March 26, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

S[redacted] R[redacted] S[redacted] appeals an administrative determination of the Department of State that she expatriated herself on May 10, 1973 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

The Department approved the certificate of loss of nationality in this case on October 31, 1978. The appeal was entered on January 2, 1985. A threshold issue is thus presented: whether the appeal may be considered to have been entered within the limitation prescribed by the applicable regulations. It is our opinion that the appeal is not timely and is therefore barred. Lacking jurisdiction, we deny the appeal.

I

Mrs. S[redacted] acquired United States citizenship by virtue of her birth at [redacted] She was educated in the United States, attending the University of Texas for two years from 1956 to 1958. She married [redacted], a United States citizen, in 1958, and in 1964 accompanied him to Canada. In 1966 appellant travelled to Europe on a United States passport issued that year by the Consulate General at Toronto. Mrs. [redacted] obtained employment with the Toronto Board of Education as an elementary school teacher. She has submitted evidence that teachers born outside Canada were required by legislation enacted in 1973 to present evidence of Canadian citizenship in order to obtain a

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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, . . .

permanent teaching certificate. For this reason and because her husband, who had obtained Canadian citizenship to be tenured at the University of Toronto, allegedly urged her to do so, Mrs. Silvers applied for Canadian citizenship. On May 10, 1973 she was granted a certificate of citizenship. She obtained a Canadian passport in 1976 to travel to Europe. In 1976 she and her husband were separated. In 1977 she communicated with the United States Consulate General at Toronto "to find out if I have any claim to regain my United States citizenship."

The Consulate General advised her that by obtaining naturalization she might have lost her United States citizenship. She completed forms for determining U.S. citizenship in December 1977 and, for information purposes, an application for registration as a United States citizen. The Consulate General referred Mrs. Silvers' case to the Department in late December 1977 for an advisory opinion. In March 1978 the Department instructed the Consulate General to prepare a certificate of loss of nationality and to elicit additional information from her regarding the issue of her intent to relinquish United States citizenship when she became a Canadian citizen, and to submit that information with the certificate.

On March 28, 1978 the Consulate General executed a certificate of loss of nationality, since appellant had not by that date furnished the information requested of her. 2/

The Consulate General certified that appellant became a United States citizen at birth; that she obtained naturalization in Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. Appellant subsequently submitted supplemental information in support of her "request for determination of my U.S. citizenship."

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.

Six months later, on October 31, 1978, the Department approved the certificate that had been executed by the Consulate General. This action constitutes an administrative determination of loss of nationality from which an appeal, timely and properly filed, may be taken to the Board of Appellate Review. On January 2, 1985 Mrs. Silvers initiated this appeal pro se. She subsequently retained legal counsel who submitted a brief. She argues that she did not become a Canadian citizen voluntarily because her former husband insisted that she obtain Canadian citizenship in order to maintain her employment as a teacher. She also contends that she lacked the requisite intent to relinquish United States citizenship.

II

At the outset, we must determine whether the Board has jurisdiction to consider this case on the merits. We may do so only if we conclude that the appeal was filed within the limitation prescribed by the applicable regulations, for timely filing is mandator and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960).

In 1978 when the Department determined that appellant had expatriated herself, the limitation on appeal was "within a reasonak time" after receipt by the affected party of notice of the Departmer adverse nationality decision. 3/ Consistently with the Board's practice in cases where an appeal is taken from a holding of loss of nationality made prior to November 30, 1979 (the effective date of the present regulations), the limitation of "reasonable time" will apply in the case now before us. Thus, if we find that appellant failed to enter an appeal within a reasonable time after she receive a copy of the approved certificate of loss of her nationality, the appeal would be barred and the Board would lack jurisdiction to consider the case on the merits.

3/ Section 50.60 of Title 22, Code of Federal Regulations (1967-19 22 CFR 50.60, provided that:

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

What constitutes reasonable time has been exhaustively defined by the courts. 4/ The definition of the United States Court of Appeals for the Ninth Circuit in Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir. 1981), sums up the rule as succinctly as any:

> What constitutes "reasonable time" depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. See Lairsey v. Advance Abrasives Co., 542 F. 2d 928, 930-31 (5th Cir. 1976); Security Mutual Casualty Co. v. Century Casualty Co., 621 F. 2d 1062, 1067-68 (10th Cir. 1980).

Reasonable time begins to run with receipt of notice of the Department's adverse holding, not some later time when a person may decide that entering an appeal might be convenient or advantageous.

Absent evidence to the contrary, we may assume that appellant received a copy of the approved certificate of loss of her nationality shortly after it was approved by the Department, and that the procedures for taking an appeal from that decision to this Board were, as was the practice at that time, set out on the reverse of the certificate.

