June 9, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This is an appeal from an administrative determination of the Department of State that appellant, A[redacted] S[redacted], expatriated himself on September 26, 1966 under the provisions of section 349(a)(3) of the Immigration and Nationality Act by entering the armed forces of Israel. 1/

The Department determined on March 23, 1967 that S[redacted] expatriated himself. Eighteen years later, on August 6, 1985, S[redacted] entered an appeal from that determination. Appellant's delay in coming before the Board raises a jurisdictional issue: whether the appeal may be considered to have been filed within the limitation prescribed by the applicable regulations. It is our conclusion that the appeal is time-barred and not properly before the Board. Since the Board lacks jurisdiction to entertain the appeal, we dismiss it.

1/ Section 349(a)(3) of the Immigration and Nationality Act reads as follows:

Section 349 [8 U.S.C. 1481] (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 --

...

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: Provided, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or....

I

[redacted] became a United States citizen upon his birth at [redacted]. He obtained a United States passport in July 1965 and a few months later (September) went to Israel to live on a Kibbutz, intending to remain there for one year. A year later, on September 12, 1966, [redacted] changed his status from temporary to permanent resident of Israel, and automatically acquired the citizenship of Israel under the Law of Return. [2/] Stein also legally changed his name at that time from [redacted] to A[redacted]. On September 25, 1966 [redacted] entered the Israel Defense Force (IDF). A statement issued by the Chief of the Personnel Section, Adjutant General's Department, IDF, dated April 18, 1975, attesting to [redacted] service, reads in part as follows:

> 1. I hereby confirm that [redacted] served in the Israel Defense Forces from September 1966 until July 29, 1969 as part of his compulsory military service.
>
> 2. The /aforementioned/ soldier went on leave and completed his compulsory service between October 1, 1969 and June /sic - should be January/ 21, 1970 on which date he was discharged from compulsory service /requirements/ in the Israel Defense Forces in accordance with the Seiective Service Act of 5719 - 1959 (Consolidated Version), which imposes compulsory military service on all citizens or permanent residents of the State of Israel.

2/ Section 3(a) of the Law of Return of 1950 and section 2(b)(4) of the Nationality Act of 1952.

> 3. Failure of [redacted] to report to duty in accordance with the Selective Service Act of 5719 - 1959 (Consolidated Version) would have resulted in his being brought to judgment and to punishment.

Stein appeared at the United States Embassy in Tel Aviv on January 9, 1967. At the Board's hearing on the matter [redacted] explained that shortly before he started basic training, he felt that "I should tell the American Embassy where I was and what I was doing in the unfortunate case of an emergency or accident." 3/

On January 9, 1967 S[redacted] executed an affidavit of expatriated person that read as follows:

> I, A[redacted] S[redacted], formerly known as A[redacted] L[redacted] S[redacted], solemnly swear that I entered the Israeli Army on September 25, 1966 and am currently serving.
>
> I further swear that the act mentioned above was my free and voluntary act and that no undue influence, compulsion, force or duress was exerted upon me from any sources whatever.

3/ Transcript of Hearing in the Matter of A[redacted] S[redacted], Board of Appellate Review, February 26, 1986 (hereafter referred to as "TR"). TR. 10.

Following this meeting with [redacted] a consula[redacted]er executed a certificate of loss of nationality in [redacted] name on January 13, 1967. 4/ Therein he certified that [redacted] acquired United States citizenship at birth; that he also later acquired Israeli citizenship by operation of law; that he entered the Israeli Army on September 25, 1966; and thereby expatriated himself under the provisions of section 349(a)(3) of the Immigration and Nationality Act. In forwarding the certificate to the Department, the consular officer made no comment on the circumstances under which S[redacted] had called at the Embassy and executed an affidavit of expatriated person, but he noted that [redacted] had surrendered *the* passport issued to him in 1965 and that [redacted] had said he had permission from his local draft board to remain abroad until August 1966.

4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, provides that:

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.

At the hearing, S[redacted] described his visit to the Embassy on January 9, 1967. He stated that when he was inside the Embassy he spoke to "some people" and told them what his situation was with respect to entering the IDF. TR 10. "After a period of time," he said, "somebody came back with a statement and they asked me to sign it, stating the fact that I was serving with the IDF, and that appeared to me to be a reasonable thing for them to want to have a record of, so I signed the statement." TR 11. He continued:

> Then I believe it was said that, well, something to the effect that you are no ionger an American citizen and 'we can't give you your passport back,' something of that nature. I was really shocked. And that was that. They said, 'Any further communication, we'll send you some letters, or any material through the Embassy,' and then I was ushered out. Id.

