March 11, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M[redacted] E[redacted] A[redacted]

This case is before the Board of Appellate Review on an appeal brought by M[redacted] E[redacted] A[redacted] from an administrative determination of the Department of State that she expatriated herself on May 5, 1953 under the provisions of section 349(a)(6), now 349(a)(5), of the Immigration and Nationality Act by making a formal renunciation of her United States citizenship before a consular officer at the United States Embassy in San Salvador, El Salvador. 1/

The certificate of loss of nationality issued in this case was approved by the Department on July 24, 1953. The appeal was entered in June 1985, a delay of approximately 32 years. The initial issue to be determined is whether the appeal was filed within the limitation prescribed by the applicable regulations. It is our

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1/ Section 349(a)(6), now 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; . . .

Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of section 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of section 349(a) as paragraph (5).

conclusion that the appeal was not timely filed and is therefore barred. Lacking jurisdiction we will dismiss the appeal.

I

Appellant became a United States citizen by birth at [redacted], [redacted] [redacted] She also acquired the citizenship of El Salvador through her parents who were citizens of that country.

Appellant alleges that on May 5, 1953 she went to the Embassy at San Salvador seeking documentation enabling her to travel to tne United States to visit her father-in-law who, she alleges, was gravely ill at tne time. In her consultation with a member of the consular staff, appellant maintains tnat she was informed tnat tne processing of an application for a United States passport would take approximately three months. She states that she was unwilling or unable to delay her trip so long.

The record shows that appellant made a formal renunciation of her United States citizenship at the Embassy in San Salvador before a consular officer of the United States. The oath of renunciation read. in part as follows:

> ...I desire to make a formal renunciation of my American nationality as provided by section 349(a)(6) of the Immigration and Nationality Act, and pursuant thereto I hereby absolutely and entirely renounce my nationality in the United States and all rights and privileges thereunto pertaining and abjure all allegiance and fidelity to the United States of America.

Following her renunciation, the Embassy prepared a certificate of loss of nationality as required by section 358 of the Immigration and Nationality Act. 2/ The Embassy certified that appellant,

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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 Unite States has reason to believe that a person while in a foreign state ha lost his United States nationality under any provision of chapter 3 of chis title, or under any provision of chapter IV of the Nationality Ac 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 tne 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.

E[redacted] M[redacted] A[redacted] as she was then known, acquired United States citizenship by virtue of her birth in the United States; and that she expatriated herself under the provisions of section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act by making a formal renunciation of her United States nationality.

The Department approved the certificate on July 24, 1953, and on September 22, 1953 forwarded to the Embassy a copy of the approved certificate of loss of nationality for delivery to appellant. There is no further record of subsequent actions until 1978.

It appears that appellant, at a later time, obtained an El Salvador passport, and on June 23, 1978, received from the American Embassy at San Salvador a multiple entry non-immigrant visa to the United States. The visa was valid until June 23, 1982.

In January 1980, while residing in the United States, appellant obtained a United States passport from the Houston Passport Agency. When she sought to renew her passport in January 1985, the Department recognized that her 1980 passport had been issued in error. On March 5, 1985, pursuant to instructions from the Department, the Houston Passport Agency informed appellant that her previous passport had been issued in error because she was not a United States citizen at the time of its issuance;that she had not reacquired United States citizenship; and that her recent passport application was denied.

Appellant gave notice of appeal to this Board on June 8, 1985 from the Department's 1953 administrative determination of loss of nationality. Appellant contends that she did not renounce her citizenship voluntarily; she was coerced into doing so.

The Department, in transmitting the administrative case record to the Board,submitted the following:

> This Office has reviewed this file as well as her recent submissions in support of her appeal. We believe that her appeal is barred by the reasonable time requirement of the Board's regulations: 22 C.F.R. 50.60 (1967). She has not provided any compelling reasons why she waited thirty-two years before filing the appeal that would excuse the unreasonable delay.
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> The Department has concluded that based on the evidence *Mrs.* A[redacted] has intended /sic/ to relinquish her claim to U.S. citizenship when she formally renounced her U.S. citizenship in El Salvador. She contends that she was never notified of her loss of nationality.

However, it cannot be doubted that appellant knew she had lost her nationality when she formally renounced her citizenship.

We have examined the case record and find that the holding of loss represents the Department's conclusion that Mrs. [redacted] relinquished her United States citizenship when she renounced her citizenship in El Salvador. We see nothing in the record that causes us to question that conclusion.

