October 14, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF M[redacted] T[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, M[redacted] T[redacted] expatriated himself on July 13, 1971 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 his United States nationality before a consular officer of the United States at Osaka-Kobe, Japan in the form prescribed by the Secretary of State. 1/

More than fourteen years after he received notice that the Department had approved the certificate of loss of nationality that was executed in his name, appellant instituted this appeal. A threshold issue is presented by appellant's very considerable delay in taking the appeal: whether the Board may assert jurisdiction over an appeal so long delayed. It is our conclusion that since no sufficient reason for the delay has been shown, the appeal is barred by the passage of time and so must be dismissed for want of jurisdiction.

I

T[redacted] was born at [redacted] and so acquired United States nationality. Since his parents were citizens of Japan, he also acquired the nationality of that country. He lived for a little over one year in the United States, until September 1954 when his parents returned with him to Japan. His parents registered T[redacted] as a United States citizen at the Consulate General in Osaka-Kobe in 1959. In 1962 that office issued him a United States passport valid to 1965. He apparently spent the year 1962-1963 in the United States.

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Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph 5 of section 349(a) of the Immigration and Nationality Act and re-designated paragraph (6) of section 349(a) as paragraph (5).

Ta[redacted] visited the Consulate General at Osaka-Kobe on June 15, 1971 with his mother and "expressed his desire to make formal renunciation of the nationality of the United States." 2/ The consular officer who interviewed T[redacted] further reported to the Department that:

> Inasmuch as he was a minor under the age of 18 at that time, the consular officer explained to him fully the nature and meaning of the oath of renunciation and the consequences of his action and suggested that he take the matter into his careful reconsideration. He was also told about the necessity of registration under Selective Service Act upon reaching the age of 18.
>
> On July 13 (he is now over 18 years of age), Mr. T[redacted] visited the Consulate General again with his mother and stated that he is an only son and wishes to reside in Japan permanently with his Japanese parents and after due consideration, he decided to renounce the nationality of the United States. He claims that his renunciation is not for the purpose of evading military service or training. 3/

[redacted] executed a statement of understanding regarding the consequences of making a formal renunciation of United States nationality which was witnessed by his mother and an employee of the Consulate General. He signed the statement in English, attesting that he had read a Japanese translation of it. In the statement he averred, inter alia, that he was acting voluntarily; that the serious consequences of formal renunciation of his United States nationality had been explained to him by a consular officer; and that he fully understood those consequences. [redacted] did not avail himself of the opportunity to make a statement of the reasons for his renunciation, There then followed [redacted] signing of the oath of renunciation in the presence of the consular officer and the afore-mentioned witnesses.

2/ Report of Consulate General to the Department dated July 15, 1971.

3/ Id.

In accordance with the requirements of the statute, the consular officer then executed a certificate of loss of nationality in appellant's name. 4/ The consular officer certified that [redacted] acquired the nationality of the United States at birth; that he made a formal renunciation of his United States nationality on July 13, 1971; and thereby expatriated himself under the provisions of section 349(a)(6) of the Immigration and Nationality Act.

The Department approved the certificate on August 12, 1971. Approval of the certificate 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.

Appellant states that he moved to the United States in 1980 where he still lives. In September 1981 he applied for a United States passport at Boston. He telephoned the Department on March 25, 1982 to inquire about the status of his application. The official to whom he spoke made the following record of their conversation:

> I told him our records indicate that he lost his US citiz. I asked him if he could possibly recall what he did to lose his US citizenship.
>
> He said that he may have renounced in Japan due to Vietnam War.
>
> He seemed vague, evasive, and covering facts.
>
> He still wanted to know if he could get a US ppt as "someone" in Canada told him that he is entitled to one if he only presents a birth cert.

4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

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

> I told /sic/ birth in US normally endows citiz. on individual however, there are certain acts done overseas that adversely affect your US citiz.
>
> He said that he is in possession of a Japanese ppt.
>
> I told him we are in process of getting his '71 refusal & docs w/it.
>
> I asked him to complete a citiz. questionnaire & mail it into us. He can get one in Boston.
>
> We will contact him when we know more.

The record presented to us does not indicate whether [redacted] obtained and completed a questionnaire, as the Department official suggested he do. The next recorded development in his case was the Department's refusal of his passport application in August 1983. Two years later (July 1985) [redacted] again applied for a passport at Boston. As requested by the Department, he completed a form for determining United States citizenship. In it he explained as follows why he made a formal renunciation of his United States nationality:

> Prior to my 18th birthday my parents were informed by the American Consul in Japan that I would have to choose which country I wanted to be a citizen of - U.S. or Japan. My parents instructed me to choose Japanese citizenship and Japanese culture mandates that children be obedient and carry out their parents' wishes. On July 13, 1971, I unwillingly executed a /sic/ oath of Renunciation before a consular officer in Japan. My action was clearly involuntary and without the necessary intent for a valid act of expatriation.

