DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: A[redacted] W[redacted] M[redacted]

A[redacted] W[redacted] M[redacted] appeals an administrative determination of the Department of State, dated October 23, 1975, holding that he expatriated himself on January 31, 1974 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

More than eleven years after the Department held that he expatriated himself M[redacted] entered this appeal. An initial issue is thus presented: whether the Board has jurisdiction to entertain an appeal *so* long delayed. For the reasons that follow, we conclude that the appeal is time-barred since it was not filed within the applicable limitation. Thus lacking jurisdiction to hear and decide the appeal, we dismiss it.

I

M[redacted] was born in [redacted] From 1941 to 1946 he served in the Royal Canadian Navy. Upon discharge he went to the United States. He became a United States citizen on August 9, 1960 by virtue of naturalization before federal district court in Chicago. He lost his Canadian citizenship (at that date, actually the status of a British subject) upon obtaining naturalization in the United States,

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1/ In 1974 when appellant obtained Canadian citizenship, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read in pertinent part 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, ...

Pub. L. 99-653 (approved Nov. 14, 1986), 100 Stat. 3655, 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".

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[redacted] left the United States in November 1972 and on November 20th was hired by an agency of the Nova Scotia government. Since a condition of such employment was Canadian citizenship, appellant made an application therefor. On January 31, 1974 he was issued a certificate of Canadian citizenship under the provisions of section 10(4) of the Canadian Citizenship Act of 1946 which prescribed the procedure for reacquisition of Canadian citizenship by persons like appellant who were born Canadian citizens or British subjects but lost such status obtaining foreign naturalization.

[redacted] naturalization came to the attention of the United States Consulate General at Halifax around the spring of 1974. In April of that year the Consulate General wrote to him to state that he might have expatriated himself, and asked him to complete a short questionnaire concerning his performance of the expatriating act. This he did in May, indicating that he had obtained naturalization in Canada voluntarily with the intention of relinquishing United States nationality. He appended a statement explaining why he had sought Canadian citizenship and expressed the wish to retain United States citizenship as well as Canadian. On November 22, 1974 an officer of the Consulate General executed a certificate of loss of nationality in [redacted] name, as required by law. 2/ Therein the officer certified that [redacted] acquired United States nationality by virtue of naturalization; that he acquired Canadian citizenship by virtue of naturalization upon his own application, and

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.

thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. 3/

The Department did not act on the certificate of loss of nationality, but instructed the Consulate General to develop fully the issue of whether [redacted] intended to relinquish his United States nationalilty. The Department forwarded the text of a letter that it instructed the Consulate General to send to [redacted] to elicit information relevant to his intent when he performed the expatriative act The Consulate General was to send a second letter to the Canadian authorities to elicit information about his employment. The Cons[redacted] General dispatched the two letters in January. [redacted] replied with answers to the questions posed, indica[redacted] that he had assumed that once he became a Canadian citizen he would automatically lose his American citizenship.

An official of the Nova Scotia government furnished facts about appellant's employment set forth above.

In June 1975 the Department informed the Consulate General that it agreed that [redacted] could not lose his nationality under section 349(a)(4)(A) or section 349(a)(4)(B) of the Immigration and Nationality Act, and instructed the Consulate General to send [redacted] a letter informing him that he might have expatriate[redacted] self under the provisions of section 349(a)(1) of the Act. In July 1975 the Consulate General wrote such a letter to [redacted] and gave him 60 days to submit any information he might wish the Department to consider in determining whether he expatriated himself. [redacted] replied in August. He stated that he did not have any additional information to submit, but hoped he might be able to retain his United States citizenship. In October [redacted] was interviewed by an officer of the Consulate General. [redacted]he Consulate General reported later to the Department, [redacted] stated that his

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3/ It was the view of the Consulate General that [redacted] did not expatriate himself under the provisions of either section 349(a)(4)(A) or (B) of the Immigrtion and Nationality Act - serving in a foreign government. When he entered the employment of the Nova Scotia government he was not yet a Canadian citizen, and *so* did not come within the purview of section 349(a)(4)(A) - serving in a foreign government while having the nationality of that government. Nor did he at the relevant time fall under section 349(a)(4)(B) - filling a position in a foreign government for which an oath of allegiance was required, for he was not required to make an oath of allegiance.

naturalization was voluntary and that ne had expected loss of United States citizenship would result automatically from that act. After receiving the Consulate General's letter he thought he might be able to retain United States citizenship; he thus expressed the wish that he might hold dual nationality. He noted to tne consular officer that American Jews were able to hold United States citizenship after becoming citizens of Israel. The Consular officer pointed out to him, (correctly) however, that acquisition of Israeli citizenship by American Jews "was most probably conferred automatically as a result of the operation of Jewish state law." Since, in the Consulate General's opinion, nothing in the interview or Murray's August letter provided any additional evidence showing that he intended to retain United States citizenship, the Consulate General reiterated its recommendation that the' Department approve the certificate of loss of his nationality.