On February 17, 1967 the Department informed the Embassy it had made a preliminary decision that S[redacted] expatriated himself, and instructed the Embassy to follow established procedures for processing S[redacted]'s case as one of loss of nationality. Accordingly, on February 27, 1967 the Embassy wrote to S[redacted] to inform him that he had 60 days in which to submit such information or evidence, or a statement that he would submit such information or evidence. If he did not submit further evidence, the decision in his case would become final. S[redacted] responded shortly thereafter that he had "no intention of opposing the Preliminary Decision of the Dept. of State concerning my loss of nationality. The affidavit stands as executed on 9 January, 1967."

After being informed of S[redacted]'s response to the Embassy's letter, the Department on March 23, 1967 approved the certificate of loss of nationality that the Embassy had executed. A copy was sent to the Embassy to forward to S[redacted]. On April 5, 1967 the Embassy sent S[redacted] a copy of the approved certificate, and advised him that "a notice of the privilege of appeal is attached for your information." The information regarding the right of appeal read as follows:

NOTICE

Under the law you have the privilege of appealing to the Board of Review of the Passport Office, Department of State, with regard to the decision that you have lost your American Nationality. Your appeal must be based on other than hardship or humanitarian grounds; otherwise, it cannot be entertained.

If you have new or additional evidence to submit, or if you have legal grounds for believing that your case merits reversal of the decision, you may present the appeal through an American Foreign Service office or a duly authorized attorney or agent in the United States. No formal application for reconsideration need be made but a statement should be submitted, preferably under oath, giving the grounds of appeal and should be supported by such documentary evidence as may be available.

AMERICAN EMBASSY
CONSULAR SECTION
TEL AVIV, ISRAEL

[redacted] acknowledses that he duly received a copy of the certificate and the accompanying notice of the right of appeal.

There is no record of further contact between [redacted] and United States authorities until 1969 when in June of that year he went to the United States Embassy to inquire how he could visit the United States. According to Embassy records, the Embassy handled his case in the following manner:

> As he stated in his application that he was born in the United States, he was referred to the Citizenship Section to clarify his status. He was then informed of the Attorney General's Statement of Interpretation of the Afroyim Decision /Afroyim v. ~~Rusk~~, 387 U.S. 253 (1967)/ and of the possibility of regaining his U.S. nationality which he lost in 1966 through his service in the Israeli Defense Forces. As he wished at that time to travel to the U.S. on an emergency, he was issued a limited non-immigrant visa. He was also asked to bring appropriate documentation to this office upon his return to Israel in order to adjudicate his case.

[redacted] and his wife, a United States citizen and permanent resident of Israel whom he married in January 1969, went to the United States during the summer of 1969, While there he reportedly discussed his citizenship case with his father. A few months after S[redacted] returned to Israel he completed his military service and returned to the kibbutz, waiting for his father "to find a method of dealing with this situation /his citizenship/." TR 24.

In May 1975 [redacted] visited the Embassy. According to a report the Embassy sent the Department on May 19, 1975, [redacted] "indicated that he wished to explore the possibility of regaining his U.S. citizenship as he plans a trip to the United States on June 26, 1975." [redacted] completed two questionnaires to facilitate the determination of his citizenship status and an application for a passport. In forwarding the foregoing material to the Department, the Embassy made the following statements:

> In the attached questionnaire Subject stated that as a Citizen of Israel, he was conscripted into the Israeli Army on September 25, 1966 and served until January 21, 1970. This statement is supported by the attached letter from the IDF dated April 18, 1975 which indicates that Subject was conscripted according to law. It further states that his failure to comply with the law would have caused him to be prosecuted and punished.
>
> In connection with his military service and as an inseparable incident of his induction, Subject took an oath of allegiance to the State of israel on September 25, **1966.** In the same questionnaire, Subject adds that by his military service and the oath of allegiance connected therewith, he did not intend to give up his American citizenship or his allegiance to the U.S.A.
>
> In view of Subject's statements and the Afroyim Decision, the Department's opinion is requested as to whether Subject may regain his **U.S.** nationality.
>
> Enclosed for the Department's information is a supplementary affidavit executed by Subject concerning his ties and obligations in Israel and the United States.
>
> **Also** enclosed is Subject's authorization for release of information from his Selective Service file.

On January 9, 1976 the Department of State informed the Embassy that a reversal of its decision on [redacted]'s case was not warranted. The Department gave the following rationale for this conclusion.

