September 10, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This is an appeal from an administrative certification of the United States Consulate General at Jerusalem that appellant, [redacted] expatriated himself on December 27, 1938 by being naturalized as a citizen of Palestine. 1/

The Consulate General certified on February 9, 1939 that E[redacted] expatriated himself. He entered an appeal from the Consulate General's determination on September 12, 1985. No good cause having been shown why appellant could not have moved many years earlier to challenge the holding of loss of his nationality, we conclude that the appeal is time-barred, and accordingly dismiss it for want of jurisdiction.

I

[redacted] formerly named [redacted], was born at [redacted] and so acquired United States citizenship. His parents, who had been born in Russia, were naturalized as United States citizens in 1921. According to appellant, he lived in Milwaukee from 1917 to 1932. In 1932 he was included in his father's passport and emigrated with him to Palestine. He purportedly studied at an agricultural college and joined a Kibbutz in 1936. He was issued a passport by the Consulate General at Jerusalem in June 1936. In his application, E[redacted] stated that he wanted the passport for travel to the United States. On December 27, 1938 he became a naturalized citizen of Palestine as a consequence of circumstances which he has described as follows:

---

1/ The statutory provision under which Ephrat expatriated himself was section 2 of the Act of March 2, 1907, 8 U.S.C. 17, which read as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that ... Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

> The Jewish Agency appealed to all organized settlements such as Kibbutz and Moshav to make decisions in their General Assemblies that their American members apply for Palestinian Citizenship, to prove to the British Mandatory government that American volunteer pioneers, such as myself, were there to stay. Being a full member of the Kibbutz obliged me to comply with the decision.

The Palestine Department of Migration informed the Consulate General on February 7, 1939 that [redacted] formerly A[redacted] Z[redacted] (appellant states that he changed his name legally in 1938), had acquired Palestine citizenship by naturalization on December 27, 1938. On February 9, 1939 a consul executed a certificate of expatriation in the name of A[redacted] Z[redacted]. In it he attested that Z[redacted] acquired United States citizenship at birth and that he expatriated himself by being naturalized as a citizen of Palestine. 2/ The consul sent the certificate to the Department under cover of a memorandum in which he reported that: "The expatriate's passport, number 62, has been surrendered to this Office and will be destroyed...." After receipt of the certificate, the Department prepared a "Lookout" in the name of A[redacted] Z[redacted].

Forty-five years later (January 1984) the Embassy at Tel Aviv cabled the Department to report that [redacted] wished to clarify his citizenship status, "as he shortly intends to travel to the U.S." The Embassy stated that the computer indicated a hold should be placed on issuance of a passport to [redacted] and requested information about [redacted] case.

The Department informed the Embassy about [redacted] expatriation and instructed it not to issue him a passport. However, [redacted] was issued a visa in his Israeli passport and travelled to the United States. A widower, he married a United States citizen and lives in Arizona. He entered an appeal on September 12, 1985 after having been informed by the Department through Senator DeConcini (who had made inquiries on his behalf)

---

2/ The consul did not cite the applicable section of the statute under which loss of nationality occurred, but it is obvious that the provisions of section 2 of the Act of March 2, 1907 applied. Text supra, note 1.

about the Board of Appellate Review. "Mr. E[redacted] should be aware," the Department wrote the Senator, "that the Board would only have jurisdiction to hear his appeal if they determine that it was filed within a reasonable time."

E[redacted]'s principal contention for restoration of his citizenship is that:

> I applied for Palestinian Citizenship under duress of the Kibbutz General Assembly decision and was unaware that I was renouncing my American Citizenship as a result of that.

II

Obviously, the first issue presented here is whether the Board may assert jurisdiction over an appeal taken so long after a determination was made that E[redacted] expatriated himself. The sheer passage of so many years could warrant our dismissing the appeal on those grounds alone. Nonetheless, we are prepared to consider whether there might be any extraordinary extenuating reasons why we should entertain the appeal.

It was not until 1949 that a body to hear appeals by expatriates was established by the Department of State. 3/ First named the Board of Review of the Passport Division, it was later named the Board of Review on the Loss of Nationality. There was no prescribed time limit on appeal to the Board until 1966, when federal regulations were promulgated prescribing that an appeal might be taken "within a reasonable time" after the person affected received notice of the Department's determination of his expatriation. 4/

---

3/ In 1941 a Board of Review was established in the Passport Division. Its function was to review and recommend approval or not of certificates of expatriation upon submission by consular officers. It was not then a true appellate body In 1949 the Department gave the Board appellate responsibilities. The Board was later renamed Board of Review on the Loss of Nationality.

4/ Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60 (1966).

