DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IM THE MATTER OF: F[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, [redacted] M[redacted] [redacted] expatriated herself on July 20, 1973 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 issued in this case was approved by the Department on August 7, 1974. Appellant entered the appeal on October 11, 1983. The first issue the Board confronts is whether this appeal, taken nine years after the Department determined that appellant expatriated herself, was filed within the limitation prescribed by the applicable regulations.

It is our conclusion that the appeal was not timely filed and is therefore barred. Accordingly, we dismiss the appeal for want of jurisdiction.

I

Appellant was born on [redacted] and so acquired United States citizenship. She obtained a passport in 1967 and travelled to Austria. In 1972 appellant registered as a United States citizen at the Embassy in Vienna and obtained a new passport.

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

Section 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, . . .

On July 20, 1973 appellant married an Austrian citizen, and on the same day, having declared that she wished to become an Austrian citizen, she was granted a "certificate of citizenship by declaration." Appellant later explained to the Board that when she married she was not sure whether her United States nationality would be "revoked," but she proceeded to become an Austrian citizen because "I needed the Austrian citizenship to become a tenured English teacher."

Appellant states that in 1974 she wanted to visit the United States. As she put it in a statement to the Board:

> I checked with the American Embassy in Vienna. They had no idea about my Austrian citizenship and requested me to come in to 'give up' my American citizenship. But by then I had found out that dual-nationality was not legal. Therefore I did not question the consul when he presented me with the document to sign.

The record shows that on June 3, 1974 appellant executed an affidavit of expatriated person wherein she stated that she had obtained Austrian naturalization voluntarily and with the intention of relinquishing United States nationality. At that time she surrendered her United States passport to the Embassy. According to the record, the consul involved did not examine appellant further regarding her intent to relinquish United States citizenship.

In compliance with section 358 of the Immigration and Nationality Act, the consular officer executed a certificate of loss of nationality in appellant's name on June 14, 1974. 2/

2/ 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.

He certified that appellant acquired United States nationality at birth; that she obtained naturalization in Austria upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

In forwarding the certificate to the Department, the consular officer reported that appellant had said she had made Austria her home and would return to the United States only for visits.

The Department approved the certificate on August 7, 1974, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

On October 11, 1983, the Embassy forwarded appellant's appeal to the Board. It appears that in the summer of 1983 appellant learned that a former American acquaintance had become an Austrian citizen without losing her American citizenship; appellant was thus led to inquire how to reclaim her citizenship. Appellant completed a form for determining United States citizenship in which she conceded that she had voluntarily obtained Austrian citizenship which "helped me to remain employed as an English teacher." She contends, however, that she did not intend to relinquish her United States citizenship.

II

Appellant's delay of nine years in taking the appeal raises a jurisdictional issue that must be resolved at the outset. Timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if an appellant fails to comply with a condition precedent to the Board's going forward to determine the merits of his claim, i.e., does not bring the appeal within the applicable limitation and adduces no legally sufficient excuse therefor, the appeal must be dismissed for want of jurisdiction. Costello v. United States, 365 U.S. 265 (1961).

Under the federal regulations presently in effect, an appeal must be taken within one year after approval of the certificate of loss of nationality. 22 CFR 7.5(b). In 1974, however, when the certificate was approved in the instant case the limitation of appeal was "within a reasonable time" after the affected person received notice of the Department's holding of loss of nationality. 22 CFR 50.60 (1967-1979).

Since a change in regulations shortening the period of time allowed for appeal customarily is intended to operate prospectively, we believe it fair to apply the limitation in effect in 1975 rather than the present one.

What is reasonable time depends on the facts of each case. Chesapeake & Ohio Railway v. Martin, 283 U.S. 209 (1931). Generally, "reasonable" means reasonable under the circumstances. It is such period of time as an appellant may fairly require to prepare a case showing that the Department erred in making a determination of loss of nationality. It does not mean, however, that a party will be allowed to determine a "time suitable to himself." In re Roney, 139 F. 2d 175, 177 (7th Cir. 1943). Nor should reasonable time be interpreted to permit a protracted delay which is prejudicial to either party. Ashford v. Steuart, 657 F. 2d 1053 (9th Cir. 1981). To excuse an extended delay, a legally sufficient reason must also be shown. Id.

