May 5, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: V[redacted] B[redacted] d[redacted] D[redacted]

This an appeal to the Board of Appellate Review from administrative determination of the Department of State t appellant, V[redacted] B[redacted] d[redacted] D[redacted], expatriated herself April 27, 1971 under the provisions of section 349(a)(6), section 349(a)(5), of the Immigration and Nationality Act making a formal renunciation of her United States national: before a consular officer of the United States at Mexico City. 1/

The Department approved a certificate of loss appellant's nationality in 1971. Not until 1987 did appellant move to contest the Department's holding of her expatriation. threshold issue is thus presented: whether the Board m exercise jurisdiction over an appeal filed after the passage so much time. For the reasons that follow, we conclude that th

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1/ Section 349(a)(6) of the Immigration and Nationality Act, U.S.C. 1481(a)(6), read as follows:

> Sec. 349. (a) From and after the effective date c this Act a person who is a national of the United State whether by birth or naturalization, shall lose hi nationality by --
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> . . .
>
> (6) making a formal renunciation o nationality before a diplomatic or consular office of the United States in a foreign state, in suc form as may be prescribed by the Secretary o State; . . ,

Pub. L. 95-432 (approved Oct 10, 1978), 92 Stat. 1046 repealed paragraph (5) of subsection 349(a) of the Immigratio and Nationality Act, and redesignated paragraph (6) o subsection 349(a) as paragraph (5).

Pub. L. 99-653 (approved Nov. 14, 1986) 100 Stat. 3655, amended subsection 349(a) by inserting "voluntarily performinc any of the following acts with the intention of relinquishinq United States nationality:" after "shall lose his nationality by;".

appeal is time-barred and that the Board lacks the jurisdiction to consider and decide it. The appeal is dismissed.

I

Appellant was born at [redacted] a United States citizen father. She thus acquired the nationality of the United States under the provisions of section 201(g) of the Nationality Act of 1940, 8 U.S.C. 601, which conferred citizenship on children born abroad of a United States citizen and an alien parent. Section 201(g) prescribed that in order to retain citizenship, such a child would have to live in the United States for five years between the ages of thirteen and twenty-one. The retention provision did not, however, apply to a child whose American parent was at the time of the child's birth, inter alia, residing abroad in the employment of a United States business organization. Ms. Br[redacted] father reported her birth to the United States Embassy which issued a consular report of birth in July 1952. On the reverse of the report of birth a consular officer attested that appellant was exempt from the retention provisions of section 201(g) because her father was living in Mexico in the employ of a United States company with its head office in Racine, Wisconsin.

By virtue of her birth in Mexico, appellant also acquired Mexican nationality as well.

On September 29, 1969 appellant was registered by the Embassy as a United States citizen and issued a card of identity as a United States citizen.

Appellant states that she realized that upon attaining the age of eighteen she would be required under Mexican law to decide which citizenship she wished to adopt. Wishing to retain her United States citizenship, she states, she went to the Embassy "to confirm this and *to* apply for a passport." (Presumaably the year was 1969). She alleges she was told that the proviso of section 201(g) of the Nationality Act of 1940, exempting her from the residence requirements to retain citizenship, had been "changed by law, and that I would have to comply with this situation [live in the United States for five years between the ages of thirteen and twenty-one]." However, appellant adds, "at the time I was already **18** years old and would have been unable to comply" with the proviso. Appellant's father, writing to the Board in August **1987**, corroborated his daughter's recollection of tht information she was given by the consular office at the Embassy.

> It then became apparent to us, previously unknown, that a change had taken place with the U.S. Immigration law and we were informed through a U.S. Consulate officer at the Mexico City consulate that this pro-

> vision of 5 years U.S. residence had to be complied with in my daughters [sic] case.
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> Even had we been able to make a suitable arrangement as parents of a minor daughter to live in the U.S., it was not then possible for her to complete this specified time within tne ages specified as she was already 18 years or older, in other words it was too late.
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> Since she had to continue to live with us as parents, it was necessary for her to accept Mexican citizenship according to Mexican law applying to persons 18 years old. In order for her to do this it became necessary for her to renounce her U.S. citizenship as explained by the consular officer, very much to our regret, but otherwise she would have become stateless. I recall there was no other choice as this was the law.