4/ Cont'd.

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.

In response to a question whether he knew he might lose his United States citizenship, [redacted] stated that:

> At the time of this occurrence, I was unaware of my action's ramifications. I was only approaching eighteen years old, and I am doing what I always did, obeyed my parents' instructions.

The Department denied appellant's passport application in Ocotober 1985. He entered the appeal through counsel in February 1986. His substantive case is summed up in the following declaration of his father made on June 5, 1982 which reads in pertinent part as follows:

> ...Before he /appellant/ has reached the age of eighteen years, we were told by the staff of the American Consulate in Kobe that one can not keep two citizenships and he must choose one of them. We rather innocently accepted the advice without making the further effort to check the accuracy of the legal ground of the two countries, We then informed M[redacted] accordingly and told him that it is not possible to keep dual citizenship. According to our advise, /sic/ M[redacted] has unwillingly agreed to choose one of the two citizenships. In view of his parents'citizenship and his whole living and education, from the kindergarten to high school, took place in Japan, it was quite natural for him to choose Japanese citizenship. But we can testify that act was not based on any feeling to /sic/ against the United States. In fact if we knew he could maintain two citizenships we would advised [sic] him accordingly and he would have decided to maintain the dual citizenship. When we look back now, we should have made the thorough inquiry as to the exact legal implication of both countries U.S.A. and Japan to get the whole picture before we made advice to M[redacted]. M[redacted] was at the time a high school student and was having very cordial nature, followed the advice of the parents rather obediently. I believe above description is true to what actually had happened.

II

At the outset, the Board must determine whether, in the circumstances of this case, an appeal taken nearly 15 years after approval of the certificate of loss of nationality and appellant's right of appeal accrued may be deemed to have been timely filed.

In August 1971 when the Department approved the certificate of loss of nationality that was issued in this case, the federal regulations then in effect prescribed that an appeal be taken within a seasonable time after the affected party received notice of the Department's holding of loss of his or her nationality. 5/

The applicable regulations were amended and revised in November 1979, and require that an appeal be filed within one year of approval of the certificate of loss of nationality. 6/

Believing that the current regulations shortening the time limit on appeal should not apply retroactively, we will apply the standard of "reasonable time" in the instant case.

Under the limitation of "reasonable time", a person who contends that the Department's determination of loss of nationality in his case is contrary to law or fact must file a request for review within a reasonable time after notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be barred and the Board would lack jurisdiction to consider it. Timely filing is thus a condition precedent to the Board's proceeding to consider an appeal. United States v. Robinson, 361 U.S. 220 (1960); Costello v. United States, 365 U.S. 265 (1961).

5/ Section 50.60 of 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.

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

III

Whether appellant's delay in taking an appeal was reasonable or not depends on several factors. Reasonable time must be determined in light of all the circumstances of the particular case, taking into account the interest in finality, the reason for delay, and prejudice to other parties. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). Similarly, Lairsey v. The Advance Abraisives Company, 542 F.2d 928, 930 (5th Cir. 1976), quoting 11 Wright & Miller, Federal Practice and Procedure, Sec. 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.

The principal question to be answered is whether appellant "had some good reason for his failure to take appropriate action sooner."

Appellant does not contend that he did not receive a copy of the approved certificate of loss of nationality sometime in the late summer or early fall of 1971. Nor has he alleged that he was not advised by the Consulate General at Osaka-Kobe that he had a right to appeal the Department's determination to the Board of Appellate Review. 7/

[redacted] thus was on notice from the first that he had the right to appeal. He did not avail himself of the right until 1986. Why he did not is set forth in his reply to the Department's brief:

> Although Appellant did not file an appeal to his loss of citizenship until 1986, the circumstances in his case require the Board to view this case as being appealed within a reasonable time. When Appellant renounced his United States citizenship in Osaka Kobe,

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7/ In 1971 certificates of loss of nationality did not contain information about the right of appeal. Prior to 1972 such information was conveyed by means of a form letter sent to the expatriate by the consulate concerned, spelling out the procedure for taking an appeal. We may presume, in the absence of evidence to the contrary, that the Consulate General advised [redacted] of his right of appeal, as prescribed by 8 Foreign Affairs Manual 224.21 (procedures),

Japan, on July 13, 1971, he was barely eighteen years of age. Coming from a traditional Japanese family, Appellant was an obedient child who did as his parents instructed him. He and his parents were told in the consular office in Osaka Kobe that Appellant could not maintain dual citizenship. Neither Appellant nor his parents were fully aware of the ramifications his action would have. Appellant had, in effect, no choice to make because if he maintained United States citizenship, he would be immediately losing his Japanese citizenship and would be faced with parental opposition. Moreover, he was dependent upon his parents for financial and emotional support, therefore, he did not have any resouces /sic/ to come to the United States.

