April 14, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: R[redacted] K[redacted] S[redacted]

This is an appeal from an administrative holding of the Department of State that appellant, R[redacted] K[redacted] S[redacted], expatriated himself on January 15, 1973, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in the Philippines upon his own application. 1/

The Department of State (the "Department") made its determination of loss of nationality on February 18, 1975; the appeal was taken on June 20, 1985. The first issue to be decided is whether the appeal was taken within a reasonable time, as prescribed by the applicable regulations. We find that the appeal was not timely filed and will dismiss it for want of jurisdiction.

I

Appellant was born in the [redacted] on [redacted]. His father and mother at the time of his birth were citizens of the United States, and, appellant, therefore, acquired the nationality of the United States. 2/ His parents were educators serving in the Philippines under the United States Civil Service.

1/ Prior to November 14, 1986, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read as follows:

> 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 --
>
> (1) obtaining naturalization in a foreign state upon his own application, . . .

The Immigration and Nationality Act Amendments of 1986, PL 99-653, approved November 14, 1986, amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

2/ Section 1993 of the Revised Statutes (1878) read:

> All children heretofore born or hereafter born out of the limits of and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States,

Section 1993 (1878) was revised from the Act of April 14, 1802, 2 Stat. 153, and the Act of February 10, 1855, 10 Stat. 604. Section 1993 (1878) was subsequently amended by the Act of May 24, 1934, 48 Stat. 797, and thereafter repealed by the Nationality Act of 1940, 54 Stat. 1172.

Appellant has always resided in the Philippines, excepting a period from 1940 to 1946, During that time, he attended high school in California, enlisted in the U.S. Army (1942) at the age of 18, received fighter pilot training, became an officer in the Army Air Corps (1944), and served in the Asiatic-Pacific theater of war. He received several military awards and decorations.

Following his separation from military service in 1946, appellant returned to the Philippines to assist his parents in the development and management of the family real estate holdings in the municipality of Malabang, province of Lanao del Sur. After his father's death in 1963, appellant took over full management of the family properties and the development of other agricultural properties that he subsequently acquired.

Appellant filed a petition for Philippine citizenship with the Court of First Instance of Lanao del Sur in January 1968, The court granted the petition on October 22, 1970.

In a visit to the American Embassy at Manila (the "Embassy") on November 6, 1972, appellant discussed his prospective naturalization in the Philippines. According to the Embassy records;

> ...he called at the Embassy and informed the consular officer that he would like to renounce his United States citizenship, The officer urged him to think over the matter carefully, because such action was a serious and irreversible matter. He stated that he had done so, and wished to renounce his United States citizenship at the behest of the Philippine authorities in connection with the application for naturalization he had made, He was then given a letter stating that at the time he obtained naturalization in a foreign state, he would automatically lose his United States citizenship under Section 349(a)(1) of the Immigration and Nationality Act of 1952, as amended, No further action on his part would be required.

During the course of the interview, he is also said to have informed the consular officer of his reluctance to divest himself of United States nationality but that he was acquiring Philippine citizenship because of his long residence in the Philippines and to safeguard his property interests in the Philippines. The impending termination of the Parity Amendment to the Philippine Constitution on July 3, 1974, he believed, would subject his family's real estate properties to escheat or reversion proceedings in favor of the Philippine Government.

The so-called Parity Amendment to the Philippine Constitution, to which appellant referred, was an Ordinance appended to the Constitution, as of September 18, 1946. It expressly extended to United States citizens and to business enterprises owned or controlled by United States citizens the privilege to acquire and exploit agricultural lands of the public domain, and other natural resources of the Philippines, and to operate public utilities. As originally drafted, the Philippine Constitution reserved these privileges to Filipinos and entities owned or controlled by them. The Parity Amendment prescribed that the privileges would "in no case" extend beyond July 3, 1974. 3/

Appellant returned to the Embassy on November 29, 1972, and obtained a United States passport that was valid to 1977.

