date. 2/

On June 4, 1973 the Department wrote to appellant to inform her that she might have expatriated herself under sectio 349(a)(1) of the Act by obtaining Austrian nationality. 3/ She was advised that a preliminary finding of loss of her Unite States citizenship had been made, and was offered the opportunity to present evidence concerning her naturalization for consideration by the Department before a final decision on her citizenship was made. If she did not submit such information or evidence within 60 days or request an extension of time to do so, the Department stated that it would make a final determination on the evidence available.

Meanwhile, the Department instructed the Embassy at Vienna to prepare a certificate of loss of nationality in appellant's name. This, the Embassy did on June 26, 1973, in compliance wi

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2/ Under Austrian law, an alien woman acquires citizenship from her Austrian citizen husband by marriage. Acquisition of citizenship is not automatic, however. The alien woman must make a declaration of loyalty to Austria whereupon she becomes an Austrian citizen.

The Department takes the position that under section 101(a)(of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(23), t making of such a declaration by a U.S. citizen who acquires the right to citizenship of the foreign state through marriage and perfects that right by a positive subsequent act, has obtained naturalization in a foreign state within the meaning of section 349(a)(1) of the Act. Section 101(a)(23) of the Act reads as follows:

> The term "naturalization" means the conferring of nationality of a state upon a person after birth, by any means whatsoever.

3/ At that time appellant was living in New York City with her husband who had been posted to the Austrian Mission to the Unit Nations.

the provisions of section 358 of the Immigration and Nationality Act. 4/

The Embassy certified that appellant acquired United States nationality at birth; that she acquired the nationality of Austria on August 8, 1972; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

Appellant did not respond to the Department's letter of June 4th. Accordingly, the Department approved the certificate of loss of nationality on August 20, 1973 and sent a copy thereof to appellant at a New York City address.

Four years later appellant wrote to the Department on November 24, 1977 from Pretoria, South Africa where her husband was serving at the Austrian Embassy, in effect, asking the Department to reconsider her case. The Department replied to appellant on February 7, 1978. In explaining the grounds of its holding of loss of her nationality the Department noted that:

> Loss of United States citizenship can result from the voluntary performance of any of the acts set forth in the marked portion of the enclosed circular M-321 with the intent to relinquish U.S. citizenship. Intent can be determined only after the potentially expatriating act has been performed; any such determination is made on the basis of objective evidence as well as subjective statements.

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

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 Department cited the Supreme Court's decision in Afroyim v. Rusk, 387 U.S. 253 (1967) and the Attorney General's Statement of Interpretation of that decision. 42 Op. Atty. Gen. 397 (1969). A copy of the Statement was sent to appellant. She was informed that if she believed the Department's holding of loss of her nationality was contrary to law or fact, she might request that the Passport Office reconsider her case. If she chose to request reconsideration, the Department added, she should get in touch with the United States Embassy at Pretoria to furnish that office with information about her naturalization.

The Department's letter was sent to appellant through the Embassy at Pretoria under cover of a memorandum instructing the Embassy that if appellant moved to re-open her case, the Embassy should put a series of detailed questions to her about her naturalization and actions subsequent thereto. The Embassy was also instructed to ask appellant to complete questionnaires for determining U.S. citizenship, and to obtain information from the Austrian authorities about her application for naturalization.

Appellant did not reply to the Department's letter, which she concedes she duly received; nor, as far as the record shows, did she pursue the matter with the Embassy.

Five years passed before there is a record of any further contact between appellant and U.S. authorities about her citizenship. In March 1983 the United States Embassy at Ottawa reported to the Department that appellant, whose husband was then serving at the Austrian Embassy in Canada, had approached the Embassy about her loss of nationality. She had told the Embassy that the issue of her intent to relinquish citizenship had never been considered by the Embassy at Vienna in 1972, and had denied that she intended to terminate citizenship when she became an Austrian citizen. The Embassy requested that the Department review appellant's case to determine if the issue of intent had been assessed when the certificate of loss of nationality was approved, or whether it was a new issue that she might properly raise.

The Department replied to the Embassy on April 12, 1983, stating that it had reviewed appellant's file. It noted that appellant had not responded to the Department's letters of June 4, 1973 and February 7, 1978. The Department concluded:

> The Department believes that Mrs. H[redacted] has been given every opportunity available to establish her claim to U.S. citizenship. She should be informed of her rights to appeal and a copy of the appeal procedures should be made available to her. No further action is anticipated by CA/OCS/CCS/EUR.

The Embassy informed appellant of the Department's position by letter dated April 19th.

