May 20, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: L[redacted] D[redacted]

This appeal is from an administrative determination of the Department of State holding that appellant, L[redacted] D[redacted] expatriated himself on February 11, 1976 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application, 1/

The Department determined in July 1976 that appellant expatriated himself. He entered the appeal ten years later. No legally sufficient reason having been presented that would excuse such a long delay, the Board finds the appeal barred by the passage of time and not properly before the Board. The appeal is hereby dismissed.

I

D[redacted] acquired United States citizenship by birth at [redacted]. He attended elementary school, high school and junior college in the United States. In 1941 he enlisted in the United States Army Air Force, serving first as an enlisted man, and later as an officer. He took part in a number of campaigns in the Pacific theater of war, and was honorably discharged in 1945. Around 1948 he went to Australia where he acquired a bachelor's degree in architecture. For several years he worked in the offices of private architects. In 1968 he was employed by the Public Transport Commission of Sydney. Seven years later in 1975 he was engaged by the Experimental Building Station,

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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 No. 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".

Commonwealth Department of Construction, which, according to appellant, is roughly equivalent to the U.S. Bureau of Standards. Employment with the Commonwealth Construction Department required Australian citizenship. [redacted] therefore applied to be naturalized. On February 11, 1976 he was granted Australian citizenship.

In May 1976 the Department of Immigration and Ethnic Affairs informed the United States Consulate General at Sydney that [redacted] had acquired Australian citizenship and had surrendered his United States passport, which the Department forwarded to the Consulate General.

Later that month the Consulate General wrote to D[redacted] to inform him that he might have expatriated himself by obtaining Australian citizenship. He was asked to submit comments or evidence in his case for the Department to consider in determining his citizenship status. He was asked also to indicate whether he obtained naturalization voluntarily with the intention of relinquishing United States nationality. [redacted] replied to the Consulate's letter on June 1, 1976. In the form enclosed in the Consulate's letter he completed the following two items as indicated:

> 1. (X) I was naturalized as a citizen of Australia on 11 Feb. 1976. I further state that this was my free and voluntary act and that no influence, compulsion, force or duress was exerted upon me by any other person, and that it was done without any reservation and with the intention of relinquishing my United States citizenship.
>
> ...
>
> 5. (X) I would like to make the following statement explaining my reasons for performing the act which you have referred to and my motives and purposes in doing so as they relate to my allegiance to the United States citizenship (statements of others or documentary evidence should be submitted).
>
> In order to gain employment as an Architect with the Australian Government Department of Construction it was necessary to become an Australian Citizen. [Underlined part written by [redacted]]

He did not take up the Consulate's officer to discuss his case with a consular officer.

In accordance with the provisions of section 358 of the Immigration and Nationality Act, a consular officer executed a certificate of loss of nationality in appellant's name on June 16, 1976, 2/ Therein he certified that [redacted] acquired United States citizenship at birth; that he obtained Australian citizenship upon his own application; and concluded that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate in July 1976. 3/ Approval of the certificate constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board.

[redacted] entered an appeal on June 9, 1986. "It was not my intention," he wrote, "to relinquish my United States nationality permanently,.." He noted that for economic reasons he felt he had to obtain Australian citizenship. In August 1984, he added, he found it was no longer necessary to be an Australian citizen to work for the Australian government. Therefore he applied to the Consulate at Sydney "for the recovery of my United States citizenship."

> In 1984 it appeared to me that the only way I could recover my United States Nationality was to immigrate to the United States and I didn't want to lose my pleasurable job with the Experimental Building Station.
>
> . . .
>
> It is a long time that on paper I've been an Australian citizen but I had given up hope of recovering my American citizenship when an American friend suggested that I

2/ 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.

3/ The exact date of approval was not typed in the block where the approving officer signed, but a notation on the certificate indicates that on July 22, 1976 a copy of the approved certificate was sent to

> write directly to you instead of going through the United States Consulate. I might add that no one here, not even at work, was aware that I was not a United States citizen.
>
> I have spent two thirds of my life as an American citizen and I hope to spend the remaining third of my life as an American citizen.

II

The first issue we must decide is whether the Board may entertain an appeal entered ten years after appellant was informed that the Department of State determined that he lost his United States nationality by performing a statutory expatriating act. The Board's jurisdiction is dependent upon a finding that the appeal was filed within the limitation prescribed by the applicable regulations. This is so because timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if an appellant, providing no legally sufficient excuse,, fails to take an appeal within the prescribed limitation, the appeal must be dismissed for want of jurisdiction. See Costello v. United States, 365 U.S. 265 (1961).