The Department approved the certificate on October 23, 1975, 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.

Murray moved from Canada to Florida in 1984. He entered this appeal on February 27, 1987.

II

As an initial matter we must determine whether the Board may entertain an appeal entered more than eleven years after the Department of State held that appellant lost his United States nationality. Although the passage of *so* many years might of itself warrant dismissing the appeal asuntimely, we will examine the case to determine whether there are any circumstances that might conceivably warrant our allowing the appeal.

To exercise jurisdiction the Board must find that the appeal was filed within the limitation prescribed by the applicable regulations. This is *so* uecause 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. Costello v. United States, 365 U.S. 265 (1961).

In October 1975 when the Department determined that appellant expatriated himself, the limitation on appeal to the Board of Appellate Review was "within a reasonable time" after the affected person received notice of the

Department's determination of loss of citizenship. 4/ Consistently with the Board's practice in cases where the certificate of loss of nationality was approved prior to the effective date of the present regulations (November 30, 1979), we will apply the limitation of "reasonable time" in this case.

Whether an appeal has been taken within a reasonable time depends upon the circumstances of the case. "Reasonable time" means reasonable under the circumstances. Courts have held that a reasonable time means as soon as circumstances permit and with such promptitude as the situation of the parties and the circumstances of the case allow. Reasonable time begins to run from the date an expatriate receives the certificate of loss of nationality, not sometime later when it becomes convenient to appeal. Although the question of a reasonable time will vary with the circumstances, it is clear that it may not be determined by a party to suit his or her own purpose and convenience or when a party, for whatever reason, takes an appeal several years later after notice of the right to take an appeal. A protracted delay that is prejudicial to the opposing party is fatal. 5/ Reasonable time has been defined as follows:

> 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).

4/ Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60. These regulations were in force from November 1967 until November 30, 1979, when the limitation on appeal was revised. The limitation now is "within one year after approval by the Department of the certificate of loss of nationality." 22 CFR 7.5(b)(1).

5/ 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).

[redacted] offers only the following reasons as justification for his delay in taking an appeal.

> Reasons for eleven year delay in filing an appeal: On receiving the July 23, 1975 letter (copy attached) from the Consulate General of the United States in Halifax stating that I *"may"* have lost my U.S. citizenship I was encouraged that there was a good possibility that I could retain my U.S. status. My letter of reply dated August 11, 1975 to the Consulate General clearly indicates that I did not want to lose my citizenship. I tried to make the strongest case possible but my letter was to little avail and I later received a certificate of loss of citizenship dated October 23, 1975.
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> I decided not to follow up on this at that time as I felt that I could not retain a local attorney who was experienced or well versed in the laws of the United States Government. I also felt that getting involved in legal proceedings may have jeopardized my position with the Nova Scotia Government. So, I decided to let the matter rest until I returned to live permanently in the United States on my retirement in October 1984. I might add that at that time Canada would not allow Canadian citizens to hold dual Canadian-U.S. citizenship. This law was changed to allow this in 1977.
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> ...Another valid reason for my long delay in appealing was that I had no legal precedent that could be used in presenting an appeal. This is where an American lawyei could have proved very helpful. I feel now that I can submit a valid precedent in the case of Rabbi Meir Kahane.

[redacted] reasons for not moving sooner are insubstantial and thus insufficient to permit us to assume jurisdiction over his case.

First, in 1975 there was legal precedent [redacted] could deploy if he were to take an appeal to this Board.

It was made clear to him by the Consulate General in 1974 and 1975 that only if he intended to relinquish United States nationality would loss of his nationality ensue. He indicates that he knew that fact from the first. Thus, his contention that only with the decision of the court in the case of Kahane v. Shultz, 653 F.Supp. 1486 (E.D.N.Y. 1987) did he have legal precedent on which he could reply in pursuing an appeal is plainly meritless.

Second, by his own admission he chose a time convenient to himself to appeal; he believed it might jeopardize his position in the Nova Scotia government if he were to become involved in legal proceedings. It is plain that [redacted] made a voluntary, deliberate choice not to appeal sooner. The holding of the Supreme Court in Ackerman v. United States, 340 U.S. 193, 198 (1950) that the petitioner had not made a timely motion to set aside an adverse judgment seems apposite here:

> ...Petitioner made a considered choice not to appeal,.... His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong,.... There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

In this case too there must be an end to litigation. Since [redacted] has not shown that he was prevented by factors beyond his control from appealing much earlier, the interest in finality and repose of administrative decisions must prevail.

Accordingly, we conclude that appellant's delay of over eleven years in contesting the Department's determination of loss of his nationality is unreasonable. The appeal is thus time-barred and not properly before the Board.

III

Upon consideration of the foregoing, we dismiss the appeal for lack of jurisdiction.

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Frederick Smith, Jr., Member