3/ On August 17, 1972, the Philippine Supreme Court in Republic of the Philippines and/or the Solicitor General v. William H. Quasha, 46 Supreme Court Reports Annotated 160 (1972), determined the scope and duration of the rights acquired by American citizens and corporations controlled by them under the Parity Amentment.

Quasha, a United States citizen, who owned a parcel of land with improvements thereon in Makati, province of Rizal, sought a declaration of his rights under the Parity Amendment. He contended that his acquisition of such private property was valid and that the ownership of such private property during the effectivity of the Parity Amendment continued even beyond July 3, 1974, when the amendment ceased to be effective,

The court stated that the Parity Amendment gave no right to United States citizens to validly acquire ownership of private agricultural land in the Philippines. However, the court said, even assuming such acquisition of private agricultural land as valid and constitutional, the rights of United States citizens expired on July 3, 1974, The court declared that under the Parity Amendment citizens of the United States and corporations and business enterprises owned or controlled by them could not acquire and own, except in cases of hereditary succession, private agricultural lands in the Philippines, and that all other rights acquired by them under the Parity Amendment would expire on July 3, 1974.

On January 15, 1973, before a judge of the Court of First Instance of Lanao del Sur, appellant subscribed and swore to an oath of allegiance to the Republic of the Philippines. 4/ The taking of the oath completed the naturalization proceedings. Appellant was admitted as a citizen of the Philippines and given a certificate of naturalization, Thereafter, he informed the Embassy of his newly acquired Philippine citizenship, and surrendered his United States passport for cancellation.

The Embassy prepared, on November 15, 1974, a certificate of loss of United States nationality in appellant's name, in compliance with the provisions of section 358 of the Immigration and Nationality Act. 5/ The Embassy certified that appellant acquired United States nationality by virtue of his birth in the Philippines to United States citizen parents, obtained naturalization in the Philippines upon his own application, and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

4/ Appellant took the following oath of allegiance:

> I, [redacted] solemnly swear that I renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to the United States of America of which at this time I am a subject; that I will support and defend the Constitution of the Philippines and that I will obey the laws, legal orders and decrees promulgated by the duly constituted authorities of the Republic of the Philippines, and I hereby declare that I recognize and accept the supreme authority of the Philippines and will maintain true faith and allegiance thereto and that I impose this obligation upon myself voluntarily without mental reservation or purpose of evasion.
>
> SO HELP ME GOD.

5/ 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 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.

The Department approved the certificate on February 18, 1975, approval constituting an administrative holding of loss of nationality from which an appeal, properly and timely filed, may be taken to this Board, The Embassy forwarded a copy of the approved certificate of loss of nationality to appellant by letter dated March 11, 1975, and informed him of his right of appeal to the Board of Appellate Review, The reverse side of the certificate contained information on appeal procedures.

On June 30, 1985, ten years later, appellant entered this appeal from the Department's determination of loss of nationality, He contends that he was consfrained to obtain naturalization in the Philippines in 1973 because of the consequences that would ensue, with respect to his real estate holdings and property interests, if he were not a Philippine citizen, when the Parity Amendment to the Philippine Constitution would expire (July 3, 1974). He also contends that he did not intend to relinquish his United States citizenship by obtaining naturalization.

II

At the outset, we are confronted with the question of the timeliness of the appeal, If the appeal was not filed within the prescribed period of time, the Board would lack jurisdiction to consider the case, The courts have consistently held that the taking of an appeal within the prescribed time limitation is mandatory and jurisdictional. 6/

Under existing regulations of the Department, the time limit for filing an appeal is one year after approval of the certificate of loss of nationality, 7/ The regulations require that an appeal filed after one year be denied unless the Board determines for good cause shown that the appeal could not have been filed within one year after approval of the certificate, 8/ These regulations, however, were promulgated on November 30, 1979, and were not in force in 1975 at the time the Department approved the certificate of loss of nationality that was issued here.

The 1975 regulations on filing an appeal had the following provision:

6/ See United States v. Robinson, 361 U.S. 220 (1960); Costello v. United States, 365 U.S. 265 (1961).

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

8/ Section 7.5(a) of Title 22, code of Federal Regulations, 22 CFR 7.5(a).