In 1976 when the Department approved'the certificate of loss of nationality that was issued in this case, federal regulations prescribed the following limitation on appeal:

> 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 within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 4/

3/ Cont'd.

the Immigration and Naturalization Service and to the Consulate to forward to [redacted] The fact that the date of the Department's approval of the certificate was not typed on that document does not in our opinion, vitiate its validity.

4/ Section 50.60 of Title 22, Code of Federal Regulations (1967-197 22 CFR 50.60.

Consistently with the Board's practice in cases where a determination of loss of nationality was made prior to November 30, 1979, the foregoing limitation will govern in this case. 5/ Thus, under the applicable limitation, if we find that appellant did not initiate the appeal within a reasonable time, the appeal would be time-barred and the Board would be without authority to entertain it.

What constitutes reasonable time depends on the facts of each 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 940 (5th Cir. 1976), citing 11 Wright & Miller, Federal Practice & Procedure, section 2855 at 228-229:

> ...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.

In acknowledging receipt of the appeal, the Chairman explained to [redacted] that timely filing is jurisdictional:

> The Department's records indicate that the Department determined in 1976 that you expatriated yourself. You wish to appeal 10 years later. The passage of so much time raises a question whether your appeal may be considered timely. This is an important jurisdictional issue; for if we determine that your appeal is not timely, we will have no alternative but to dismiss it without reaching the merits of the case. It is therefore very much in your interest to explain why you did not move sooner and to back up any statements you make with evidence.

5/ On November 30, 1979 new federal regulations were promulgated for the Board of Appellate Review. 22 CFR Part 7. 22 CFR 7.5(b) provides that the limitation on appeal is one year after approval of the certificate of loss of nationality.

Despite the Chairman's suggestion that [redacted] explain why he did not appeal sooner, he did not address the issue. In one communication to the Board he intimated that he simply did not think about trying to recover his citizenship until **1984.** As he put it in a letter dated July **28, 1986,** [redacted] wrote that he learned in August **1984** it was no longer necessary to be an Australian citizen to work for the Australian Government "and I made an application to the Consulate General...in Sydney for the recovery of my United States citizenship." That office reportedly replied to [redacted] that he appeared to be eligible to immigrate since he [redacted] a relative who is a United States citizen. [redacted] commented to the Board that he did not choose to immigrate to the United States in **1984** since "I didn't want to lose my pleasurablg job with the Experimental Building Station."

Plainly, [redacted] **was** not deterred from taking an earlier appeal by any factors beyond his control. Thus he has not adduced a legally sufficient reason why he could not have acted much sooner.

Furthermore, it would be patently prejudicial to the Department if we were to allow the appeal. The Department bears the burden of proving by a preponderance of the evidence that a citizen who performed a statutory expatriating act did so voluntarily with the intention of relinquishing United States citizenship. Vance v. Terrazas, **444** U.S. 252 **(1980).** Undertaking its burden of proof after the passage of ten years would be extremely difficult for the Department. Recollection of the events of **1976** assuredly has faded from the memory of the government officials involved, if not from [redacted] memory.

A limitation provision is not designed to serve administrative convenience. Its essential purpose is to compel the exercise of a right of action within a reasonable time so as to protect the adverse party against belated appeals that could more easily have been adjudicated when the recollection of events upon which the appeal is based is fresh in the minds of all parties directly involved. This is not the situation here. Furthermore, there must be an end to litigation at some point.

It is clear that appellant allowed a considerable period of time to elapse before taking an appeal. There is no record that he showed any interest in the restoration of his citizenship until **1984,** eight years after his expatriation. We find his failure to take any action until then clear evidence that his delay was unreasonable. Whatever definition may be given to the term "reasonable time", we do not believe that such language contemplated a delay of over ten years. The period of "within a reasonable time" commences with appellant's receipt of notice of the Department's holding of loss of nationality and not at a moment in time when he deems it propitious to assert a claim to his lost citizenship.

In the circumstances of this case where there has been no showing of a requirement for an extended period of time to prepare his case, or any obstacle beyond appellant's control in taking a timely appeal, it is obvious that a delay of more than ten years is unreasonable.

- III -

Upon consideration of the foregoing, we conclude that the appeal was not brought within a reasonable time after. appellapt had notice of the Department's holding of loss of his nationality. The appeal is barred by the passage of time and not properly before the Board. It is hereby dismissed.

Given our disposition of the case, we are unable to reach the other issues presented.

Alan G. James, Chairman

Howard Meyers, Member

George Taft, Member