May 7, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D[redacted] R[redacted]

This appeal has been taken by D[redacted] R[redacted] from an administrative determination of the Department of State that he expatriated himself on April 1, 1968 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 before a consular officer of the United States Embassy at Mexico City. 1/

The Department determined in 1968 that appellant voluntarily expatriated himself. Entry of the appeal sixteen years later presents a threshold issue: whether the Board may entertain an appeal so long delayed. It is our conclusion that the appeal is barred because it was not filed within the period allowed by the applicable regulations. Lacking jurisdiction, we dismiss.

1/ Section 349(a)(6), now 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Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of section 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of section 349(a) as paragraph (5).

I

Appellant became a United States citizen by birth at [redacted] Through his parents he also derived the citizenship of Mexico whence they took him shortly after birth. He was issued United States passports in 1960 and 1965.

On April 1, 1968 appellant appeared at the United States Embassy in Mexico City, allegedly accompanied by his mother, Mrs. Margaret Prieto. In an affidavit attached to his brief, appellant explained the purpose of his visit.

...

II.

> ...The reason that I appeared at the Embassy was solely to comply with the instructions of my mother and step-father that I execute a document which would prevent my returning to the United States.

III.

> While at the Embassy, my mother and a consular official prepared documents which I now know to have been an Oath and a Statement of Renunciation. I did not provide any of the information contained in either of those documents....

IV.

> My mother made the appointment with the Embassy official. The entire process lasted less than five minutes. After the above-mentioned documents were prepared. I was told to sign them, which I did. I never read the documents before I signed them, nor were their contents explained to me by the Embassy official. Since I was only 18 years of age, I not only felt that I had no choice but to comply with my mother's request but that, due to my culture and upbringing, I was also morally obligated to comply with my mother's instructions that I execute the documents which were prepared by the Embassy official at her request.

The record gives few details about appellant's appearance at the Embassy, and there is no mention by the consular officer that appellant's mother was present. The record does show that on April 1, 1968 appellant made a formal renunciation of his United States nationality before a consular officer of the United States in the form prescribed by the Secretary of State. The operative paragraph of the formal oath of renunciation that appellant signed in English read as follows:

> ...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 United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

Appellant also signed a sworn statement of understanding, attesting, in part, that he had decided voluntarily to exercise the right of renunciation; that he had an opportunity to explain the reasons for renouncing his citizenship but did not choose to do so; and that the extremely serious nature of his act had been explained to him by the consular officer who administered the oath. That statement too was in English.

Appellant executed a third document in English, an affidavit, in which he essentially repeated what he had attested to in the statement of understanding, namely, that the serious consequences of his act had been explained to him and that "I wholly understand the importance of my action."

The consular officer prepared a certificate of loss of nationality in appellant's name on April 1, 1968. 2/ In it

---

2/ 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 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.

she certified that appellant acquired United States citizenship at birth; that he made a formal renunciation of 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 April 18, 1968. On April 19th a copy of the approved certificate was sent to the Embassy at Mexico City to be forwarded to appellant.

The same day appellant formally renounced his United States nationality, he completed an application for a non-resident Alien's Mexican Border Crossing Card, which was duly issued. The following year appellant obtained a F-1 visa to study at Orange Coast College in California, and was admitted into the United States in January 1969.

Fourteen years later (the record does not show that appellant took any action in the interim to assert a claim to United States citizenship), appellant applied for a passport on August 10, 1983 at San Antonio, Texas, where he presently lives. In the application he stated that he had never been issued or included in a United States passport, and signed the following statement:

> I have not since acquiring United States citizenship, performed any of the acts listed under "Acts and Conditions" on the reverse side of this application form....I solemnly swear that the statements made in this application are true....

One of the "Acts and Conditions" listed on the reverse of the application is formal renunciation of United States citizenship.

It appears that appellant's application produced a "stop" notice when it was entered into the clearance system, and accordingly was placed on "hold." Through inadvertence, however, a passport was mailed to appellant on September 8, 1983. A few days later the San Antonio Passport Agency telephoned appellant to request that the passport be returned. For reasons that are not germane to our disposition of this case, appellant did not immediately return the passport. In January 1984 the Department wrote to appellant to explain why the inadvertently issued passport had been "revoked", requested its prompt return, and advised him that he might "appeal this decision" to the Board of Appellate Review. 3/

3/ The passport was subsequently returned to the Department.

The appeal was entered on May 3, 1984.

Appellant contends that his formal renunciation of United States nationality was invalid because it was the result of the duress of his step-father, and that he lacked the requisite specific intent to relinquish his American citizenship.

II

Before proceeding we must determine whether this appeal, taken sixteen years after the Department found that appellant expatriated himself, was filed within the limitation prescribed by the applicable regulations, for timely filing is mandatory and presents a jurisdictional issue. United States v. Robinson, 361 U.S. 220 (1960).

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 1975, when the certificate was approved in the case before us, however, 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. 2d175, 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 argues that his appeal was timely, adducing the following considerations.

> ...In this case, Mr. R[redacted] appeal was filed within a reasonable time. In 1968, Mr. Rocha was 18 years old, legally a minor, and was residing outside of the United States. Furthermore, Mr. R[redacted] was not informed and did not know he had a right of appeal. In 1967, the United States Supreme Court held for the first time that in order for performance of an expatriating act to result in loss of citizenship, it must be performed freely and voluntarily. Afroyim v. Rusk, 387 U.S. 253 (1967). However, it was not until 1969 that the State Department promulgated policy pursuant to Afroyim and sent an air telegram explaining the ramifications of Afroyim to its field offices, and it was not until 1980 that the United States Supreme Court clarified that, in order for the performance of an expatriating act to result in loss of citizenship, it must be established not only that the act was voluntary, but, in addition, that it was accompanied by an intent to relinquish citizenship. Vance v. Terrazas, 444 U.S. 252 (1980).