> The Department has thoroughly reviewed Mr. S[redacted]'s case including his previous passport file and the record of his Selective Service classifications. These records reveal that he adjusted his status in Israel to that of a permanent resident on September 12, 1966 and thereafter failed to decline Israeli nationality, thereby acquiring that nationality under the Law of Return on that date. Approximately two weeks later, Mr. S[redacted] entered the Israeli armed forces and took an oath of allegiance in connection with his service. He notified the Embassy in January 1967 that he was serving in the Israeli Defense Forces.
>
> On October 4, 1966 Mr. S[redacted] wrote his local Selective Service Board and informed it that he was a citizen of Israel and that he was on full-time active duty with the Israeli Army. Mr. S[redacted] was subsequently reclassified 4-C, an alien not currently residing in the United States.
>
> The record does not support the finding that Mr. S[redacted] was interested in preserving his United States citizenship at the time he entered the Israeli armed forces. In connection with the development of his citizenship case in 1967, he executed an affidavit swearing that his entry into the Israeli Army was a free and voluntary act and that no undue influence, compulsion, force or duress was exertea upon him. Shortly after being informed of the Department's preliminary finding of loss of nationality Mr. S[redacted] wrote a letter to the Embassy stating that he had no intention of opposing the Preliminary Decision of the Department of State.

Appellant states that after he had been informed of the Department's refusal to reverse its decision in his case, he again communicated with his father who reportedly said he would see what could be done. TR 30. According to [redacted] his father had been advised that "it was futile to continue appealing to the State Department, and that the best way to deal with it was when we returned to the U.S. to take residence here, that we should then make an appeal through the Immigration and Naturalization Service /INS/." TR 31.

When S[redacted] returned to the United States in 1979 on a tourist visa he took up his case with the INS in San Francisco, using the device of a request for an extension of temporary stay to attempt to reach a resolution of his status. His application was rejected, but INS apparently took no action in his case for four years, not responding to his request for a hearing. He then consulted counsel. This appeal followed shortly thereafter.

[redacted] contends that he did not intend to relinquish his United States citizenship; his service in the Israeli Defense Forces (IDF) is not conduct from which an intent to relinquish United States citizenship can fairly be inferred. He further contends that in 1975/1976 the consular officer concerned with his case and officials of the Department of State violated their own agency regulations in failing to address the issue of appellant's intent in joining the IDF. "Failure to observe agency regulations resulting in the denial of a substantive right," appellant argued in his opening brief, "is a constitutional violation."

[redacted] requested oral argument which the Board heard on February 26, 1986.

II

We confront a threshold issue: whether the Board may assert jurisdiction over a case in which an expatriate has waited eighteen years to seek appellate relief. Since timely filing is mandatory and jurisdictional, United States v. Robinson, 361 U.S. 220 (1960), the Board may only consider the merits of the cause if we determine that the appeal was filed within the limitation prescribed by the applicable regulations. If we find that the appeal was untimely, we must dismiss it.

In January 1967 when the Department approved the certificate o loss of nationality executed in appellant's name, the Board of Appellate Review did not exist. There was, however, a Board of

Review on the Loss of Nationality, an entity of the Passport Office of the Department, to which persons who had been found to have expatriated themselves might address an appeal. Appellant was so informed when the Department forwarded to him a copy of the certificate of loss of his nationality. In 1967 the time limit on appeal to the Board of Review on the **Loss** of Nationality was "within a reasonable time" after the affected party received notice of the Department's holding of his expatriation. 5/ Shortly after the Board **of** Appellate Review was established (July 1967), regulations were promulgated tnat adopted the "reasonable time" limitation. 6/ The regulations of the Board of Appellate Review were further revised in November 1979. They prescribe that an appeal be filed within one year of approval of the certificate of loss of nationality. 7/ 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 tne case now before the Board.

"What constitutes reasonable time," the 9th 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

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5/ Section 50.60, Title 22, Code of Federal Regulations (1966), 22 CFR 50.60, 31 Fed. Reg. 13539 (1966).

6/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60, 32 FR 16359, Nov. 29, 1967, provided:

> 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.

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

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). 8/

Appellant submits that the circumstances leading up to his eventual appeal reveal that he has not acted unreasonably, but rather has exercised diligence in attempting numerous times to pursue his case, and any neglect in filing the appeal is excusable.

We are unable to agree that appellant was diligent in seeking restoration of his citizenship.

In 1969, two years after the decision had been made that he had expatriated himself, appellant visited the Embassy at Tel Aviv. While there, he stated in his brief, "he inquired about his citizenship." Appellant's brief continues:

> He was told by a consular official that he could restore his citizenship if he swore that he did not voluntarily enter the Israeli Army, or in the alternative, if he remained in the United States and refused to return to Israel. Not wishing to follow the consular officials's advice, appellant traveled to the United States for a family visit and returned to Israel with his wife.

