DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: I[redacted] P[redacted]

This ca[redacted] i[redacted]re the Board of Appellate Review on the appeal of I[redacted] P[redacted] from an administrative determination of the Department of State that he expatriated himself on November 20, 1970 under the provisions of section 349(a)(1) of the Immigration and Nationality act by obtaining naturalization in France upon his own application. 1/

The Department approved the certificate of loss of nationality on February 28, 1974. The apeal was entered on November 21, 1984.

The threshold issue presented is whether the Board has jurisdiction to entertain an appeal taken ten years after the Department approved the certificate of loss of nationality that was issued in appellant's name. We find the appeal barred by time, Thus lacking jurisdiction, we dismiss it.

I

Appellant acquired United States citizenship by birth at [redacted], and after serving in the United States Merchant Marine during World War II, he moved to France in 1948 and married a French citizen there in 1953. His daughters, born in 1953 and 1958, respectively, are

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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, . . .

dual citizens of France and the United States. Appellant applied for French citizenship in 1970 in order, as he has stated, to advance the career of one of his daughters, and for his own convenience. Although appellant became a French citizen on November 20, 1970, this fact did not become known to United States authorities until June 1973, when appellant appeared at the American Consulate in Nice to renew his American passport. He told the Consulate of his naturalization and that he did not intend to abandon his United States citizenship.

In a sworn statement of June 5, 1973, he stated, "I did not apply for French citizenship with the intention of divesting myself of my United States citizenship, and hoped I could have both nationalities." In supplemental statements to the Consulate appellant expressed his intention and wish to retain his United States citizenship.

After appellant had submitted the foregoing information, a consular officer prepared a certificate of loss of nationality in appellant's name, as required by section 358 of the Immigration and Nationality Act. 2/ The consular officer certified

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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.

that appellant expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in France upon his own application. 3/ The Department approved the certificate on February 23, 1974, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be taken to this Board. Since appellant makes no claim to the contrary, it must be assumed that appellant received a copy of the certificate of loss of his nationality sometime in 1974.

Appellant initiated this appeal by letter to the Board on November 21, 1984. He contends that it was not his intention to relinquish United States citizenship when he obtained naturalization in France.

In a memorandum of February 28, 1985 to the Board, the Department maintained that the appellant's appeal was time barred. They assert that no compelling reason has been provided to justify why the appellant waited over ten years before filing his appeal. Further, the Department concluded that based on the evidence, appellant intended to relinquish his claim to U.S. citizenship when he obtained naturalization in France.

3/ Note 1, supra.

Appellant subsequently retained counsel who filed a brief on his behalf in April 1985, arguing that the appeal was timely in the circumstances of the case, and that the appellant lacked the intent to relinquish his United States citizenship when he performed the expatriating act.

On May 23, and June 6, 1985, the Department filed memoranda informing the Board that upon further review they had concluded that they could not prove an intent to relinquish United States citizenship by a preponderance of the evidence, as required by Vance v. Terrazas, 444 U.S. 252 (1980), and requested that the Board remand the case in order that the certificate of loss might be vacated, Alternatively, the Department informed the Board, should the Board determine that it lacks jurisdiction and dismiss the appeal, the Department intends to vacate the certificate of loss of nationality,

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The basic issue raised at the outset is whether this Board has jurisdiction to entertain an appeal entered over fourteen years after a statutory act of expatriation occurred and ten after appellant's right to appeal the Department's holding of loss may be considered to have accrued.

In 1974 when the Department approved the certificate of loss of nationality the Board of Appellate Review was governed by Departmental regulations promulated in 1967 prescribing that an appeal to the Board be made "within a reasonable time." 4/

4/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1974), 22 CFR 50.60 provide:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation on 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.

The regulations of the Board of Appellate Review were revised and amended in November 1979, and require that an appeal be filed within one year of approval of the certificate of loss of nationality. 5/

Believing that the current regulations as to the time limit on appeal should not apply retroactively, we are of the view that the standard of "reasonable time" should apply in the case now before the Board.

Under the limitation of "reasonable time" a person who contends that the Department's determination of loss of nationality in his case is contrary to law or fact must file his request for review within a reasonable time after notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be barred and the Board would lack jurisdiction to consider it. The reasonable time provision is jurisdictional, 6/

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

6/ The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

> The Secretary of State did not confer upon the Board /of Appellate Review/ the power to...review actions taken long-ago, 22 C.F.R. 50.60, the jurisdictional basis of the Board, requires specifically that the appeal to the Board be made within a reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expatriation,

Office of Attorney General, Washington, D.C. File: CO-340-P, February 7, 1973.

