June 22, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: C[redacted] C[redacted] M[redacted]

This is an appeal from an administrative determination of the Department of State holding that appellant, C[redacted] C[redacted] M[redacted], expatriated himself on June 12, 1975 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 nationalitv before a consular officer of thg United States at Jerusalem, Israel. 1/

As the appeal was entered eleven years after the Department made its determination that appellant expatriated himself a threshold issue is presented: whether the Board may entertain an appeal that has been so long delayed. For the reasons set forth below, it is our conclusion that the appeal is barred by the passage of time and must be dismissed for lack of jurisdiction.

1/ Section 349(a)(5), formerly section 349(a)(6), of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads as follows:

Section 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 he prescribed by the Secretary of State;. , .

Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of subsection 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of subsection 349(a) as paragraph (5).

Public Law 99-653, approved November 14, 1986, 100 Stat. 3655, amended subsection 349(a) by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by;".

I

M[redacted] became a United States citizen by birth at [redacted]

Beginning in 1966 he travelled abroad with considerable regularity, spending a good deal of time in Israel. He married a German citizen in 1972, and by 1975 was residing in Israel.

According to a report the Consulate General at Jerusalem later sent to the Department, [redacted] visited that office,on June 9, 1975 and told a consular officer that he wished to renounce his United States nationality "because," the consular officer stated, "he fervently wishes to remain in the Holy Land indefinitely." The Consulate General further reported that [redacted] had been persuaded to read the standard statement of understanding of the consequences of formal renunciation of United States nationality (see below) and to take time to reflect upon his contemplated action.

[redacted] returned to the Consulate General on June 12, 1975 and on that day renounced his United States nationality. He was then 25 years of age. Before the oath of renunciation was administered M[redacted] read and signed a statement of understanding about the consequences of formal renunciation of nationality. Therein he declared that he decided voluntarily to exercise his right to renounce his citizenship; that he realized he would thereafter become an alien under United States law: that the serious consequences of renunciation had been explained to him by the consular officer concerned, and that he understood those consequences. The oath of renunciation was then administered to him in the presence of two witnesses. The formalities of renunciation having been completed, the consular officer executed a certificate of loss of nationality in [redacted] name. 2/. The official certified

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.

that [redacted] acquired United States nationality by birth therein; that he made a formal renunciation of that nationality: and thereby expatriated himself under the provisions of section 349(a)(6) (now section 349(a)(5)) of the Immigration and Nationality Act. He dispatched the certificate to the Department under a covering memorandum that read in part as follows:

> He was convinced that if he renounced his citizenship, Israeli authorities will be unable to deport him and his presence will have to he tolerated, as is done in the case of Black Hebrews in this country who have renounced U.S. citizenship....
>
> The renunciant is moved by very intense religious feelings. He is, however, believed to be of a sound mind, not acting under duress, and, in fact behaving in a rational manner.

On September 24, 1975 [redacted] executed an affidavit at the Consulate General 'in which he requested that the Department cancel his oath of renunciation. He originally thouqht, he declared, that renunciation of his nationality would induce the Israeli authorities to permit him to live permanently in Israel; "since then I have realized that this was not really necessary."

Three months later on December 12, 1975 [redacted] wrote to the consular officer who administered [redacted]th of renunciation and stated that the Israeli authorities had approved admission of his family as immigrants. "Since we have been excepted [sic]," [redacted] wrote, "I have no desire to be reinstated as an American citizen. I hereby request that you inform the State (D)epartment that I wish for my original relinquishment of my U.S. citizenship to remain valid, and that they except (sic) this leter (sic) as evidence of this wish."

Before appellant's letter reached Washinqton, the Department on December 31, 1975 approved the certificate of loss of nationality that the Consulate General executed in appellant's name. In sending the Consulate General a copy of the approved certificate of loss of nationalitv to deliver to [redacted] the Department observed that after considering his request to cancel the oath of renunciation, it did not appear that the circumstances surrounding his renunciation amounted to duress or that he was mentally incompetent. It appeared to the Department that [redacted] was fully aware of the consequences when he renounced his nationality and made a deliberate, rational decision. The Department considered it immaterial that [redacted] later learned that his renunciation would not have a positive effect on the Israeli government decision in his case. The evidence of record did not offer any basis on which to cancel the oath of renunciation, the Department concluded.

After receiving [redacted] letter of December 12, 1975, the Department informed the Consulate General in March 1976 that it assumed that that office had informed [redacted] that he was no longer a United States citizen, and that if this were so, no further action was required in the case.

Approval of the certificate of loss of nationality constitutes an administrative determination of expatriation from which a timely and properly filed appeal may be taken to the Board of Appellate Review. [redacted] entered the appeal ~~pro se~~ on November 21, 1986. He presently lives in the Federal Republic of Germany. [redacted] asserts that he did not really intend to relinquish his United States citizenship. According to him, the Israeli authorities who originally allowed him and his family to immigrate later found the [redacted] ineligible. Appellant therefore feared he and his wife and two babies would be forced to leave the country. He especially feared that they might be sent to Cyprus (it was the time of the Greek-Turkish fighting), if he could not leave Israel on his own resources. "I was so frightened at this thought," [redacted] stated to the Board,