8/ In Lairsey v. Advance Abrasives Co., the court quoted 11 Wright & Miller, Federal Practice & Procedure, section 2866 at 228-29:

> 'What constitutes reasonable time must of necessity depend upon the facts in each individual case.' The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner. 542 F. 2d at 930.

As we have seen, the record the Embassy made in 1969 of appellant's visit reports that event somewhat differently. The Embassy told him that he might be able to recoup his citizenship if he could prove lack of intent to relinquish United States nationality. The Embassy invited him to pursue the matter upon his return from the United States. [redacted] did not go back to the Embassy or write after he returned to Israel in the fall of 1969. It was not until 1974 that he expressed the wish to see how he might regain his citizenship. (The Embassy records indicate it was actually 1975.)

[redacted] describes this next attempt to challenge loss of his citizenship as follows:

> Again in 1974, Appellant made a renewed attempt to have the decision reconsidered. His family in the United States had informed him of Afroyim decision and armed with an affidavit and letter stating that he had never intended to relinquish his citizenship, he again went to the Embassy. He was refused the opportunity to present the letter and affidavit and was told to apply for a passport, which he did in 1975.

The Embassy's contemporary records, however, disclose that appellant executed a supplementary affidavit regarding his lack of intent to relinquish citizenship which the Embassy forwarded to the Department.

As we have seen, in January 1976 the Department affirmed its original decision in appellant's case. Appellant asserts that he was not then told he had the right to appeal that decision. He alleges moreover that:

> He believed he had exhausted his options and remedies as long as he remained in Israel. Moreover, he did not have much confidence in Consulate's advice since he had been misdirected in the past....Therefore, it is reasonable that appellant believed he could not assert his right to citizenship until he was safely in the United States.
>
> In December of 1979, Appellant returned to the United States on a tourist visa with his wife. Resorting to the only agency he could think of to assist him, he went to the Immigration and Naturalization Service to attempt to get his citizenship restored....

The salient fact relevant to the timeliness of the appeal is that in 1967 [redacted] was informed that the Department had determined that he expatriated himself, and was advised that he had the right to appeal that decision to an appellate review body of the Department. He took no action then to prevent what was described as a preliminary determination from becoming final, nor did he utter any word of opposition to the certificate of loss of nationality subsequently issued. Quite the contrary, he asserted in writing that he had no intention of opposing the preliminary decision of the Department. That this statement of no intention to contest the preliminary decision is equally applicable to the Department's final determination is clear from the fact that appellant took no further action when he was advised of the final decision and a right to appeal,

The record shows that he has been dilatory about acting to oppose the holding of loss of his United. States citizenship. He has not explained why he did not in 1969, after his return from holiday in the United States, submit documentation that would assist the Embassy to act in his ease, as he had been invited to do. Instead, he allowed five or six years to elapse before he acted in the matter. After the Department in 1976 affirmed its 1967 determination of loss of his citizenship, [redacted] remained passive, alleging that no one told him of the right of appeal, and that he believed it would be futiie to do anything about his citizenship until he returned to the United States. In the following ten years the only action he took was to try to engage the INS in his case,

Without deciding whether if he had come to this Board in 1976 (nine years after the Department's original determination), his appeal would have been timely, we are of the view that at that time assuredly he should have availed himself of the right of appeal. The grounds he gives for not taking any action until 1985 are legally insufficient to excuse any further delay in appealing to this Board. In 1976 he was 29 years old, and not unfamiliar with the essential facts about citizenship law as applied to his case. Why he did not then consult counsel or communicate with the Department about what reccurse might be available to him is not explained. At the hearing, he said that in 1974/1975 and again after the Department affirmed Its original decision in 1976 he left the matter of a legal remedy in his father's hands. "He is a very resourcef'ul individual. He has many friends in, I guess, what you would call high places...." appellant stated. TR 71.

In brief, [redacted] has presented no adequate reason why he could not have taken an earlier appeal.

In the premises, the interest in the finality and stability of administrative determinations must be accorded considerable

weight, in the absence **of** a showing by appellant that he had gooa cause for not taking an earlier appeal.

We are unable to consider that appellant's delay - whether it be regarded as eighteen years or ten years - was reasonable within the meaning of the applicable regulations. The appeal is time-barred.

II

Upon consideration of the foregoing, it is our conclusion that the Board lacks jurisdiction to entertain the appeal. It is accordingly denied.

Alan G. James, Chairman

Mary E. Hoinkes, Member

Frederick Smith, Jr., Member