The Chairman of the Board of Appellate Review advised appellant of the foregoing jurisdictional considerations by letter of November 29, 1984.

III

At the outset we must determine whether appellant's delay of approximately ten years in taking his appeal was reasonable in the circumstances of his case,

The rule of reasonable time is well established. 7/ Whether an appeal was lodged within a reasonable time depends on the circumstances of the particular case, It has been held to mean as soon as the circumstances permit and with such promptitude as the situation of the parties will permit. A party may not be allowed to determine a time suitable to him or herself. Further, the rule presumes that an appellant will pursue an appeal with the diligence of an ordinary prudent person. A protracted and unexplained delay generally is fatal, Where an appeal has been long delayed it has been held that the appellant must show a valid excuse. Reasonable time begins to run with receipt of notice of the Department's holding of loss of citizenship, not at some later date when the appellant for whatever reason may seek to restore his or her citizenship.

In his letter to the Board of January 4, 1985, appellant explained why he had delayed in seeking restoration of his citizenship as follows:

> The letter from the U.S. Consulate in Nice /presumably transmitting a copy of the approved certificate of loss of nationality7 was categorical and presented in a manner that gave little hope in the recovery of my U.S. Birthright.

7/ See, for example, Chesapeake and Ohio Railway v. Martin, 283 U.S. 204 (1931); Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir. 1981); In re Roney, 134 F. 2d 125 (7th Cir. 1943); Dietrich v. U.S. Shipping Board Emergency Fleet Corp., F 2d 733 (2nd Cir. 1926); Smith v. Pelton Water Wheel Co., 151 CA 343 (1907); Appeal of Syby, 66 N.J. Super 460, 160 A. 2d 744 (1961).

In the brief which counsel for appellant filed the following reason for the delay was adduced:

> The summary of appeal procedures contained on the reverse of the certificate of loss of nationality sent to Mr. P[redacted] in 1974 did not indicate a time limit for an appeal and did not apprise an uncounseled non-attorney like Mr. P[redacted] that his right to an appeal could be forfeited through failure to meet a time requirement.

These explanations plainly are legally insufficient to excuse a delay of ten years in taking the appeal. A discouraging letter from the Consulate at Nice should not have deterred appellant from making inquiries about how he might seek recourse. If he believed that he was right and the Department and the Consulate wrong, he could and should have written directly to the Board, as the notice of appeal invited him to do, Barring evidence that the Consulate misled appellant (and there is none in the record), it was incumbent on him to ascertain his rights. He did not do so, but remained passive until many years later,

The fact that the notice of appeal did not explicitly warn appellant that he would forfeit the right of appeal if he did not act within a reasonable time after receipt of notice of the Department's holding of loss of his nationality, can hardly be accepted as a valid reason for his delay. The information on appeal procedures specifically stated that a copy of the governing regulations could be obtained from any embassy or consulate or the Board of Appellate Review, The responsibility of taking the initiative in ascertaining what steps he should follow and how soon was then solely appellant's.

Under the rule of reasonable time, a party who has been the subject of an adverse determination of his or her nationality is expected to exercise the right of appeal within a flexible but not limitless period of time, account being taken of the time one requires to prepare a case showing wherein the Department erred in law or fact.

In the circumstances of this case, where there has been no showing of a requirement for an extended period of time to prepare his case, or any obstacle beyond appellant's control in taking a prompt appeal, it is obvious that the norm of "reasonable time" cannot be extended to a delay of ten years.

IV

On consideration of the foregoing, we conclude that the appeal was not taken within a reasonable time after appellant received notice of the Department's holding of loss of his United States citizenship. Accordingly, we find the appeal barred by the passage of time and not properly before the Board. The appeal is hereby dismissed. 8/

Given our disposition of the case, we need not reach the other issues presented.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Howard Meyers, Member

8/ The fact that the Board of Appellate Review has dismissed the appeal on the grounds that it lacks jurisdiction does not in itself bar the Department from taking such further administrative action as may seem appropriate in the premises. Opinion of the Legal Adviser of the Department of State, Davis R. Robinson, December 27, 1982. Excerpted in American Journal of International Law, Vol. 27, No, 2, April 1983,