When the Board of Appellate Review was established in 1967, the federal regulations promulgated for the new Board also prescribed a limitation of "within a reasonable time." 5/ Consistent with the Board's practice in cases where determination of loss of nationality was made prior to November 30, 1979, the effective date of the present regulations, 6/ the norm of reasonable time will govern in the case now before us.

The essential question therefore is whether [redacted] took his appeal within a reasonable time after he received, or may be deemed constructively to have received, notice of loss of his nationality.

What constitutes reasonable time depends on the facts of the case, taking into account a number of considerations; the interest in finality, the reason for the delay, and prejudice to other parties. Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir. 1981). See also Lairsey v. Advance Abrasives Co., 542 F.2d 928, 940 (5th Cir. 1976), citing 11 Wright & Miller, Federal Practice & Procedure section 2866 at 228-229:

> 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.

[redacted] contends that his delay should not be deemed unreasonable because:

> (1) In 1952 when I was sent to study in the United States I became aware for the first time that I had lost my American citizenship, not having an occasion until then to travel abroad.

---

5/ 22 CFR 50.60 (1967-1979).

6/ 22 CFR 7.5(b)(1) provides a limitation of one year after approval of a certificate of loss of nationality.

> (2) In the past I have made two requests for repatriation directly to Presidents Johnson and Nixon. The appeals were forwarded, by the two President's offices to the American Embassy in Tel Aviv, Israel from whom I received negative answers....
>
> Not having known of the possibilities of appealing to your Board and not having been informed as to such by the American Embassy I gave up all hope.

Regarding [redacted] alleged communications with the Embassy, the Board wrote [redacted] observe that:

> You were aware as early as 1952 that you had lost your American citizenship, and have stated that you sought to regain your citizenship status during the Johnson and Nixon administrations. Moreover, we note that on both occasions you were referred to the United States Embassy at Tel Aviv for assistance. And absent evidence to the contrary, we must presume that they informed you of your right of appeal to this Board.

[redacted] replied as follows:

> Since you in your letter of Oct. 10 in par 3 state in the last sentence "and absent evidence to the contrary, we must presume that they informed you of your right to appeal to this Board" I can only say that you can get the evidence that the American Embassy ~~did not~~ inform me of the right to appeal by demanding copies of the letters (the Am Embassy sent to me at those times) from the Embassy in Tel Aviv.
>
> Unfortunately I did not see fit to retain the letters since I gave up hope - the result of not knowing and not having been informed of the right of appeal. (Emphasis in original).

We are unable to agree that [redacted] moved as soon as he was able to do so. Plainly, he knew in 1952 he had lost his citizenship. Nor would it be unreasonable to assume that he knew in 1938 he lost it. When he obtained naturalization he apparently surrendered his U.S. passport to the British authorities, an act that should have alerted him to the fact he had transferred his allegiance. Even if no appeal in the current Sense was open to [redacted] at that time, he could have taken some challenging action anytime after 1939 to assert a claim to United States citizenship, but did not do so.

We assume that when [redacted] visited the Embassy in 1952 he did so to obtain a visa to travel to the United States and that he stated on the visa application that he had been born in the United States. If he had done so, a consular officer would presumably have raised a question about his citizenship status. Had [redacted] wished to challenge loss of his citizenship, he then had the opportunity to do so and had he asked about possible recourse would have learned there was a Board of Review on the Loss of Nationality.

We are unable to accept without more that if [redacted] made requests for "repatriation" in the 1960's and 1970's, the Embassy would not have informed him of the right of appeal (from 1967 onwards) to this Board. Consular officers had been under the injunction since the early 1950's to inform expatriates of the right of appeal. Here we may assume [redacted] was told of the right, absent evidence to the contrary. In law it is presumed that public officials execute their duties faithfully and correctly, absent evidence to the contrary. Boissonas V. Acheson, 101 F.Supp. 138 (S.D.N.Y. 1951).

Assessing the meager evidence in this case we find no sufficient reason for [redacted] delay in asserting a claim to United States citizenship by petitioning this Board or its predecessor for relief.

Furthermore, there is patent prejudice to the Department by [redacted] failure to move sooner. His central argument for restoration of his citizenship is that he was pressured in 1938 to obtain naturalization in Palestine. To ask the Department to address the issue of duress at this late date when no contemporary evidence of duress exists and the consul who handled his case is dead would be prejudicial in the extreme.

Finally, given the absence of a legally sufficient reason for the delay and obvious prejudice to the Department the interest

nality and stability of decisions must have paramountcy. [redacted] is chargeable with laches. The appeal is time-barred. The Board lacks jurisdiction to hear and decide the case. The appeal is therefore dismissed.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Howard A. Meyers, Member