April 11, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: V[redacted] H[redacted] [redacted]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, V[redacted] H[redacted] K[redacted] 1/ expatriated himself on May 25, 1979 under the provisions of section 349(a)(5) of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a censular officer of the United States at Kaduna, Nigeria. 2/

1/ Appellant's name at birth was [redacted]. In T977 he changed his name legally to [redacted]. Presently, he calls himself [redacted], a name, he informed the Board, he assumed "for religious-linguistical reasons."

2/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), 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; . . .

The appeal was entered in July 1984, five years after the Department approved the certificate issued in this case. For the reasons set forth below, we find the appeal time-barred, and that as a consequence the Board lacks jurisdiction to consider it. The appeal is dismissed.

I

Appellant became a United States citizen by birth at [redacted] passport at Miami, Florida in 1978, and subsequently went to Nigeria. On his passport application he indicated that he intended to remain abroad for six months and that the purpose of his trip was "commercial."

According to appellant, when he arrived in Nigeria in 1979, he was accompanied by his wife, her two children by a previous marriage, and a male friend, all United States citizens. The party reportedly encountered various difficulties and their money ran low. Appellant states that he contemplated returning to the United States, but his wife and their friend decided to stay in Nigeria. Not wishing to leave his wife and her children in the lurch, appellant decided to remain. He states that in the succeeding weeks his friend told him he intended to renounce his United States citizenship in order to facilitate settling in Nigeria. Appellant's wife reportedly decided to do so as well. The record shows that appellant's wife renounced United States nationality in March 1979.

In his appeal statement appellant explains as follows the pressures that he felt in 1979 which led him to renounce his own United States nationality:

> Mr. Muhammad /appellant's friend7 kept telling me that I wasn't trying to assist my wife and the children. My wife kept telling me I was not making enough serious efforts to get the children in school, and that I was not concern /sic7 about them. And I was still unable to get a home or work, coupled with little money. Mr. Muhammad also suggested that if I renounced my citizenship it would assist me in getting work, otherwise I would be suspected as an espionage agent by some officials.
>
> So under this pressure in May 1979, I (inwardly reluctantly) renounced my

> citizenship. In the coming months after living with about three different families I caught malaria. My wife asked for a divorce.

The record shows that on May 25, 1979 appellant made a formal renunciation of his United States nationality before a consular officer at the Consulate in Kaduna in the form prescribed by the Secretary of State, He also executed a statement of understanding, attesting that he voluntarily exercised his right to renounce his citizenship and fully understood the serious consequences of his act which had beer, explained to him by a consular officer, Appellant also executed an affidavit on May 25, 1979 in which he stated as follows:

> I renounce my citizenship rights to the United States not in nostiiity, but, being that my wife has renounced her's previously on her own free will, and has expressed her desire to stay in Nigeria.
>
> Certainly I have experienced much mental anguish, because I do not desire to separate from her and our children at this time. Nor does she desire that we separate. Not that she does not possess the capability of surviving, but the fact that I asked her to come to Nigeria, with the idea of staying. I do not wish to separate from my relatives, but I have done what I think is best. It is only through the power, knowledge and mercy of the Creator, that the that the end of this affair lies.

On May 25, 1979 the consular officer who administered the oath of renunciation to appellant prepared a certificate of loss of nationality. 3/ The officer certified that

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3/ 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 apprcved by tne Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for nis information, and tne 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.

appellant acquired United States nationality by birth in the United States; that he made a formal renunciation of his nationality; and thereby expatriated himself under the provisions of section 349(a)(5) of the Immigration and Nationality Act. In forwarding the certificate for approval, the consular officer informed the Department in part as follows:

> ...
>
> 2. Mr. K[redacted] was counselled as to the seriousness of the Act, but remained firm in his desire to execute the Oath and declined to discuss it further. As reflected in his written statement which is enclosed, both Mr. Lake and the other Consular Officer who talked with Mr. K[redacted] felt he was acting under mental duress and only accepted his oath with great reluctance and at his insistence, Mr. K[redacted] stated that he intended to become a Nigerian citizen.

The Department approved the certificate on September 19, 1979, approval being an administrative determination of loss of nationality from which an appeal, timely and properly filed, may be taken to this Board. On September 20, 1979 the Department dispatched a copy of the approved certificate to the Consulate to forward to appellant.

The appeal was entered July 27, 1984. Appellant contends that his renunciation was the product of depression and indirect pressure; in effect, that it was involuntary.

II

The Department determined on September 19, 1979 that appellant expatriated himself by making a formal renunciation of his United States nationality. The appeal was entered five years later on August 16, 1984. An initial question is thus presented: may the appeal be deemed to have been filed within the limitation prescribed by the applicable regulations?

Timely filing is mandatory and jurisdictional. 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. See Costello v. United States, 365 U.S. 265 (1961).

In September 1979 when the Department approved the certificate of loss of nationality that was executed in this case, the limitation on appeal was "within a reasonable time" after the affected person received notice of the Department's holding of loss of nationality. 4/ Consistently with the Board's practice in cases similar to the one now before us, the standard of "reasonable time" will govern in this case rather than the present limitation of one-year after approval of the certificate of loss of nationality which became effective in November 1979. 5/

What constitutes "reasonable time," the Ninth Circuit said in Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981),

> 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, 1967-68 (10th Cir. 1980).

4/ Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60, 1967-1979, provided as follows:

> 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.

5/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b), November 30, 1979, provides as follows:

> (b) Time limit on appeal. (1) A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval by the Department of the certificate of loss of nationality or a certificate of expatriation....

