DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: L[redacted] J[redacted] S[redacted]

L[redacted] J[redacted] S[redacted] takes this appeal from an administrative determination of the Department of State that he expatriated himself on July 19, 1974 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 nationality before a consular officer of the United States at Frankfurt am Main, Federal Republic of Germany. 1/

The Department determined in November 1974 that [redacted]e expatriated himself. Thirteen years later he filed an appeal from that determination through counsel. The initial issue confronting the Board is whether, in light of appellant's long delay in taking the appeal, the Board may hear and decide the case. For the reasons that follow, we find the appeal time-barred, and therefore dismiss it for want of jurisdiction.

1/ Section 349(a)(6) 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 of naturalization, shall lose his nationality by --
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> . . .
>
> (6) 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 be prescribed by the Secretary of State: ...

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 L. 95-432 (1978) 92 Stat. 1046 repealed paragraph (5) of subsection 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of subsection 349(a) as paragraph (5).

Pub. L. 99-653 (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

Appellant acquired United States nationality under the provisions of section 301(a)(7) of the Immigration and Nationality Act by virtue of his birth in the [redacted] of a United States citizen father (a retired U.S. Army Warrant Officer) on [redacted]. 2/ His mother is a citizen of the Federal Republic of Germany. The Consulate General at Frankfurt am Main ("the Consulate") periodically registered appellant as a United States citizen and issued him passports. His last passport was issued in 1972.

On October 24, 1972, appellant wrote to the Consulate to inquire about the effect on his citizenship status if he were to obtain naturalization in Germany. Evidently the Consulate did not respond to that letter, for appellant repeated his inquiry on January 23, 1983. On January 31, 1973, the Consulate replied and invited him to call to discuss his case. It seems that on March 13, 1973 appellant wrote to the Consulate again (there is no copy of that letter in the record), for on March 22, 1973 the Consulate wrote appellant at length to reply to specific points appellant apparently made in his March 13th letter. We may

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2/ In 1955, section 301(a)(7), 8 U.S.C. 1401, read in pertinent part as follows:

> Sec. 301. (a) The following shall be nationals and citizens of the United States at birth:
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> ...
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> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions of a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States,...may be included in order to satisfy the physical-

infer from the Consulate's reply that in his March 13th letter appellant had inquired, inter alia, about the formalities of making a renunciation of his United States citizenship.

The following is a summary of the pertinent parts of the March 22nd letter:

> -- He might renounce his United States citizenship at age 18 and one half years of age. (Appellant then was 17 and one half years of age.) 3/
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> -- If he wished to acquire German nationality, he should inquire of the competent German authorities.
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> -- Since he acquired United States citizenship under section 301(a)(7) of the Immigration and Nationality Act (see note 2, supra), section 301(b) of the Act was applicable in his case. 4/ That section required that a person in appellant's situation live in the United States for 2 years between the ages of 14 and 28 in order to retain citizenship. 'In your case this means that you will lose United States nationality if you do not begin a two-year stay in the United States before your 26th birthday.'
>
> -- If after his 21st birthday he acquired German nationality, he would automatically lose United States nationality.
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> -- If he acquired German nationality before the age of 21 on his parents'

3/ The Consulate apparently was confused about the applicable law. A person who is 18 years of age may renounce his U.S. citizenship definitively. If one renounces under the age of 18 years, however, he or she may annul the act by asserting a claim to United States citizenship in the manner prescribed by the Secretary of State prior to the age of 18 and one half years. Section 351(b) of the Immigration and Nationality Act, 8 U.S.C. 1483.

4/ Section 301(b) of the Immigration and Nationality Act. 8

> application he would lose his United States citizenship only if he did not enter the United States to live permanently before age 25,
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> -- If he renounced his citizenship, his case would be referred to the State Department for decision. The process could take two months,

The Consulate enclosed a copy of the statement of understanding that is signed by a renunciant, and urged appellant to study each point in it carefully before seeking an appointment to make an oath of renunciation.

One year later, appellant wrote to the Consulate on June 28, 1974 stating that he had learned from the German authorities that the application he made for German citizenship had been

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4/ Cont'd.

See. 301.

...

> (b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: Provided, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

Pub. L. 92-584 (Oct. 27, 1972) 86 Stat. 1289, amended the foregoing provisions by rewriting section (b) to provide for only a two-year residency requirement, Thus, in order to retain citizenship, a person who acquired United States citizenship under section 301(a)(7) would have to be physically present in the United States for not less than two years between the ages of fourteen and twenty-eight.

Pub. L. 95-432 (Oct. 10, 1978) 92 Stat. 1046, repealed section 301(b) with prospective effect only.

approved, but that a citizenship certificate could not issue until he renounced his United States nationality. To this end, he asked for an early appointment at the Consulate. He hoped the matter could be disposed of quickly as "I must be a German citizen by the end of September." The Consulate invited him to call and enclosed another copy of the statement of understanding, again urging him *to* study it carefully.