II

The initial issue confronting the Board is whether it has jurisdiction to consider an appeal entered 32 years after the Department's determination of loss of nationality.

In 1953 when the Department approved the certificate of loss of nationality the rules of procedure of the then existing Board of Review of Loss of Nationality of the Passport Office (predecessor of the Board of Appellate Review) had no provision relating to time limitation on an appeal. Where no limitation is specified, however, it is customary to apply the common law rule, that being that the right of appeal from an adverse decision should be exercised "within a reasonable time" after receipt of notice of such holding.

In 1966 when federal regulations were promulgated for the Board of Review on the Loss of Nationality, an appeal from an adverse determination of nationality was required to be taken within a reasonable time after receipt of notice of the holding. 3/ This

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

limitation was incorporated in the regulations promulgated when the Board of Appellate Review was established in 1967. 4/

In 1979 the Board's regulations were revised and amended. They provide that an appeal be made within one year after approval by the Department of the certificate of loss of nationality. 5/ Moreover, the regulations provide that an appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time.

Believing that the current regulations as to the time limit on appeal of one year after approval of the certificate of loss of nationality should not be applied retroactively, we are of the view that the standard of "reasonable time" should govern in the case.

Under the limitation of reasonable time a person who contends that the Department's determination of loss of nationality is contrary to law or fact must file his appeal within a reasonable time after receipt of notice of such determination. If the person

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4/ Section 50.60, Title 22, Code of Federal Regulations (1967-1979) 22 CFR 50.60, 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.

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

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.

does not file his or her appeal within a reasonable time after receipt of the Department's adverse decision, the appeal would be time-barred, and the Board would lack jurisdiction to consider it on the merits. Timely filing is thus mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). 6/

What is reasonable time has been exhaustively defined by the Courts. 7/

How long is a "reasonable time" depends on the circumstances of each case. It is such length of time as may fairly be properly and reasonably allowed or required, having regard for the nature of the act or duty, or the subject matter, and the attending circumstances. It has been held to mean as soon as the circumstances of the parties will permit, but a person may not determine a time suitable to himself. Whether an appeal has been filed within a reasonable time

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6/ See also the opinion of the Attorney Gereral in the citizenship case of Claude Cartier in 1973:

> The Secretary of State did not confer upon the Board the power to...review actions taken long ago. 22 CFR 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-349-P, February 7, 1973.

7/ 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); Ashford v. Steuart, 657 F. 2d 1053 (9th Cir. 1981), 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).

Ashford v. Steuart states the rule succinctly:

> 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). 657 F. 2d at 1055.

depends on whether a legally sufficient reason has been presented for the delay. A protracted delay, particularly one that is unexplained and that is prejudicial to the interests of the opposing party, is fatal.

The rationale for allowing a reasonable time in which to bring an appeal is that one should be permitted sufficient time to prepare a case showing that the Department's holding of loss of nationality is contrary to law or fact. At the same time, the rule presumes that the appellant will prosecute an appeal with the diligence of a reasonably prudent person. Reasonable time begins to run from the time an appellant received notice of the Department's holding of loss of nationality -- not sometime later when for whatever reason a person is moved to seek restoration of his or her citizenship.

Through her counsel, appellant argues that her appeal should be considered timely filed. She argues that:

> This appeal is timely, although the loss of nationality occurred 32 years ago. Appellant was never a party to any proceeding for expatriation and had no notice of or opportunity to be heard at the proceeding that resulted in the loss of nationality on July 24, 1953. The first notice that appellant had of said loss of nationality was on May 2, 1985, when her passport renewal application was denied on that ground. Therefore her right of appeal accrued on May 2. 1985, the date she received notice. ...

We are not persuaded that the foregoing explanation is sufficient to excuse the delay involved in taking this appeal. And we attach no weight to appellant's unsupported contention that she was not aware of the Department's determination of loss of nationality until May of 1985.

A copy of the approved certificate of loss of appellant's nationality was sent to the Embassy at San Salvador in September of 1953 to be forwarded to appellant. Absent evidence to the contrary, there is a legal presumption that officials of the Department and the Embassy duly complied with their instructions, that the certificate arrived in San Salvador, and was forwarded in the correct manner to appellant. Boissonnas v. Acheson, 101 F. Supp. 139 (S.D.N.Y. 1951). She has offered no evidence to rebut that presumption.