Appellant explains that he did not appeal sooner because he did not know he had the right to do so. As he put it in a letter to the Board:

> However, my delay in bringing this appeal, was simply because I assumed that loss of citizenship, not being a normal situation, was simply a dead end matter, that could not be resolved. And as a result I simply attempted to adjust myself to the circumstances and restructure my life as best I could,
>
> On meeting some Americans living here, and traveling through, I was advised by them to go back to the consulate, because perhaps their /sic/ was an apparatus for reviewing and reconsidering cases as mine.,..

The record shows that on September 19, 1979 the Department dispatched a copy of the approved certificate of loss of nationality (CLN) to Kaduna for the consulate to forward to appellant, The procedures €or taking an appeal to this Board were set forth on the reverse of the certificate.

The record also shows that on December 15, 1981 the Consulate informed the Department (in connection with a matter concerning appellant but not related to this appeal) that: "The consulate has been unable to deliver CLN as subject failed to return to consulate to pick up same." On September 12, 1985, in response to a specific inquiry made by the Department, the consulate stated: Kaduna can find no record of CLN [redacted]

At the Board's request the Department directed a further inquiry to the consulate in November 1985 about the disposition of appellant's copy of the approved certificate of loss of his nationality. The Board asked the Department to ascertain: whether the consulate had any record that it and appellant agreed in 1979 he would return to the consulate to pick up the certificate of loss of nationality; or whether the consulate decided because of the reported unreliability of the Nigerian post that it should hold the certificate until such time as appellant might choose to call; and whether there was any record that the certificate was mailed to appellant but had been returned undeliverable.

On December 24, 1985 the Consulate responded as follows:

> Post unaware of appellant agreeing to pick up CLN from consulate in 1979. Post has no record of CLN having been mailed to appel- and returned undeliverable. Present Conoff recalls that previous Conoff said that CLN should not be mailed due to the unreliability of the Nigerian postal system. To the best of Conoff's knowledge, CLN has never left the Consulate since being received from the Department.

On tne foregoing facts, the relevant inquiry is whether appellant's explanation of why he did not take an earlier appeal is legally sufficient to excuse his delay,

The Department clearly carried out its statutory duty by sending a copy of the approved certificate to the Consulate with instructions to forward it to appellant. 6/ From the evidence available, it seems that the Consulate decided, on the basis of local conditions, that it would not be prudent to entrust the certificate of loss of nationality and that the surest way to get it into appellant's hands was to ask him to call to pick it up. 7/

6/ Supra, note 3.

7/ Early in the processing of this appeal, the Board asked the Consulate how best to communicate with appellant. The Consulate replied as follows:

> Communication with Mr. [redacted] is indeed best done wthrough the Consulate General in Kaduna. Mail service in Nigeria is slow and unreliable.
>
> We have informed Mr. [redacted] of this arrangement and he is quite satisfied with it.

The Board specifically invited [redacted] to comment on the three telegrams cited in the above factual statement which dealt with the question of the disposition of the certificate of loss of nationality issued in his name. The Consulate at Kaduna informed the Board that [redacted] had no comment to offer. In the circumstances, the Consulate's actions seem to us to be responsible and we are not prepared to find that the Consulate erred in deciding that this was the appropriate way to comply with the statute. 8/

Had appellant called at the Consulate a few months after his renunciation to collect the certificate, as it would have been prudent for him to have done (whether or not it was agreed that he would do so), he would have been apprised of the procedures to take an appeal by information printed on the reverse certificate.

But even if appellant did not receive actual notice of the Department's approval of the certificate and his right of appeal, he may not be absolved of the responsibility to ascertain whether he had any recourse well before he finally inquired about possible relief at the Consulate in 1984.

Formal renunciation of United States citizenship is an unambiguous act, one that clearly puts the actor on notice that he has probably lost his citizenship. Moreover, in light of the serious consequences of his actions, which were explained to him, appellant should have taken the initiative to inquire of the Consulate about the possibilities of an appeal, if he truly felt that the circumstances surrounding his renunciation forced him to act against his will. It is well-established that if an individual has actual knowledge of the facts that would lend an ordinary prudent person to make further investigation, the duty to make inquiry arises and he is charged with the knowledge of the facts which inquiry would have disclosed. Nettles v. Childs, 100 F.2d 952 (4th Cir. 1949). Appellant had the responsibility to inquire about the possibilities of appeal long before 1984.

8/ It was not until November 30, 1979 that federal regulations with the force of law were promulgated, mandating that an expatriate be expressly informed of the right of appeal at the time the certificate of loss of nationality is forwarded. Section 50.52 of Title 22, Code of Federal Regulations, 22 CFR 50.52 (November 30, 1979). In the circumstances of this case, we do not think that appellant's apparently not having received information about his right of appeal is material error, as we elaborate below.

The limitation of "reasonable time" was designed to allow an expatriate sufficient time to prepare a case showing wherein the Department erred in law or fact in determining that he expatriated himself. It contemplated also that one would move with all deliberate speed in filing a claim while the events upon which the appeal is based are still fresh in the minds of all parties concerned. Here, there is little evidence contemporaneous with appellant's renunciation relevant to his contention that he acted under duress. While the consular officer concerned stared at the time that he and another officer *felt* appellant was acting under "mental duress," appellant stated at the time that although he had experienced "much mental anguish", he did not wish to be separated from his wife, "and I have done what I think best." At this distance from the events of 1979, it would be an unreasonable burden for the Department *to* be asked to address appellant's latter-day allegations that he did not make his renunciation voluntarily.

Furthermore, the interest in finality and stability of administrative determinations must, in the absence of a substantial excuse for tardy filing, be given great weight.

In the circumstances of this case, where no persuasive reason has been presented for delay of five years in taking an appeal, the Board is of the view that the **appeal** is barred by passage of time.

III

Upon consideration of the foregoing, the Board hereby dismisses the appeal for want of jurisdiction.

Given our disposition of the case, we do not reach the substantive issues presented.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member