October 2, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This is an appeal from an administrative determination of the Department of State, dated February 17, 1961, that appellant, M[redacted] M[redacted] B[redacted] T[redacted], expatriated herself on October 27, 1960 under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/

The case presents a threshold issue: whether the Board may entertain this appeal which was entered twenty-seven years after the Department determined that appellant expatriated herself. The Board's jurisdiction depends on our finding that, despite appellant's delay in taking the appeal, there are cogent reasons why the delay should be excused. For the reasons set forth below, it is our conclusion that appellant has presented no persuasive reasons why her appeal could be deemed timely. Therefore, lacking jurisdiction, we dismiss the appeal.

1/ When appellant made a formal declaration of allegiance to Mexico, section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481, read 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 --
>
> . . .
>
> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof;...

Public Law 99-653, 100 Stat. 3655, (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;". It also amended paragraph (2) of subsection 349(a) by inserting "after having attained the age of eighteen years" after "thereof".

I 2/

Appellant acquired United States citizenship by birth [redacted] Since her parents w Mexican citizens, she acquired the nationality of that state birth as well. When appellant was ten years old her pare took her to Mexico and there she has since resided. She marr [redacted] a Mexican citizen, in 1947. Twelve ye later on October 27, 1959 appellant applied for a certificate Mexican nationality (CMN). Many years later she recounted reasons for making the application and the circumstances ur which she did so:

> ...First, my husband was putting a lot of press on me to do so. Second, my husband and I w wanting to take my daughter to Europe for birthday. But I needed a passport immediately order to leave. I had never obtained a Uni States passport. My husband strongly encouraged to get a Mexican passport because it would quicker and easier than getting a United Sta passport. I went to see a lawyer about gettin Mexican passport. In order to get the Mexi passport he had me sign a lot of papers. I ne read the papers. I just signed them where he t me to sign. The lawyer never explained to me t I was signing documents that might take away United States citizenship. By signing the pape I realized that I was applying for a Mexi passport and acknowledging my Mexican citizensh but I never intended to relinquish my United Sta citizenship....I signed the papers simply becaus wanted to obtain a Mexican passport. Also husband pressured me to get a certific reflecting my Mexican citizenship so that it wo make some of his financial transactions easier.

2/ The Department informed the Board that it could not loca its record of appellant's case. The record upon which the Boa decided the case consists of documents submitted by appellant counsel and by the Immigration and Naturalization Service; t latter agency furnished a copy of the key document, the appro certificate of loss of nationality that was executed appellant's name.

3/ Appellant's affidavit of uncertain date in August 198 purportedly executed in connection with her application for U.S. passport dated August 13, 1986.

According to the certificate of Mexican nationality that was subsequently issued to appellant, she declared in the application adherence and obedience to the Government of Mexico and renounced any rights of United States nationality. A certificate of Mexican nationality was issued in appellant's name on February 1, 1960.

On September 7, 1960 appellant communicated with the Department of Foreign Relations stating that in order to obtain a United States visa she was required to present a document attesting that she had renounced her United States citizenship which she acquired at birth in Texas. The next day the Department of Foreign Relations issued appellant such a statement, 4/. It seems that appellant presented the statement of the Department of Foreign Relations to the visa section of the Embassy in September 1960 and that the latter office referred it to the citizenship section; the fact that she had performed an expatriating act thus was brought to light. On September 8th appellant also executed an affidavit of expatriated person at the Embassy in which she acknowledged that she made a declaration of allegiance to Mexico in connection with her application for a CMN, and that she had done so freely and voluntarily, and that no "influence, compulsion, force or duress" had been exerted on her. On September 12,

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4/ It is not apparent why appellant requested a statement from the Department of Foreign Relations with respect to renunciation of her United States citizenship, since, as noted above, a CMN stating that fact had been issued in her name some months before. Possibly, although dated February 1, 1960, the certificate had not yet been prepared and mailed to her; this is, however, only speculation.

1960 a consular officer executed a certificate of loss nationality in appellant's name, as required by law. 5/ officer certified that appellant acquired United St citizenship by virtue of her birth therein; that she ma formal declaration of allegiance to Mexico; and the expatriated herself under the provisions of section 349(a)(2 the Immigration and Nationality Act. The Department appr the certificate on February 17, 1961. The is no record of further official business between appellant and United St authorities until 1986 when on August 13 appellant app for a United States passport. Her application was denied on grounds of non-citizenship in November 1986. Counsel appellant entered an appeal on her behalf on March 18, 1987.