Even if appellant did not receive the certificate, she can hardly have been in doubt that the action she had taken in 1953 would effectively terminate her United States citizenship. The language of the renunciation of United States citizenship to which appellant

subscribed is clear and explicit. Regardless of the circumstances surrounding her performance of the proscribed act, which she was perfectly free to address in her appeal to this Board or its predecesso she should have realized that her renunciation of United States nationality jeopardized her status as a citizen of tnis country. And it was her responsibility *to* take the initiative *to* inquire as to her standin

In addition, because appellant claimed the right to a U.S. passport in 1985, and was denied the issuance of one, does not make her appeal timely. The proper basis for an appeal in this case is not the denial of a passport; it is the underlying determination of loss of appellant's citizenship made in 1953. 8/ Thus the limitation of "reasonable time" began to run in 1953 not 1985.

At no time between 1953 and 1985 did appellant take any steps to dispute the Department's holding of loss of citizenship by filing an appeal through the proper channels, And even were we to accept that appellant's obtention of a United States passport in 1980 manifested a desire to challenge the Department's holding of loss *of* nationality, we are unable to say that a delay of 27 years in bringing an appeal is reasonable in the circumstances of appellant's case.

Whether it be thirty-two or twenty-seven years after the event, the Department cannot but be seriously prejudiced in its ability, given the meager record, to controvert appellant's allegations that attending circumstances forced her into renouncing her United States citizenship, and that at the relevant time it was not her intention to relinquish her American nationality when she performed the proscribed act.

The essential purpose of a limitation on appeal is to compel the timely exercise of the right while recollection of the events surrounding the performance of an expatriating act are still fresh in the minds of the parties involved. That is not the situation with which we are now faced,

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8/ The Board lacks jurisdiction to consider an appeal from the denial of a passport on grounds of non-citizenship. 22 C.F.R. 51.80.

Here, there has been no showing of a requirement for an extended period of time to prepare an appeal, or any obstacle beyond appellant's control preventing her from taking one in a timely fashion. In our view, appellant's delay in taking an appeal is unreasonable.

III

Upon consideration of the foregoing, we conclude that the appeal was not brought within a reasonable time after appellant received notice of the Department's holding of loss of her United States citizenship and her right to appeal accrued. Accordingly, the appeal is time-barred, and the Board lacks jurisdiction to entertain it, The appeal is therefore dismissed,

Given our disposition of the ease, we do not reach the other issues that may be presented,

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member

March 19, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: Richard Hughes Marshall, Jr. -- On Motion by Appellant for Reconsideration

The Board of Appellate Review on December 13, 1985 affirmed the Department of State's determination dated August 2, 1983 that Richard Hughes Marshall, Jr. expatriated himself on February 14 1975 under the provisions of section 349(a)(1) of the and Nationality Act by obtaining naturalization in Canada upon his own application.

On January 11, 1986 appellant filed a motion for reconsideration of the Board's decision. 1/

Marshall contends that the Board did not take due account of his arguments that economic pressures forced him to seek Canadian citizenship and that he had carefully explored alternatives but to no avail.

1/ Section 7.9 of Title 22, Code of Federal Regulations, 22 CFR 7.9, provides as follows:

Sec. 7.9 Motion for Reconsideration.

The Board may entertain a motion for reconsideration of a Board's decision, if filed by either party. The motion shall state with particularity the grounds for the motion, including any facts or points of law which the filing party claims the Board has overlooked or misapprehended, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Board by the party filing the motion, Oral argument on the motion shall not be permitted. However, the party in opposition to the motion will be given opportunity to file a memorandum in opposition to the motion within 30 days of the date the Board forwards a copy of the motion to the party in opposition. If the notion to reconsider is granted, the Board shall review the record, and upon such further reconsideration, shall affirm, modify, or reverse the original decision of the Board in the case.

The Department did not file a memorandum in opposition to appellant's motion, stating that it believed its position had been fully stated in its brief on the appeal.

Upon examination of appellant's motion for reconsideration, the Board is of the view that the motion fails to disclose any facts or points of law that the Board may have overlooked or misapprehended in reaching its decision, or any new matter that would warrant reconsideration of its decision of December 1, 1985. Accordingly, appellant's motion for reconsideration is hereby denied.

Alan G. James, Chairman

G. Jonathan Greenwald, Member

Mary Elizabeth Hoinkes, Member