> that I began to search for a way to delay such action until I could find some financial means to move our family. The plan I came up with was to renounce my U.S. citizenship which would automatically intail [sic? the confiscation of mv passport. I reasoned that without a passport, it would make it difficult for the Israel ministry of interior to know what to do with us. I reasoned further that when I finally had the means to suport [sic] my family and provide for their transport to the US, I could just immagrate [sic] and get my citizenship back. This was my expressed plan and reasoning given to Mr. John C. Mallon, Counsul [sic] of the U.S. Consulate in Jerusalem, Israel at that time. I did not give any written reason for the renunciation because I was consirned [sic] there might be Israel [sic] workers at the consulate office who could possibly inform the Israely [sic] ministry of my intents. But I repeat, I did most clearly reveal to Mr. Mallon my acctual [sic] reason and that it was only a tacktical [sic] manuver [sic] to buy time. I have

written to the consulate in Jerusalem, whose replv is that they have no detailed records of the case and that anything they may have had has been forwarded to Washington.

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 consistentlv held that the taking of an appeal within the prescribed time limitation is mandatory and jurisdictional. 3/.

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. 4/ 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. 5/ 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 nationalitv that was issued here.

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

4/ Section 7.5(b) of Title 22, Code of Federal Regulations, 73 CFR 7.5(b).

5/ Section 7.5(a) of Title 22, Code of Federal Regulations, 72 CFR 7.5(a).

The 1975 regulations on filing an appeal provide? as follows:

> 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/.

It is generally recognized that a change in regulations shortening a limitation period, as existinq regulatibns 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 he

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

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. 7/

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 is free to determine "a time suitable to himself." In re Roney, 139 F.2d 175, 177 (1943). What is a reasonable time also take 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., 542 F.2d 928, 94n (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 opposinq 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.

Since appellant has not alleged to the contrary, we may assume that he received a copy of the approved certificate of loss of nationality executed in his name not lonq after the Consulate General forwarded it to him. The form of certificate

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7/ 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.

used in this case was obsolete: it did not provide information on the reverse about making appeals, as prescribed by Departmental guidelines promulgated early in 1973. 8/ Whether [redacted] was informed about his right of appeal by the Consulate General, we do not really know, since the record is silent on the point. But it would be reasonable to assume, absent evidence to the contrary, that the Consulate General complied with long established practice mandated by 8 Foreign Affairs Manual 1224.21 (Procedures) and informed appellant that he might take an appeal to this Board. But even if appellant did not receive or was not sent notice of the right of appeal, we do not consider that fact to be material. He surely knew he had lost his citizenship. If he believed the Department had erred in approving the'certificate of loss of nationality and really wished to regain his citizenship, it is reasonable to assume that he would have made an effort to find out how he could proceed, whether or not he had been given express instructions how to contest the Department's action. In any event, due process of law does not contemplate a right of appeal. District of Columbia v. Calwans, 300 U.S. 617 (1936). Giving notice of the right of appeal therefore is not mandatorv unless statute or regulations with the force of 'law so prescribe. 9/

The essential inquiry therefore is whether appellant had some valid reason for not moving sooner.

In reply to the brief of the Department of State, [redacted] stated that he believed there "is enough information in my original appeal to show why the appeal comes 11 years after loss of citizenship...." We have made a careful review of appellant's long letter of November 21, 1987 and find that it reveals nothing that could conceivably excuse a delay of so much time in taking an appeal. After giving his account of the

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8/ By airgram no. A-491 the Department informed all diplomatic and consular posts on January 18, 1973 that a new form of certificate which contained appeal information on the reverse would be used henceforth. The appeal information on the certificate was to serve in lieu of the form letter posts had sent expatriates with the certificate to inform them of the right of appeal to this Board.

9/ Federal regulations, in force since 1979, which, unlike the Department's internal guidelines, have the force of law, mandate that when a certificate of loss of nationality is sent to the person to whom it relates, the expatriate shall he informed of the right of appeal to this Board. 22 CFR 50.52.

circumstances surrounding his renunciation, the letter recites n detail the events in his life from 1976 to date. The following is a summary thereof.

Appellant remained in Israel for two years after he expatriated himself; he returned to the United States in 1977, travelling on an Israeli laissez passer. In the spring of 1978, traveling on a permit issued by the Immigration and Naturalization Service to re-enter the United States, he went to Germany where his wife and children were living. Pis wife left him in 1979. In 1980 he was convicted by a Bremen court of drug dealing, and sentenced to a year in prison but later placed, on probation. His submissions also show that in 1980 he applied at the United States Embassy at Cairo for a permit to re-enter the United States but was told there was nothing the Embassy could do for him. He returned to Germany, and in the spring of 1986 applied at the United States Consulate General in Frankfurt for an immigrant visa, sponsored by his mother. His application was denied on the grounds of his drug conviction. His appeal to this Board followed some months later.

The foregoing recapitulation of appellant's comings and goings over the past eleven years while indicative of personal difficulty, unhappiness and uncertainty, in no way accounts for his inertia in appealing.

It is beyond dispute that appellant permitted a substantial period of time to elapse before takinq an appeal. There is no record of any interest by appellant in re-establishing his claim to United States citizenship prior to the time he filed the appeal. 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 eleven years in taking an appeal.

The rationale for giving a reasonable time to appeal an adverse decision is to allow an 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 aation 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 well before 1986. His failure to move much sooner would be prejudicial to the Department which bears the overall burden of proof, were we to allow the appeal. The interest in stability and repose of administrative judgments must be served in 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

James G. Sampas, Member