Appellant submits that she had legally sufficient justification for not taking an earlier appeal. She contends that during the perioc from 1977 to 1984 she "was suffering from chronic and debilitating illnesses rendering me incapable of taking any earlier action." Her brief continues:

4/ See, for example, Ackerman v. United States, 340 U.S. 193 (1950); Klapprott v. United States, 335 U.S. 601 (1949); Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); United States v. Karahalis, 205 F. 2d 331 (2nd Cir. 1953); In re Roney, 139 F. 2d 175 (7th Cir. 1943); Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F. 2d 733 (2nd Cir. 1926).

> Between the years 1977 and 1984, appellant developed several serious medical problems which necessitated constant physical care. Appellant initially received medical treatment for hepatitis. Subsequently, appellant developed biliary cirrhosis (Liver disease) and giant urticaria. Both of these illnesses are chronic and debilitating. Ms. [redacted] experienced other unrelated medical problems, including phlebitis and several bone fractures. Appellant's medical problems were compounded by severe depression, resulting from the termination of her marriage. It is significant that all four of appellant's treating physicians attribute her delay in instituting this appeal to appellant's medical condition. (Physicians' statements attached hereto as Exhibit 4, collectively).

We accept that appellant suffered debilitating illnesses from 1977 to 1984. The pertinent question, however, is whether on the evidence presented she was beyond reasonable doubt incapable physically or emotionally of initiating a timely appeal.

[redacted] appellant's family physician, declared in a statement executed on March 26, 1985 that:

> It is my my opinion that due to her medical and emotional problems from 1977 to 1984 Simone was unable to instigate an appeal regarding regaining her U.S. citizenship. I believe that Simone iniated /sic/ an appeal as soon as she was able to do so....

Dr. Lorber does not say, however, that Mrs. Silvers was incapable during that period of attending to any of her business affairs, simply that she was unable to take an appeal.

Dr. Alvin Newman, Gastroenterologist, declared in a statement exexuted March 11, 1985 that:

> It is my feeling that patients suffering from chronic illnesses are not very good candidates at making or initiating actions or making strong decisions on their own behalf. I can readily understand why there was considerable delay in Mrs. [redacted] applying to the U.S. Government to regain her U.S. citizenship. I think it is consistent with the degree of illness that Mrs. Silvers suffered from that such a delay would have been encountered....

The comment just made about Dr. Lorber's declaration might appropriately also be made about Dr. Newman's.

An internal medicine specialist, Dr. Michael Gordon, submitted a statement dated March 12, 1985. His medical diagnosis of appellant is similar to those of the other physicians, but he states that he did not see Mrs. [redacted] after mid-1980; his evidence is therefore not relevant to the period 1980-1985.

Dr. S. J. J. Freeman, a psychiatrist, declared in a statement executed March 19, 1985 that appellant had considerable emotional problems from 1977 to 1985, in addition to the above described medical problems. He stated:

> ...as the illness dragged on, she could not mobilize herself to undertake the actions necessary to resume her American citizenship even though her intention to so evidently remained unchanged. Other illnesses followed, including phlebitis and a number of fractures, so that her goal of returning to the U.S. was constantly delayed. It is only in the last year or so that her health has been stable enough to allow her to take up, again, her wish to live near her parents in California and to resume her U.S. citizenship.

Dr. Freeman continued:

> I should emphasize that Ms. Silvers, despite the difficulties she has had, has at all times been self-supporting and active as a teacher in an inner city school; a job which would challenge the most fearless among us. At no time was her psychiatric condition of a psychotic nature and it is very improbable that she would ever be unable to function on the grounds of poor mental health.

In our judgment, the foregoing medical opinions do not indicate that appellant was immobilized from 1977 to 1984. As Dr. Freeman has stated, she carried on with her life, under admittedly trying and evident painful circumstances. However sympathetically we may regard appellant's situation we are, unable to accept that she could not at least have written to the Board of Appellate Review, within a reasonable time after she received notice of the Department's determination of her expatriation, to state her wish to challenge the

Department's decision, and ask the Board's advice on how, in her obviously trying circumstances, she might pursue an appeal. She has not produced any persuasive reason why she could not have taken such a simple step to protect her interest in United States citizensh

After carefully weighing the facts presented, we hold that Mrs. Silvers' delay of nearly six years in taking the appeal was not reasonable. The interest in finality and stability of administrative determinations must therefore be given considerable weight.

III

Upon consideration of the foregoing, it is our conclusion that Mrs. Silvers' appeal is time-barred and that the Board lacks jurisdiction to consider it on the merits. Accordingly, we hereby deny her appeal.

Alan G. James, Chairman

Howard Meyers, Member

F. Smith Jr.
Frederick Smith Jr., Member