II

A threshold issue is presented here: whether the B may entertain an appeal entered twenty-seven years after Department of State determined that appellant expatri herself. The passage of so many years might, of itself, war dismissal of the appeal as untimely. Nonetheless, we prepared to consider whether there might be extenua circumstances that would warrant our entertaining the appeal.

The Board's jurisdiction is dependent upon a finding the appeal was filed within the limitation prescribed by applicable regulations. This is so because timely filing mandatory and jurisdictional. United States v. Robinson, U.S. 220 (1960). Thus, if an appellant, providing no leg sufficient excuse, fails to take an appeal within the prescr limitation, the appeal must be dismissed for want jurisdiction. See Costello v. United States, 365 U.S. (1961).

5/ Section 358 of the Immigration and Nationality Act, 8 U 1501, reads as follows:

Sec. 358. Whenever a diplomatic or consular officer the United States has reason to believe that a person while foreign state has lost his United States nationality under provision of chapter 3 of this title, or under any provisio chapter IV of the Nationality Act of 1940, as amended, he s certify the facts upon which such belief is based to Department of State, in writing, under regulations prescribe the Secretary of State. If the report of the diplomatic consular officer is approved by the Secretary of State, a of the certificate shall be forwarded to the Attorney Gene for his information, and the diplomatic or consular office which the report was made shall be directed to forward a copy the certificate to the person to whom it relates.

Under current federal regulations (promulgated in 1979), the time limitation for filing an appeal from an administrative determination of loss of nationality is one year after approval of the certificate of loss of nationality. 6/ The regulations further provide that an appeal filed after the time limit shall be denied unless the Board for good cause shown determines that the appeal could not have been filed within the prescribed time.

In 1961 when the Department of State approved the certificate of loss of nationality that was issued in this case, the Board of Appellate Review did not exist. There was then a Board of Review on the Loss of Nationality in the Passport Divsion whose internal rules and procedures did not prescribe a time limit on appeal. 7/ In the absence of a specified limitation on appeal, it is generally recognized that the common law rule of "reasonable time" governs. Therefore the limitation applicable to appeals brought to the Board of Review on the Loss of Nationality was within a reasonable time after receipt of notice of the Department's holding of loss of nationality. In conformity with the Board's practice in cases where the certificate of loss of nationality was approved prior to 1979, we will apply the limitation of "reasonable time" to the appeal now before us.

6/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b) (1987).

7/ Unpublished Circular, Passport Office, Department of State, October 29, 1958.

On October 30, 1966, regulations were promulgated for the Board of Review on the Loss of Nationality prescribing that an appeal was required to be made within a reasonable time after receipt of notice of loss of nationality. Section 50.60, Title 22, Code of Federal Regulations, 22 CFR 50.60, 31 Fed. Reg. 13539 (1966). In 1967 this "reasonable time" limitation was incorporated in the Department's regulations for the then newly established Board of Appellate Review. The relevant section read 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. Section 50.60, Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60.

Thus, under the time limitation governing in the ins case, if we conclude that appellant did not initiate her ap within a reasonable time, the appeal would be time barred the Board would lack authority to entertain it.

The question whether an appeal is taken withi reasonable time depends upon the circumstances in individual case. Generally, reasonable time means reason under the circumstances. Chesapeake and Ohio Railway v. Mar 283 U.S. 209 (1931). Courts take into account a number considerations in determining whether the facts of a partic case indicate that the affected party moved within a reason time including the interest in finality, the reason for de the practical ability of the litigant to learn earlier of grounds relied upon, and prejudice to the other party. Ash v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See Security Mutual Casualty Co. v. Century Casualty Co., 621 1062, 1067-68 (10th Cir. 1980); and Lairsey v. Advance Abras Co., 542 F.2d 928, 930-31 (5th Cir. 1976). 8/

The rationale for giving a reasonable time to appeal adverse decision is to allow an appellant sufficient time receipt of such decision to assert his or her contentions the decision is contrary to law or fact, and to compel appel to take such action within a reasonable time so as to prot the adverse party against a belated appeal that could easily have been resolved when the recollection of events which the appeal is based is fresh in the minds of the part involved. Unreasonable lapses of time cloud a perso recollection of events and also make it difficult for the tr of fact to determine the case, particularly where the record incomplete or lost or obscured by the passage of time. Furth it should be noted that the period of a reasonable time beg to run with the receipt of notice of the Department's hold of loss of nationality, and not at some subsequent time, ye later when an appellant, for whatever reason, may seek to regain re-establish his or her United States citizenship status.