.In 1952 the Immigration and Nationality Act of 1952, U.S.C. 1101, was enacted. This Act changed the citizensl retention provisions for persons born abroad of a U.S. par and an alien parent found in the 1940 Act by prescribing f: years residence in the United States between the ages fourteen and twenty-eight. However, as the Department poir out in its brief, because of the savings clause of t Immigration and Nationality Act, section 405(a), appellant c not become subject to the new retention requirements of t Immigration and Nationality Act, that is to say, the exempti she enjoyed at the time of her birth was unaffected by t enactment of the 1952 Act. Appellant concedes she learned mu later that she had retained her exemption under the Act of 194 but contends that in 1971 she had not been *so* informed.

Thus, the information she was allegedly given at t Embassy led her to decide to make a formal renunciation of h United States citizenship. In her letter initiating the appea appellant recalled that:

> ...as it was explained to me at the Consulate, that since I could not comply I could not become an American United States citizen and this was clear. Since I was also a Mexican citizen I had to accept it or become without any citizen- ship and it was then I was also informed that I would have to renounce my U.S. citizenship to accept the Mexican. It was all sort of confusing to me at that

time and I did what I thought was the only thing that I could do.

The record shows that on April 27, 1971 appellant made a formal renunciation of her United States nationality at the United States Embassy in Mexico City. Before making the oath of renunciation, she completed a statement of understanding in the presence of two witnesses and a consular officer. In the statement she acknowledged that she was acting voluntarily and understood fully the serious consequences of renunciation which had been explained to her by the consular officer involved. On the same day, as required by law, the consular officer executed a certificate of loss of nationality in the name of [redacted] [redacted] [redacted] He certified that appellant acquired the nationality of both the United States and Mexico at birth; that she made a formal renunciation of her United States nationality and thereby expatriated herself under the provisions of section 349(a)(6) of the Immigration and Nationality Act. 2/ The Department approved the certificate on May 7, 1971, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

Appellant entered an appeal pro se by letter dated November 21, 1987.

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.

II

A threshold issue is presented: whether the Board entertain an appeal entered more than sixteen years after the Department of State determined that appellant lost her Uni States nationality. Although the passage of so many years mi of itself warrant dismissal of the appeal as untimely, we prepared to examine the case to determine whether there are circumstances that might warrant our allowing the appeal.

To exercise jurisdiction, the Board must find that appeal was filed within the limitation prescribe 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 lega sufficient excuse, fails to take an appeal within the prescri limitation, the appeal must be dismissed for want jurisdiction. Costello v. United States, 365 U.S. 265 (1961).

In May 1971 when the Department determined that appell expatriated herself, the limitation on appeal to the Board Appellate Review was "within a reasonable time' after affected person received notice of the Department determination of loss of citizenship. 3/ Consistently with Board's practice in cases where the certificate of loss nationality was approved prior to the effective date of present regulations (November 30, 1979), we will apply limitation of "reasonable time" in this case.

Whether an appeal has been taken within a reasonable ti depends upon the circumstances of the case. "Reasonable tim means reasonable under the circumstances. Courts have held th a reasonable time means as soon as circumstances permit and wi such promptitude as the situation of the parties and t circumstances of the case allow. Reasonable time begins to r from the date an expatriate received the certificate of loss nationality, not sometime later when it becomes convenient appeal. Although the question of a reasonable time will va with the circumstances, it is clear that it is not determined a party to suit his or her own purpose and convenience or when party, for whatever reason, takes an appeal several years later

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3/ Section 50.60 of Title 22, Code of Federal Regulations, 2 CFR 50.60. These regulations were in force from November 196 to November 1979, when the limitation on appeal was revised. I now is "within one year after approval by the Department of th certificate of loss of nationality." 22 CFR 7.5(b)(1).

after notice of his right to take an appeal. A protracted delay that is prejudicial to the opposing party is fatal. 4/

> What constitutes reasonable time depends upon the facts of each case, taking into consideration the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. See Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930-31 (5th Cir. 1976); Security Mutual Casualty Co. v. Century Casualty Co., 621 F.2d 1062, 1067-68 (10th Cir. 1980).

Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981).

