September 23, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

N THE MATTER OF: G[redacted] A[redacted] K[redacted]

This case is before the Board of Appellate Review on an appeal aken by G[redacted] A[redacted] K[redacted] from an administrative determination f the Department of State that she expatriated herself on srch 20, 1973 under the provisions of section 349(a)(1) of the migration and Nationality Act by obtaining naturalization in ustria upon her own application. 1/

The Department approved the certificate of loss of nationality hat was issued in this case on June 29, 1973, The appeal was ntered over ten years later on March 16, 1984, thus presenting a hreshold issue: whether the appeal may be deemed to have been imely filed under the applicable regulations. We conclude that he appeal is barred and that the Board lacks jurisdiction to onsider it. We deny the appeal.

I

Appellant acquired United States nationality by birth at [redacted] She lived in the United States ntil 1972 ustria, documented with a passport

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

issued in that year. In 1973 she married an Austrian citizen. On March 20, 1973 appellant executed a declaration stating that she wished to be a "loyal citizen" of Austria, and the same day acquired Austrian citizenship under section 9 of the Citizenship Law of 1965. 2/

Appellant visited the United States Embassy shortly after she became an Austrian citizen; whether she was requested by the Embassy to call, or did so of her own volition, is not clear from the record. In any event, the record shows that she was interviewed by a consular officer, and on May 30, 1973 executed an affidavit of expatriated person in which she acknowledged that she had acquired Austrian citizenship upon her own application. She

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2/ Under section 9 of the 1965 Act, the alien wife of an Austrian citizen might acquire Austrian citizenship by making a declaration that she would be a loyal citizen. Section 9 was repealed in 1983.

Acquiring Austrian citizenship through the making of a declaration of loyalty is clearly obtaining naturalization in a foreign state within the meaning of section 349(a)(1) of the Immigration and Nationality Act.

further swore that she had done so voluntarily, with the intention of relinquishing her United States citizenship, According to a report the consular officer later sent to the Department, appellant had explained to him that she had obtained Austrian citizenship in order to have the same status as her Austrian citizen husband, "as she intended to make Austria her permanent home." She surrendered her United States passport.

The foregoing formalities having been completed, the consular officer executed a certificate of loss of nationality in appellant's name on May 30, 1973. 3/

The certificate recited that appellant became an [redacted] citizen by birth in the [redacted] that she obtained [redacted] citizenship upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on June 29, 1973. Approval of the certificate is an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review, A copy of the approved certificate was sent to the Embassy on June 29, 1973 for delivery to appellant.

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 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, €or 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.

Over ten years later appellant entered an appeal by letter to the Board dated March 16, 1984. According to a memorandum the Embassy at Vienna addressed to the Board on March 22, 1984, transmitting her appeal, appellant had "originally contacted the Embassy about one year ago, more or less wondering aloud whether an appeal at this late stage might have any hope." The Embassy stated that based on their experience with two earlier cases, "we explained to Mrs. K[redacted] that there was at least a good chance that the Board of Appellate Review might accept her appeal for consideration, She returned with a more formal request in February 1984, and turned in the attached papers on March 21."

With appellant's letter of appeal, the Embassy enclosed a form appellant had completed, "Information for Determining U.S. citizenship."

Appellant contends that her naturalization was involuntary. "I was," she maintains, "a victim of circumstances and misinformation which after marriage, forced me to give up my citizenship at that time." She gave the following grounds for alleging that her naturalization was involuntary:

> 1) After coming to Austria in 1972 I married a man of Austrian birth in 1973. His first job after our marriage was under the Austrian government in their social ministry (Sozialministerium). According to Austrian law a non-Austrian wife and her children would, under these circumstances, not be eligible for a widow's or orphan's pension. This would have lead to an impossible situation for me in the case that anything would have happened to my husband.
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> 2) Being trained as a teacher in the States, I was informed that I would not be able to teach in Austrian schools without the Austrian citizenship, even had I had an Austrian diploma. Therefore chances for employment were practically non-existent. At the time 1 was continuing my studies, but with little money. As an American I would have had fees and tuition to pay which would have strained our meager finances to a breaking point.

3) Thirdly, my spouse insisted that I take on the Austrian citizenship. One cannot disregard the importance of this statement considering the emotional state I was in at that time. I really had no choice, particularly since he brought me to the consulate [sic] and demanded it of me.

II

The threshold issue presented by appellant's ten-year delay in appealing the Department's determination of loss of her nationality is whether, under the applicable regulations, the Board has jurisdiction to entertain the appeal.