Even though Mr. [redacted] remained in Japan until 1980, he was still under strong parental influence, and never questioned the decision his parents had made for him. When he finally did question his parents' decision, he inquired about revoking his renunciation. However, he belived /sic/ the situation could best be rectified when he moved to the United States. He moved to the United States in 1980, and shortly thereafter, applied for a United States passport believing he could get one easily because of his birth in the United States. As soon as the passport was denied, he began to seek legal counsel. Once he secured counsel, there was a delay in obtaining all of the necessary documentation and preparing the case. Although the Board has held that a mistake in comprehending the law or government failure to inform as to the possibility of appeal, are not acceptable as excuses, (Abramson at 848 n. 127), /the reference is to Abramson, United States Loss of Citizenship Law after Terrazas: Decisions of the Board of Appellate Review, 16 N.Y.U. Journal of International Law and Politics, 928 (Spring 1984)/ we urge the Board to consider the aggregate effect of these factors in determining whether the delay should be excused. In light of the fact that Japanese culture dictates that children be obedient and carry out their parents' will, Appellant should not be penalized for having appealed his loss of citizenship years later. The special circumstances in this case require that it be heard despite the time lapse.

The reasons appellant proffers for his delay in taking an appeal are insufficient, in our view, to excuse his allowing so much time to pass before trying to recover his citizenship. He hints that he was constrained by his parents until 1980 from acting, but he has not documented that assertion. His father's statement of June 1982 does not even address the point. Although we accept that in Japanese culture deferrence to parental authority remains strong even after the age of majority, there is not a shed of firm evidence that [redacted] did not appeal earlier because he was discouraged or pressured not to do so by his parents. Nor do we note any other factors beyond his control that operated to prevent him from taking a timely appeal. Yet, appellant in effect urges the Board to disregard the limitation on appeal because of what he suggests are the merits of the appeal, This we may not do. 22 C.F.R. 7.2(a) does provide that "the Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it." We may not, however, construe the Board's authority under section 7.2(a) so as to nullify other preconditions established by 22 C.F.R. Part 7 for the Board to exercise jurisdiction over the merits of an appeal, including the requirement that an appeal be timely filed under section 7.5(b), or comparable provisions of predecessor regulations, Once the Board determines, as we have done here, that it lacks jurisdiction over an appeal as time barred, then the only proper course would be to dismiss the appeal. 8/

The rationale for a limitation on appeal in loss of nationality proceedings, whether it be "within a reasonable time" or a specific period, is to afford an appellant sufficient time to assert his or her contention that the decision of the Department was contrary to law or fact, and to compel the appellant to act while the recollection of events upon which the appeal is grounded is fresh in the minds of the parties involved. That is not the situation here. If we were to allow the appeal, the Department clearly would be prejudiced in attempting to rebut appellant's contentions (to support which he offers no independent evidence) that consular officials wrongly advised him that he would have to make a choice between his Japanese and American citizenship at age 18.

Here the period of "within a reasonable time" commenced to run with appellant's receipt of notice of loss of nationality in 1971, not years later when he belatedly decided it would be convenient to appeal. In our opinion, appellant's delay of nearly 15 years in taking an appeal was unreasonable in the circumstances of this case, The rule on reasonable time does not contemplate that an appellant may, without justification, choose a time suitable to himself to assert a right. In re Roney, 139 F.2d 175 (7th Cir. 1943).

8/ Opinion of Davis R. Robinson, Legal Adviser, Department of State, December 27, 1982. Excerpted in American Journal of International Law, Vol. 77 No. 2, April 1983.

Lastly, the interest in finality and stability must, in the circumstances of this case, be accorded considerable weight.

IV

Upon consideration of the foregoing, it is our conclusion that appellant did not file his appeal within a reasonable time after receiving notice of the Department's holding of loss of his United States nationality. The appeal is thus time barred, and the Board lacks jurisdiction to consider it. Accordingly, the appeal is hereby dismissed.

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Frederick Smith, Jr., Member