Appellant states that the reason she did not take an earlier appeal "is that we had thought that there was a finality perhaps to the **Loss** of Nationality and one becomes involved in living and time passes, but we have always talked about the injustice of this between my parents and myself." "I remember," she continued, "that I was also told by the Consular lady that when I renounced my U.S. citizenship. 'there would be no way back'..." Appellant believed "I had no more grounds on which to base my claim than of the injustice in my case." In 1971 she had not been informed "of the recourse of the Board of Appellate Review, nor was it in writing on any of the forms." Only recently did she learn that she might take an appeal to the Board following the consultation her father had at the Consulate at Monterrey. Writing to the Board in August 1987, appellant's father stated that:

> Over the years I have continually been distressed at the state of affairs that produced this anomaly, to me, *so* much so that I recently made a trip to the Consulate at Monterrey and consulted there after presenting a review of the foregoing history of them and mentioning the steps we had to take at the time regarding my daughter.
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> It was again explained that the Immigration law had been changed at a date

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4/ See generally, Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); In re Roney, 139 F.2d 175 (7th Cir. 1943); Appeal of Syby, 460 A.2d 749 (1961).

> that excluded my daughter from the provision that she did not have to live the 5 years in the U.S., but then apparently later it was changed back again and offered this same concession to children of U.S. fathers born abroad.
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> It was then suggested that I make this appeal through your office.

For the Board to corroborate appellant's claim that s was never informed that she might appeal the Department decision would probably be impossible after the passage of many years. We may presume, however, that the Embassy du complied with standing Departmental instructions to consul officers by sending her the prescribed form letter setting for the particulars about how to take an appeal to this Board. Foreign Affairs Manual 224.21 (1971). This is warranted becau there is a legal presumption that public officials perform the assigned duties correctly and in the manner prescribed by l and regulation, absent evidence to the contrary. See Boissonn v. Acheson, 101 F.Supp. 138 (S.D.N.Y. 1954). However, while have no reason to believe the Embassy did not carry out its du to inform appellant of her right of appeal, we cannot, course, be sure that the Embassy's communication did not astray in the mails.

Let us assume, arguendo, that the Embassy's communicatic informing appellant how she might take an appeal did not reac her. Would such a fact excuse her from not making some effor in sixteen years to ascertain whether she might have recours from the Department's decision? The answer to that question i that she may not excuse such a long delay in taking the appea simply by alleging that no one informed her that she migh appeal. Plainly, appellant had a responsibility to take som initiative in the matter. She had knowledge of a fact - loss o her United States nationality - that should have put her upo inquiry, especially since she alleges she was so distressed a losing her American nationality ("I never became resigned ove my loss"). In our opinion, the natural reaction of one i appellant's place would be to explore every avenue to ascertai whether anything could be done to rectify what she thougtt was ar injustice. The law does not excuse passivity under such circumstances. It is settled that the law imputes knowledge where opportunity and interest coupled with reasonable care would necessarily impart it. United States v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (4th Cir. 1939). Knowledge of facts putting a person of ordinary knowledge on inquiry notice is the equivalent of actual knowledge, and if one has sufficient information to lead him to a fact, he is deemed to be conversant therewith and laches is chargeable to him if he fails to use the facts putting him on notice. McDonald v. Robertson, 104 F.2d 945 (6th Cir. 1939).

In brief, we are unpersuaded that appellant was justified in not moving or trying to move until sixteen years after the Department confirmed her act of renouncing her United States nationality.

A limitation on the time to take an appeal is designed not only to encourage the prompt ascertainment of legal rights but also to protect the opposing party against actions where the evidence to rebut an appellant's claims is forgotten, or is no longer fresh or even obtainable. We are of the view that the appeal should not be allowed because to do so would clearly result in prejudice to the Department of State. The heart of appellant's substantive case is that sne was misinformed by an official or officials about her citizenship status. How, after the passage of *so* much time, could the Department possibly address appellant's arguments except by asserting that she could not possibly have been *so* misled?

Appellant. was not prevented by extrinsic circumstances from exercising her right to take an appeal to this Board; had she used reasonable diligence she would have learned much sooner than she did that she might petition the Board to review her case. In the circumstances of the case, we believe that the interest in finality and repose of administrative decisions requires that the appeal be dismissed as untimely.

III

Upon consideration of the foregoing, we hold that the appeal is time-barred. Since timely filing is mandatory and jurisdictional, we lack jurisdiction to entertain the appeal and accordingly dismiss it for want of jurisdiction.

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

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member