The present federal regulations (promulgated in November 1979), prescribe that an appeal from an administrative determination of **loss** of nationality may be taken one year after approval of the certificate of **loss** of nationality. **22 CFR** 7.5(b). The Board must deny an appeal not filed within the prescribed time, unless it determines, for good cause shown, that the appeal could not have been filed within one year after approval of the certificate. **22 CFR** 7.5(a).

In 1973, however, the applicable limitation on appeal was "within a reasonable time" after the affected party received notice of the Department's determination of loss of nationality. 22 CFR 50.60 (1967-1979). The limitation of "reasonable time" will govern the instant appeal, for it is generally accepted that a change in the regulations shortening the time limit on appeal should apply prospectively, not retroactively.

So, under the governing limitation, if it be found that the appeal was not filed within a reasonable time after appellant received notice of the Department's holding that she expatriated herself, the Board must deny the appeal for want of jurisdiction.

Whether an appeal has been taken within a reasonable time after entry of the decision complained of depends on the facts of the particular case. Generally, reasonable time means reasonable in the circumstances of the case. Chesapeake and Ohio Railwayv. Martin, 283 U.S. **204** (1931). It means **as** soon as the circumstances of the case may permit and with such promptitude as the situation of the parties will allow. It does not, however, mean that a party may determine to take an appeal at **a** time suitable to himself. In re Roney, 139 F. 2d 185 (7th Cir. 1943). Nor should reasonable time be interpreted to countenance

a delay that is prejudicial to either party. Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir. 1981). For a delay in taking an appeal to be found reasonable, the legally sufficient excuse must be proved. Id. For an excuse to be legally sufficient it must be shown that failure to file with minimal delay was the result of some event beyond one's control and which was to some extent unforeseeable.

The rationale for requiring that an appeal be filed within a reasonable time is that one should have sufficient opportunity to prepare a case showing wherein the Department erred in law or fact in determining that the citizen expatriated himself. A corollary of this rationale is that the affected party should move for review of his case while the recollection of events surrounding performance of the expatriative act is still fresh in the minds of the parties concerned and sufficient evidence is available to enable the reviewing panel to make a fair decision on the merits of the case.

Appellant explained why she did not take an earlier appeal in a letter to the Board dated April 27, 1984:

> Concerning the regulations of time limit on appeal I would like to say that I was never aware at all that I had this right. The way the situation was presented at that time no other choice was possible and being young and very naive, I was totally under the influence of others--husband and agencies. I was not informed of the right to appeal by the consulate directly, and only through discussions with fellow Americans within the last few months did I become aware of this possibility. To my misinformation and misfortune, I always believed that the only possibility for me would be to immigrate. Ironically, my husband did not remain in the government position which requested Austrian citizenship of me. Had I known of this appeal right, I would have appealed immediately after he left this position, which would have been 3-4 years after our marriage date in 1973, certainly a reasonable period of time, considering the circumstances.

Replying to the Department's contention that appellant had shown no compelling reason why she delayed for ten years in taking an appeal, appellant stated in a letter to the Board dated August 27, 1984 that:

> The word "reasonable" is nebulous and indefinable in concrete, individual and juridical terms. Certainly, for my part, a time elapse of ten years is reasonable considering the fact that I spent 24 years in America, only less than half of that in Austria and that not whole-heartedly, only due to a marital situation. An extremely compelling reason and good cause for me in my life situation not to appeal for several years was the fact that I would have had to have given up my rights for any kind of social and, hand-in-hand with that, financial security. Actually, I cannot think of an any more compelling reason than that---the right to financial security for family and children in a country in which the everyday existential problems more difficult are than in America.
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> Considering this fact only five or six years had elapsed, and that appears to be a more "reasonable" amount of time, especially when considering that the average life-span is now well over seventy (70!) years. In addition to this, I would like to point out the fact that it was American law at that time which did not allow dual-citizenship for married women. On the other hand, Austrian law would have deprived me of social security.

In forwarding the appeal, the Embassy stated in a memorandum to the Board on March 22, 1984 that:

> One reason for Mrs. K[redacted] filing at so late a date...was [redacted]tting

around in the local American community on the Terrazas decision, 4/ In cases

4/ The reference is to Vance v. Terrazas, 444 U.S. 252 (1980) in which the Supreme Court held that the Government must prove by a preponderance of the evidence that a party intended to relinquish United States citizenship ah the time he performed a statutory expatriating act. In Terrazas, the Supreme Court affirmed and clarified its earlier decision in Afroyim v. Rusk, 387 U.S. 253 (1967) wherein it had held that performance of an expatriating act would only result in loss of citizenship if the citizen assented to loss of citizenship. In 1969 the Attorney General ruled that Afroyim should be interpreted to mean that. loss of citizenship depended on one's intent to relinquish citizenship. 42 Op Atty Gen. 397 (1969). In Terrazas, the Supreme Court noted with approval the Attorney General's interpretation of Afroyim.