Appellant wrote to the Board of Appellate Review on April 27, 1983, giving notice of appeal from the Department's 1973 holding of loss of her nationality, an administrative act from which an appeal, properly and timely filed, may be taken to this Board.

Appellant's case in chief is that she did not intend to relinquish her United States citizenship when she acquired the nationality of Austria.

II

The threshold issue presented here is whether the appeal, taken nearly ten years after her receipt of notice of the Department's holding of loss of nationality, was timely filed.

Under the current regulations of the Department, which were promulgated in 1979, the time limitation for filing an appeal from an administrative determination of loss of nationality is one year after approval of the certificate of loss of nationality. 5/ The regulations further provide that an appeal filed after the time limit shall be denied unless the Board for good cause shown determines that the appeal could not have been filed within the prescribed time.

In 1973, however, when the Department approved the certificate of loss of nationality that was issued in this case, 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 might appeal to the Board of Appellate Review within a reasonable time after receipt of notice of the Department's holding. 6/

5/ Section 7.5, Title 22, Code of Federal Regulations, 22 CFR 7.5.

6/ Section 50.60, Title 22, Code of Federal Regulations (1967-1979) 22 CFR 50.60, provided:

A person who contends that the Department's administrative holding of loss of nationality of 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.

It is our view that the limitation of "reasonable time," rather than the existing limitation of one year after approval of the certificate of loss of nationality, should govern in this case. For it is generally recognized that a change in regulations shortening the limitation period is presumed to be prospective, rather than retrospective, in operation. To apply such change retrospectively would work an injustice and disturb a right acquired under former regulations.

Thus, under the time limitation governing in the instant case, if appellant did not initiate or file her appeal within a reasonable time, the appeal would be time barred and the Board would be without authority to entertain it.

Whether an appeal is taken within a reasonable time depe upon the circumstances in an individual case. Generally, reasonable time means reasonable under the circumstances. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). has been held to mean as soon as circumstances permit, and wit such promptitude as the situation of the parties will allow. This does not mean, however, that a party be allowed to determine a "time suitable to himself." In re Roney, 139 F. 2 185, 177 (1943). Nor should reasonable time be interpreted to permit a protracted delay which is prejudicial to either party.

A legally sufficient explanation for any obviously protra delay in taking an appeal must be adduced and proved in order excuse such delay.

The rationale for giving a reasonable time to appeal an adverse decision is to allow an appellant sufficient time upo receipt of such decision to assert his or her contentions tha the decision is contrary to law or fact. The limitation is designed to compel appellant to take such action within a reasonable time so as to protect the adverse party against a belated appeal that could more easily have been resolved when recollection of events upon which the appeal is based is fresh in the minds of the parties involved. Unreasonable lapses of time cloud a person's recollection of events and also make it difficult for the trier of fact to determine the case, particu larly where the record is incomplete or lost or obscured by th passage of time. Moreover, there must be an end to litigation at some point. It should also be noted that the period of a reasonable time begins to run with the receipt of notice of the Department's holding of loss of nationality, and not at so subsequent time, years later, when appellant for whatever reason, may seek to regain or re-establish his or her United States citizenship status.

Appellant maintains that her delay in taking the appeal was not unreasonable in the circumstances of her case. She initiated the appeal, she said, "at the very first possible moment" - when she called at the Embassy at Ottawa in the Spring of 1983. "This represents the very first time I was told that I would have grounds for an appeal," namely, lack of an intent to relinquish her United States citizenship.

Appellant submits that she was wrongly and inadequately informed about the possibility of an appeal and procedures therefor. In 1972 a consular officer at Vienna had told her that she had automatically expatriated herself by obtaining Austrian citizenship. In 1973 when she received the Department's preliminary finding of loss of nationality letter, she states, "I was so discouraged that I saw no hope in responding to the preliminary finding. I was not advised and I did not know what evidence or information I could have presented to overturn a final decision."

When appellant requested that the Department reconsider her case in 1977, the Department again advised her, she states, "that I had lost U.S. nationality and asked me, as far as I understood, to prove that I did not. Since I had at that time, and still have no such proof, I could not respond." No one had told her that if it had not been her intention to lose United States citizenship, she could retain it. "Each official response reinforced the hopelessness of my situation," she has stated.

She concedes that the procedures for appeal are spelled out on the reverse side of the certificate of loss of nationality the Department sent her in 1973, but she had assumed the Department's decision was final unless she could prove, which she could not, that her act of naturalization was involuntary.

Whether appellant's explanations for the long delay in taking this appeal was legally sufficient to excuse her tardiness, is the issue we now address.

On the basis of the record we strongly disagree with appellant that she was inadequately informed about the grounds for an appeal and the procedures for taking one.