Appellant also submits that:

> ...the delay in time in this matter would not seem to adversely affect the Government's position in any way, since all of the relevant documents are still available and have been made part of the record, and since the three individuals involved in the proceedings have each submitted an affidavit. 4/

4/ Appellant, his mother, who allegedly accompanied appellant to the Embassy on the day he renounced his citizenship, and the consular officer before whom appellant swore the oath of renunciation, submitted affidavits.

Appellant's age when he formally renounced his United States citizenship is irrelevant to the issue of timely filing. Under United States law, appellant was legally competent to divest himself of United States citizenship. 5/ He was therefore also legally competent to decide whether or not to take an appeal from the Department's ratification of his act of expatriation.

5/ Section 351(b) of the Immigration and Nationality Act, 8 U.S.C. 1501(b), provides:

> Sec. 351.
>
> ...
>
> (b) A national who within six months after attaining the age of eighteen years asserts his claim to United States nationality, in such manner as the Secretary of State shall by regulations prescribe, shall not be deemed to have expatriated himself by the commission, prior to his eighteenth birthday, of any of the acts specified in paragraphs (2), (4), (5), and (6) of section 349(a) of this title.

In 1978 paragraphs (5) (voting in a foreign political election) was repealed and paragraph (6) was renumbered as paragraph 5. See note 1, supra.

There is no evidence of record whether appellant was or was not informed of the right of appeal to this Board. It should be noted, however, that from 1954 consular officers were under express instructions from the Department to inform an expatriate of the right of appeal at the time of forwarding a copy of the approved certificate of loss of nationality. 6/ In the absence of evidence more persuasive than appellant's statement made sixteen years after the event that he was not then informed of the right of appeal, it may be presumed that the responsible Embassy official did inform appellant of his right of recourse. 7/

Afroyim v. Rusk, 387 U.S. 253 (1967) was not the first time the Supreme Court ruled that in order for performance of an expatriating act to work expatriation it must be done freely and voluntarily. Years before Afroyim, the Supreme Court declared that citizenship must be deemed to continue unless an individual has been deprived of it through his own voluntary action in conformity with applicable legal principles. See Perkins v. Elg, 307 U.S. 325 (1939).

6/ 2 Foreign Service Manual 238.1 "Advice on Making of Appeals," (1954). These instructions were amplified and incorporated in later editions of the Manual. See 8 Foreign Affairs Manual 224.21 (1977).

7/ There is a legal presumption that government officials faithfully and correctly execute their assigned responsibilities, absent evidence to the contrary. Boissonnas v. Acheson, 101 F. Supra, 138 (S.D.N.Y. 1951).

So at anytime after the Department approved the certificate of loss of nationality issued in appellant's case, he might have taken an appeal on the grounds that he performed the expatriating act involuntarily because of the duress of his step-father.

Afroyim gave a constitutional dimension to loss of citizenship, namely, that expatriation depends on the assent of the citizen. As the Attorney General made clear in his Statement of Interpretation of Afroyim, 42 Op. Atty. Gen. 397, (1969), assent to loss of citizenship means "intent" to relinquish citizenship. From 1967 and certainly after 1969 an appeal grounded on lack of intent was available to appellant. That appellant did not until recently learn of the Supreme Court's decision in Vance v. Terrazas, 444 U.S. 252 (1980), which affirmed and clarified Afroyim, may not, as a matter of law, excuse the delay in his appeal.

Not only has appellant failed to offer a legally sufficient justification for the delay in his appeal, but the delay is prejudicial to the Department. At this date it would be difficult for the Department to meet appellant's allegations of his step-father's duress -- how difficult is borne out by the affidavit executed in 1985 by the consular officer who administered the oath of renunciation. She stated that after examining the administrative record carefully, including the picture of appellant, she had no present recollection of appellant or the circumstances of his renunciation. The consular officer made no written observations about the case; at the relevant time; the only contemporary documents are those appellant executed on April 1, 1968 as part of the formalities of the renunciation of his nationality.

The limitation of "reasonable time" to take an appeal was designed not only to allow an appellant sufficient time to prepare a case contesting the Department's holding of loss of nationality, but also to compel exercise of the right of recourse within a flexible but not unlimited period of time while the recollection of events upon which the appeal was based was fresh in the minds of the parties concerned in order that the merits of an appeal could be adjudged in a way fair to both appellant and the Department. Appellant and his mother, who have submitted testimony that appellant performed the expatriating act under duress, may remember well the events of 1968; the Department has no such memory, and is distinctly disadvantaged by the delay in bringing the appeal.

As the applicable regulations make clear, the right to take an appeal began to accrue in 1968 after appellant received notice that the Department had approved the certificate of loss of nationality issued in his name, not sixteen years later when he at last decided to contest the Department's action. No legally sufficient excuse having been presented for the delay, the Board cannot consider that the appeal was filed within a reasonable time after appellant had notice of the Department's determination of loss of his nationality.

III

Upon consideration of the foregoing, it is our conclusion that the appeal is barred. The prerequisite to the Board's going forward not having been met, the Board lacks jurisdiction to entertain the appeal. It is accordingly dismissed.

In view of our disposition of the case, we do not reach the other issues presented.

Alan G. James, Chairman

G. Jonathan, Greenwald, Member

James G. Sampas, Member