8/ In Lairsey v. Advance Abrasives Co., the court quoted Wright & Miller, Federal Practice & Procedure, section 2866 228-229:

> 'What constitutes reasonable time must of necess depend upon the facts in each individual case The courts consider whether the party opposing motion has been prejudiced by the delay in seek relief and they consider whether the moving pa had some good reason for his failure to t appropriate action sooner.

542 F.2d at 930-31.

Appellant, through counsel, declares that the Board should find her appeal timely. She did not appeal earlier, she asserts, because she was not aware of the legal significance of the documents she signed to obtain a certificate of Mexican nationality; and because she was never informed of the right of appeal. Futhermore, appellant argues, even if she had known of the right of appeal and appealed in 1961, she would have been unsuccessful, for it was not until 1967 in Afroyim v. Rusk, 387 U.S. 253 (1967) that the Supreme Court declared that the government must prove the intent of the citizen to relinquish citizenship.

We find the reasons appellant gives for her delay unpersuasive.

First, the record does not bear out appellant on her contention that she did not understand the legal significance of the application she made for a certificate of Mexican nationality (CMN). Although there is no independent confirmation of her assertion, we will accept that appellant consulted an attorney in 1960 about obtaining a Mexican passport and that he may not have explained to her that by signing an application for a CMN she would jeopardize her United States citizenship. But her subsequent actions indicate that after she was issued a CMN she clearly understood the legal import of what she had done. Note that a few months after she had been issued a CMN, she asked the Department of Foreign Relations for a document attesting that she renounced "my American nationality" so that she might be issued a visa by the United States Embassy. Furthermore, the day she received the attestation from the Department of Foreign Relations she appeared at the United States Embassy where she signed a document stating that she had made an oath of allegiance to Mexico and had done so voluntarily.

Second, the record does not indicate whether a copy of the approved certificate of loss of appellant's nationality was forwarded to her and whether she received it; or whether, in conformity with standing departmental guidelines, 8 Foreign Affairs Manual 224.21(a), "Advice on Making of Appeals," 9/ the Embassy informed appellant in writing of her right to take an appeal to the Board of Review on the Loss of Nationality.

9/ These guidelines did not have the force of law. There was no legal requirement to inform an expatriate of the right of appeal until the promulgation of the current regulations on November 30, 1979. Section 50.52, Title 22, Code of Federal Regulations, 22 CFR 50.52.

However, in the absence of contrary evidence (appel has presented none), it may be presumed that an official of Embassy sent appellant a copy of the approved certificate loss of her nationality and informed her of the right of app for there is a well-settled presumption that public offic execute their assigned duties faithfully and accurately, ab evidence to the contrary. Boissonnas v. Acheson, 101 F.S 138 (S.D.N.Y. 1951.) So many years have passed, however, it is now virtually impossible to determine whether appel received the certificate of loss of nationality and informa about making an appeal. But even if it did not reach her, fact would not constitute denial of due process. Due pro does not contemplate the right of appeal. District of Colu v. Calwans, 300 U.S. 617 (1936). While a statutory revie important and must be exercised without discrimination, su review is not a requirement of due process. National Unio Cooks and Stewards v. Arnold, 348 U.S. 37 (1954).

A right of appeal existed in 1961. That appellant not have been informed of the right cannot be determinativ the issue of timely filing. The cases make clear that in circumstances she found herself appellant had responsibility to take some initiative to get the facts a possible recourse. As we pointed out above, appellant kne the very least that she had put her citizenship in peril. therefore had facts which should have led her to appropriate inquiries. It is well established that what puts, or should put, a party upon inquiry is sufficient no of a right of redress where the means of ascertaining existence of such redress is at hand. The law imputes knowl where opportunity and interest coupled with reasonable would necessarily impart it. United States v. Shelby Iron 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (4th 1939). Knowledge of facts putting a person of ordi knowledge on inquiry notice is the equivalent of ac knowledge, and if one has sufficient information to lead hi a fact, he is deemed to be conversant therewith and laches chargeable to him if he fails to use the facts putting hi notice. McDonald v. Robertson, 104 F.2d 945 (6th Cir. 1939).