> 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. 9/

It is generally recognized that a change in regulations shortening a limitation period, as existing regulations prescribe, operates prospectively, in the absence of an expression of intent to the contrary, If a retrospective effect were given, an injustice might result or a right that was validly acquired under former regulations might be disturbed. In the circumstances, we consider the limitation in effect in 1975 to govern in the instant case, and not the current limitation of one year after approval of the certificate of loss of nationality.

Thus, a person, who contends that the Department's holding of loss of nationality is contrary to law or fact, is required to take an appeal from such holding within a reasonable time after receipt of notice of the holding, If the appeal is not initiated within a reasonable time, the appeal would be barred by the passage of time and the Board would have no alternative but to dismiss it for lack of jurisdiction. The limitation of "within a reasonable time" is fundamental to the Board's exercise of jurisdiction in this case. 10/

The determination of what constitutes a reasonable time depends on the facts and circumstances in a particular case, Chesapeake and Ohio Railway v, Martin, 283 U.S. 209 (1931). Generally, a reasonable time means reasonable under the circumstances, It has been held to mean as soon as circumstances will permit, and with such promptitude as the situation of the parties and the circumstances of the case will allow. This does not mean, however, that a party be allowed to determine "a time suitable to himself." In re Roney, 139 F.2d 175, 177 (1943). What is a reasonable time also takes into account the reason for the delay, whether the delay is injurious to another party's interest, and the interests in the repose, stability, and finality of the prior decision. Ashford v. Steuart. 657 F.2d 1053, 1055 (9th Cir. 1981). See also Lairsey v. Advance Abrasives Co.,

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

10/ The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

> 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 expiration.

Office of Attorney General, Washington, D.C. File: CO-349-P, February 7, 1972.

542 F.2d 928, 940 (5th Cir. 1976), citing 11 Wright & Miller, Federal Practice and Procedure section 2866 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.

Here, as we have seen, the Embassy forwarded to appellant, on March 11, 1975, a copy of the certificate of loss of nationality and informed him of his right to take an appeal from the Department's adverse decision to this Board. On the reverse of the certificate, there was also printed information about appeal procedures. Appellant did not enter an appeal until June 20, 1985.

Appellant recognized that considerable time has elapsed since the Department's determination of loss of United States citizenship. He explained the delay, in his letter of appeal, as follows:

> ...The undersigned appellant has always been under the honest impression that since I never had the intention to relinquish my U.S. citizenship there would be no need for me to make an appeal. It was only when I and my wife travelled to the United States last April 1984 that I became aware of the need for me to take steps to clarify my U.S. citizenship. During the clearing process in the Miami airport my attention was called by the port immigration officer I checked through as my wife who is an American citizen had to separate from me to pass the gate reserved for incoming passengers who are American citizens while the undersigned had to join incoming foreigners. It was in this incident that I had been advised to clarify my status as a U.S. citizen. Upon our return to the Philippines from this trip I came personally to the U.S. Embassy in Manila in June 3, 1985 for the sole purpose of clarifying my status as a U.S. citizen as I planned to travel again to the United States shortly. Then and there I came to learn for the first time that an appeal was necessary for me to clarify my status and for the purpose of removing any doubt regarding my U.S. citizenship, hence this appeal.

Appellant also asserted, in a letter to the Board, dated December 4, 1985, that the security conditions in the area, where he lived and the family property interests were located, hampered

his ability to make an appeal earlier. He stated that, commencing in 1971, he faced overwhelming problems of how to be able to survive in the face of continuous violence and serious threats to peace and order. He said that during the period from the time martial law was imposed in the Philippines in September 1972, until it was lifted in January 1981, his time was occupied "by both direct and indirect attack" on the family properties, and that his concern about survival was aggravated by the fact "that as foreigners we lived in the center of purely Filipino-Muslim Community at a time and during a period where duly constituted authorities were seriously threatened in preserving the majesty of the law." These uncertain conditions, he said, "had immensely contributed to the occupation of my time to ever think of filing an appeal regarding my U.S. citizenship."