> referred to it since that time, the Department of State has consistently held that it could not bear the burden of proof of voluntary relinquishment of U.S. nationality in the cases of women naturalized in Austria under section 9 of the 1965 Citizenship Law for purely economic reasons (the Board may be aware that section 9 was repealed through an amendment enacted on September 1, 1983). Seen in the light of the post-Terrazas situation, Mrs. K[redacted]s case appears to be an excellent
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> From talking with several of the women expatriated prior to the Terrazas decision, consular personnel here have gained the distinct impression that (a) these women were not, at the time their cases were developed, made aware of the fatal consequences of the Affidavit of Expatriated Person (all maintain they were given to understand that they had no choice but to sign, although none of them obtained Austrian citizenship with the intention of thereby losing American citizenship); and (b)...they were not briefed on appeal procedures available to them.

We are unable to deem appellant's reasons for her delay, as supported in effect by the Embassy, 5/ legally sufficient to excuse her tardiness.

5/ Appellant has not expressly contended that her delay in appealing was due to the fact that she only recently became aware of the Terrazas decision, and did not realize until then that a challenge to the Department's determination might be based on the grounds that she did not intend to relinquish citizenship. But it should be noted that the Board has held in prior decisions that an allegation one only recently learned of Terrazas is an insufficient excuse for not taking a timely appeal, given the Supreme Court's 1969 decision in Afroyim and the Attorney General's interpretation thereof. To countenance a delay on such grounds would, in effect, permit the party concerned to take an appeal at a time convenient to himself - somthing clearly not permissible under the rule of "reasonable time."

We find it difficult to accept that she was never aware of her right of appeal. A copy of the approved certificate of loss of nationality was sent to the Embassy on the day it was approved for forwarding to appellant. Her attention was called to the procedures for taking an appeal by a notation in bold type at the bottom of the front of the certificate which read: "See Reverse for Appeal Procedures." These procedures cited the applicable federal regulations, and noted that an appeal might be presented to the Board of Appellate Review through an American embassy or consulate or an authorized attorney in the United States. Additional information about appeal procedures and a copy of the applicable federal regulations could be obtained, the statement read, through an embassy or consulate or by writing directly to the Board.

Appellant does not allege that she did not receive a copy of the approved certificate in 1973, or that the procedures were not printed on the copy sent her. As a matter of law, therefore, appellant was on notice in 1973 of her right of appeal. It was incumbent on her to have acted then or shortly thereafter if she wanted to contest the Department's determination of loss of her nationality.

The record does not show whether the Embassy expressly called appellant's attention to the right of appeal set forth on the reverse of the certificate when it sent her a copy of the certificate. Even if the Embassy did not do so, appellant's contention that the consulate did not "directly" inform her of the right of appeal is unpersuasive, given the straight-forward information about appeals set out on the certificate of loss of nationality.

Nor do we consider legally sufficient the "compelling reason" appellant gave in her reply to the Department's brief - "I would have had to have given up my rights for any kind of social and,,, financial security."

She created the circumstances that allegedly presented a dilemma for her - to jeopardize (perhaps) important and needed rights to which she was entitled as an Austrian citizen by appealing, or to forego an appeal after having been informed that she had lost her citizenship. She chose the latter course. She was in no legal sense constrained by external forces beyond her control from taking a timely appeal, and may not be heard to say that circumstances conspired against her.

The Department contends that the delay is prejudicial to both appellant and the Department. Arguably it is. Certainly it would be extremely difficult for the Board to attempt to adjudicate the merits of the case fairly to both parties so many years after the event.

Appellant's right lo take an appeal accrued in 1973, as the applicable regulations make clear. She has shown no good reason why she could not have taken a timely appeal. Her delay of over ten years in coming to this Board to review the determination of loss of her nationality is, in our judgment, unreasonable. The interests of finality of administrative determinations after passage of a fair period of time must be given great weight where no adequate reason has been adduced and proved for the delay in contesting the determination at issue.

III

Upon consideration of the foregoing, we conclude that the appeal is time-barred. It is accordingly dismissed for lack of jurisdiction.

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Howard Meyers, Member