From the outset, the Department handled appellant's case with evident care. In its preliminary finding of loss of nationality letter of June 4, 1973, the Department noted to appellant that her voluntary acquisition of Austrian nationality "is regarded as highly persuasive evidence of your

intent to relinquish United States nationality;" and that the record "relating to the circumstances, motive and purposes of your act does not appear sufficient to negate such intent." It will also be recalled that the Department invited appellant to submit information or evidence she believed should be considered before a final decision was made in her case. And it was suggested to her that she might wish to consider consulting an attorney concerning evidence or information to be presented.

In brief, the Department spelled out the importance of the issue of appellant's intent well before the holding of loss of nationality was made.

Granted, nationality law is a complex subject, and the layman might, as appellant did, feel discouraged or confused by the Department's letter. She is however, married to a diplomat, and in 1973, as later, had more than usual access to knowledge of nationality law. We find it difficult to accept that if appellant really felt concerned about her possible loss of citizenship she would or could not have reacted promptly and decisively when she received the Department's letter. Her failure to make any challenge after she received the certificate of loss of nationality is no less hard to credit. The certificate clearly advised her of her right of appeal to this Board, as she has since conceded.

That appellant remained passive after receiving the Department's letter of February 7, 1978 also raises questions in our minds about the depth of her concern at the time about the loss of her United States citizenship. On February 7th, the Department made crystal clear that her intent in 1972 was a pivotal consideration. Again she was invited (perhaps even encouraged) to present evidence and to consult the Embassy at Pretoria. There is no indication that she raised the matter there, although she alleges that she discussed her case with U.S. officials and made some telephone calls to the Embassy.

As the Department noted in its communication with the Embassy at Ottawa in 1983, appellant was offered every available opportunity to establish her claim to United States citizenship. If she had been more diligent, she surely could have elicited from U.S. officials, long before she says she finally did so, understandable information about framing an appeal and presenting it.

In replying to the Department's memorandum on her appeal appellant stated:

> I feel that in the submissions supporting my appeal I have clearly stated the reasons for the delay. It seems that after having been wrongly - and later inadequately - informed on the possibility and the procedure of an appeal, and on the basic question of intent it does not really matter whether for these reasons an appeal could only be brought forward after six months or ten years.

We disagree. It does matter that there has been an insufficiently explained delay of nearly 10 years in taking this appeal.

The essential purpose of a limitation provision is to compel the exercise of a right of action within a reasonable time so as to protect the adverse party against belated appeals that could more easily have been adjudicated when the recollection of events upon which the appeal is based is fresh in the minds of all parties directly involved. That is not the situation here.

Since the intent of one who does an expatriating act is to be proved as of the time the act was performed, the crucial moment in appellant's case was 1972 when she obtained Austrian citizenship. At this late date the Department would be handicapped in bearing its burden of proof that appellant intended to relinquish her nationality precisely because appellant has allowed so much time to pass without asserting a claim to citizenship.

The period of "within a reasonable time" commences with appellant's receipt of notice of the Department's holding of loss of his nationality. She received such notice in 1973. Despite having knowledge of the appeal procedures at the time and despite the Department's offer to reconsider he case in 1978, appellant took no meaningful step to assert a claim to United States citizenship until 1983, when she inquired at the Embassy at Ottawa how she might regain it. Her inaction in the face of legally clear and sufficient information about the possible grounds for an appeal may not be excused by asserting, as she has done, that:

> No one informed me of the possibility that if it wasn't my intention to lose my American citizenship, and that it

> was based on other considerations, I could retain my citizenship. I really believe that this is a semantic problem, ... It seems to be that alternatives, that words like intent must be defined, qualified for people not to misunderstand the State Department's intent.

But it was her responsibility to take initiative to find out what she might do in light of the Department's precise exposition of the law and judicial and administrative interpretations.

Appellant allowed a substantial period of time to elapse before taking an appeal. Whatever definition may be given to the term "reasonable time", we do not believe that such langu contemplated an inadequately explained delay of over ten year

In the circumstances of this appeal where there has been no persuasive showing of a requirement for an extended period of time to prepare her case, or any insuperable obstacle in bringing a timely appeal, it is obvious that appellant's delay was unreasonable.

III

Upon consideration of the foregoing analysis, we conclud that the appeal was not taken within a reasonable time after appellant received notice of the Department's holding of loss of her nationality in 1973. The appeal is barred by the passa of time and not properly before the Board. It is hereby dis- missed.

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

Alan G. James, Chairman

Warren E. Hewitt, Member

Howard Meyers, Member