It is appellant's contention that he filed his appeal within a reasonable time. In a letter dated November 25, 1986, which he described as a reply to the Department's brief in his appeal, he submitted that the computation of a reasonable time within which the appeal was to be filed "should start from the date I became aware of the question about my U.S. citizenship which in this case happened on that incident of April 1984 at the Miami airport." As a consequence, he argued that the appeal he filed in June 1985 had been within a reasonable time.

We do not find appellant's reasons for the delay or his contention that the appeal was taken within a reasonable time persuasive. In the first place, we believe that appellant was aware of or should have been aware of his loss of United States citizenship when he acquired Philippine citizenship. The evidence of record shows that prior to appellant's naturalization in the Philippines, a consular officer at the Embassy informed appellant that he would lose his United States citizenship status were he to follow through with his naturalization as a Philippine citizen, Appellant was put on notice of his impending loss of United States citizenship. Also, when appellant was naturalized he took an oath of allegiance to the Philippines, whereby he solemnly swore that he renounced "absolutely and forever all allegiance and fidelity" to the United States, Furthermore, the approved certificate of loss of nationality that was sent to appellant in March 1975, stated he had expatriated himself by obtaining naturalization in the Philippines. That appellant was aware of his loss of United States citizenship can hardly be doubted. It, therefore, is all the more difficult to understand why appellant found it necessary in June 1985, as he stated, to clarify his United States citizenship status at the Embassy.

With respect to appellant's assertion that, on the occasion of his visit to the Embassy in June 1985, he learned "for the first time" that an appeal was necessary to clarify his status and remove any doubt regarding his United States citizenship, the record shows, as we have noted, that the Embassy on March 11, 1975, sent appellant

his certificate of loss of nationality and informed him of his right to appeal that determination to the Board. Furthermore, the reverse of the certificate contained printed instructions relating to appeal procedures. The instructions pointed out that any holding of loss of United States nationality may be appealed to the Board of Appellate Review, cited the governing federal regulations, indicated how the appeal should be submitted, and where additional information about appeals and the provisions of the Federal regulations might be obtained.

Assuming security conditions prevailing in the Philippines were as described by appellant, we do not believe that the existence of such conditions would preclude him from taking up the matter of an appeal with the Embassy or by writing to this Board within a reasonable period of time after receipt of the Department's holding of loss of nationality in 1975, if he so intended. Though appellant maintained that he learned "for the first time" of the necessity of taking an appeal in June 1985, we do not accept this contention.

It is beyond dispute that appellant permitted a substantial period of time to elapse before taking an appeal. The record shows that the appeal was not filed with this Board until June 20, 1985, ten years after the Department's determination of loss of nationality. There is no record of any interest by appellant in re-establishing his claim to United States citizenship prior to his visit to the Embassy on June 3, 1985. In our view, his failure to take any action before then demonstrates convincingly that his delay in seeking appeal was unreasonable. Whatever the meaning of the term "reasonable time" as used in the regulations may be, we do not believe that such language contemplates a delay of ten years in taking an appeal.

The rationale for giving a reasonable time to appeal an adverse decision is to allow appellant sufficient time to assert his or her contentions that the Department's holding of loss of nationality is contrary to law or fact. It is intended to compel one to take such action when the recollection of events upon which the appeal is grounded is fresh in the minds of the parties involved. It is clear that appellant had ample opportunity to take an appeal prior to 1985. The period of a reasonable time commences to run with appellant's receipt of the holding of loss of nationality in 1975, and not, as appellant maintains, in April 1984, when, he said, he became aware of the need to clarify his United States citizenship status. In our opinion, appellant's delay of ten years in taking an appeal was unreasonable in the circumstances of this case.

III

On consideration of the foregoing, we are unable to conclude that the appeal was taken within a reasonable time after receipt of the Department's administrative holding of loss of nationality. We find the appeal time barred, and, as a consequence, the Board is without jurisdiction to consider the case. The appeal is hereby dismissed for want of jurisdiction.

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

Alan G. James, Chairman

Edward G. Misey, Member

Gerald A. Rosen, Member