Appellant states that when she executed an affidavit of expatriated person in 1974, she asked the consular officer "about becoming an American again." She continues:

> He said I would have to reapply and wait as all immigrants must do. He never mentioned and/or advised me to appeal my case. Nor did he say there was any time limit in which to change my situation. Of course I felt somehow cheated but I was not about to question this person's words, as I considered the consul properly informed about the laws. Thus, I signed the document, had my passport canceled and nothing was changed to assist me in any way. /Emphasis in original./

As appellant put it, the consul "truly led me to believe I had no chance or even right to appeal my case."

Appellant also states that when she sought support in early 1984 from a United States Senator, the Department in responding to the Senator's inquiry about appellant's case, cite Afroyim v. Rusk, 387 U.S. 253 (1967) and stated that the Department was satisifed about her intent to relinquish United States citizenship. "This is not true!", she wrote to the Board. "I intended to become an Austrian citizen and later was told I had to give up my U.S. nationality." No one at the Embassy

mentioned Afroyim to her in 1974, she added. "Now, from recent facts and amendments in U.S. law it seems as though I was unjustly treated."

Briefly, appellant justifies her delay in taking an appeal on the grounds that the consul never told her of the right of appeal or suggested that she might have a basis for appeal if she lacked the requisite intent in 1973 to relinquish her United States citizenship.

The record reveals nothing of what the consul said to appellant in 1974. Her reasons for not taking an earlier appeal thus are unsubstantiated. But even if the Board were to accept that appellant was led by the consul to believe that she had no right of recourse, may that perception justify a nine-year delay in seeking recourse from this Board? The answer to that question must be in the negative.

The certificate of loss of nationality issued in appellant's name was approved on August 7, 1974 and a copy sent to the Embassy to be forwarded to appellant. Absent evidence to the contrary, it may be presumed that she received the certificate in the summer or early fall of 1974; she has not denied receipt. The copy of the certificate in the record, which we must assume is identical to the copy appellant received, bears this stamp at the bottom of the page: "See Reverse for Appeal Procedures." The procedures set out on the reverse of the certificate state that an appeal might be taken to this Board under the applicable regulations (22 CFR 50.60 - 50.72); they explain how an appeal should be framed and inform the affected person that additional information about appeals may be obtained at any consular office or by writing directly to the Board of Appellate Review.

Even if appellant had been discouraged by the consul from taking an appeal, or misled by him to believe that she had no such right, she received due notice that such a right existed, and may not be heard to contend years later that she had not been advised that she might seek a review of the Department's holding of loss of her nationality. She now believes that she was treated unjustly, and may have felt so in 1974. But would it be captious to wonder whether appellant was deeply concerned in 1974 about loss of her United States nationality? Had she been resolute in finding out what relief she might have, would she not have pursued the matter at least by making an inquiry of the Board as the procedures on the reverse of the certificate of loss of nationality invited her to do?

It is evident to us that appellant's explanation for her tardiness in filing an appeal is insufficient as a matter of law.

Under Afroyim, supra, and Vance v. Terrazas, 444 U.S. 252 (1980), the Department bears the burden of proving appellant's intent to relinquish United States citizenship in 1973 when she obtained naturalization in Austria. For the Department fairly to meet that burden now would be difficult, given lack of more contemporary evidence in the record. It seems unlikely that the consular officer concerned would be able to remember appellant's case. How effectively could the Department rebut appellant's latter day statements that she had been confronted with the requirement to sign the affidavit of expatriated person, and not informed about the basic issue of intent to relinquish citizenship?

Furthermore, proceedings like this one must be terminated at some reasonable time, absent good cause to hold them open.

The limitation on appeal of "within a reasonable time" was intended to compel the exercise of the right to request a review of the Department's holding of loss of nationality within a reasonable period while the recollection of events upon which the appeal was based was fresh in the minds of all parties concerned and the merits of an appeal could be adjudicated fairly to both the Department and the appellant. That is not the situation in the case before us.

Measured against objective criteria, appellant's delay of nine years in taking the appeal was not reasonable.

III

Upon consideration of the foregoing, it is our conclusion that the appeal is barred by the passage of time. The jurisdictional prerequisite to the Board's going forward not having been met, the appeal must be and hereby is dismissed.

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

Alan G. James, Chairman

James G. Sampas, Member

George Taft, Member