Appellant did nothing for twenty-six years to chall the decision of the Department that she expatriated herself. perceive in the record no obstacle to her moving much earl save her own passivity - arguably, indifference to loss of United States citizenship. Had she been so moved, she c have inquired at the Embassy in Mexico City whether any reco was open to her. Access to official information was readil hand.

Finally, we cannot agree with appellant that her dela excusable because an adverse decision was rendered in her before the decision of the Supreme Court in Afroyim v. R

supra, and thus if she had appealed in 1961 her case would have been without legal merit.

In January 1969, the Attorney General issued a statement of interpretation of Afroyim. He noted that the rule laid down in Afroyim is that a United States citizen has a constitutional right to remain a United States citizen "unless he voluntarily relinquishes that right." Therefore loss of citizenship can only result if the citizen voluntarily relinquishes that citizenship by conduct that manifests an intention to abandon allegiance to the United States. Afroyim leaves it open to the citizen, the Attorney General said, to raise the issue of his intent when he performed a statutory expatriating act. 42 Op. Atty. Gen. 397 (1969). In the spring of 1969 the Department of State sent instructions to all diplomatic and consular posts regarding the processing of potential loss of nationality cases in light of Afroyim. 10/ With respect to cases in which an adverse determination of citizenship had been made prior to the Supreme Court's decision in Afroyim, the Department's instructions read as follows:

> 4. Reconsideration of Previous Adverse Determinations
>
> Initiation of reconsideration of previous determinations of loss of nationality may be made by the person against whom the previous determination was made or any person claiming United States citizenship through him by filing the FS-176 form as noted above. It is not considered feasible to give individual notice to each person who is recorded at each post as the subject of a prior determination of loss of nationality. In view of the enormous number of cases that are involved, the only practical means of informing the potential citizenship claimants is through extensive public notice.

All posts were given the following instructions regarding dissemination of the circular instruction:

10/ Circular Airgram to all Diplomatic and Consular Posts, CA-2855, May 16, 1969.

5. PUBLICITY

Each post is requested to give the most exte publicity to this instruction appropriate fo consular district. Publicity should be give newspapers or other mass media unless publication is not possible or politically fea for a particular country or consular district. substance of the public statement in whatever it is given should be as follows:

'A recent Statement of Interpretation of Attorney General of the United States may resu the reversal of many previous determination loss of United States citizenship. Any person was the subject of such a determination or person who may have a claim to United St citizenship through such person should commun with this office.'

We may reasonably assume that the United St representatives in Mexico executed the foregoing direc promptly and conscientiously. Constructive notice may there be imputed to appellant that she might request that her cas reopened. That she may not have read or learned about Department's advice to persons who were the subject of adv determinations of nationality prior to 1967 does not excuse from not seeking redress at least in 1969 or a reasonable thereafter from the Department's 1961 adverse decision in case. Accordingly, she may not be heard to claim that she justified in not appealing earlier since, with reason diligence, she could have ascertained long before then that might have grounds to have her case reopened.

To allow the appeal plainly would prejudice Department's ability to undertake its burden of proof. appears that the consular officer who processed appellant's is no longer in the Service. Even if she were available to evidence, it is highly doubtful that she would be able, at distance from 1960/1961, to remember any of the circumstance appellant's case. The Department's ability to gather evid to supplement the sparse record in this case would therefore severely limited.

No legally sufficient excuse having been presented appellant and the potential prejudice to the Department being obvious, the interest in repose, finality and stability must served in this case.

III

Upon consideration of the foregoing, we are unable to conclude that the appeal was taken within a reasonable time after appellant had notice of the Department's holding of loss of her United States citizenship. As a consequence, we find that the appeal is time barred and that the Board is without authority to consider the case. The appeal is hereby dismissed.

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

Alan G. James, Chairman

Warren E. Hewitt, Member

George Taft, Member