Appellant, accompanied by his father, went to the Consulate on July 19, 1974. According to a report the Consulate later sent the Department, the consular officer who presided "carefully informed" appellant about the significance of renunciation and explained to him the statement of understanding "in detai1 prior to his taking the oath". In the statement of understanding appellant declared that he wished to exercise his right to renounce his United States citizenship and did so voluntarily; recognized that he would become an alien toward the United States and would become stateless if he did not hold another nationality; that the consequences of renunciation had been explained to him by the consular officer and that he understood those consequences; and that he fully understood the contents of the statement in the German language. The consular officer's jurat recited that appellant read the statement of understanding in the German language in the presence of two witnesses and that, after her explanation before them of its meaning and of the consequences of renunciation of United States citizenship, appellant signed the statement under oath. 5/ (Oddly, in his affidavit of June 5, 1987, appellant alleges "with certainty that there was not an interpretor [sic] nor "anyone that read anything to me in German", on the date of his expatriation.) The consular officer thereafter administered the

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5/ There is a discrepancy in the dates on the documents relating to appellant's renunciation, all of which, we are satisfied, were actually executed on the same day. The statement of understanding and the witnesses' attestation are dated June 19, 1974. The oath of renunciation is dated July 19, 1974, and the certificate of loss of nationality issued by the Consulate certifies that appellant made a formal renunciation of nationality on July 19, 1974. Since it is clear that appellant performed the expatriative act on July 19, 1974, the dating of the statement of understanding and the witnesses' attestation clause is erroneous. The discrepancy in the dates of the documents may perhaps be attributed to clerical error. We do not consider it material.

oath of renunciation to appellant in the presence of the witnesses, Appellant was then nearly 19 years old. The operative part of the oath reads as follows:

> I desire to make a formal renunciation of my American nationality, as provided by section 349(a)(6) of the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

On the day appellant made his renunciation, the Consulate wrote to the authorities of Kassel (presumably at appellant's request) to attest that he had formally renounced his nationality. The State Department would review the matter and make a final decision, it added. The Consulate's letter concluded as follows:

> In the case of Mr. S[redacted], who is a minor, born on September 28 55, we accepted the oath of release from American citizenship, since in contrast to persons who are of legal age, he would not lose his American nationality on the day of his naturalization in Germany (Paragraph 349 (a)(1) of the U.S. Nationality Act). The oath of renunciation can be sworn at the age of 18 1/2 years at the earliest. 6/

On September 25, 1974, the consular officer who presided at appellant's renunciation executed a certificate of loss of nationality in appellant's name, as required by law. 7/ She

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6/ English Translation, Division of Language Services, Department of State, LS No. 124056 (German) 1988.

7/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

> Sec. 358. Whenever the 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

certified that appellant acquired United States nationality by virtue of birth abroad of a United States citizen father; made a formal renunciation of United States nationality; and thereby expatriated himself Under the provisions of section 349(a)(6) of the Immigration and Nationality Act. The Consulate forwarded the certificate to the Department under cover of a memorandum reporting on the circumstances of appellant's renunciation which stated in part that:

> Mr. L[redacted] Ja[redacted] S[redacted] appeared to be mature and competent to take the Oath of Renunciation. He was carefully informed about the importance of his voluntary act and the Statement of Understanding was explained to him in detail prior to his taking the oath. He has no intention to travel to the United States but wants to finish his education in Germany and live here permanently.

The Department approved the certificate on November 26, 1974, approval being an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review, On the same day the Department sent the approved certificate to the Consulate to forward to appellant which the Consulate did by registered mail on December 17, 1974. In its letter of transmittal, the Consulate called appellant's attention to the enclosed information on the reverse of the certificate "which explain[s] that you may appeal the Department's decision and outlines the procedures to be followed if you believe that a reversal of the decision is warranted.'

At the request of the Board the Consulate at Frankfurt late in 1987 submitted documents that had not previously been forwarded to the Department as part of the record in this case.

1/ Cont'd.

> 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.

These documents consist of correspondence exchanged between appellant and the Consulate, and the passport and nationality card maintained by the Consulate on its citizenship dealings with appellant.

According to the Consulate's records, appellant, accompanied by his father, visited that office on February 18, 1975. He stated that he wished to appeal the Department's decision. He had not got the federal government job for which he applied and for which German citizenship was a prerequisite. "Would like to be an American again," a consular officer or employee recorded. The person who saw [redacted] told him he might execute a statement of appeal which the Consulate would forward to Washington. The Consulate's records further note that appellant said that the consular officer who processed his renunciation had told him he "may come back while under the age of 21 if he changes his mind and he can appeal."

Appellant returned to the Consulate on March 4, 1975. He stated that the German authorities found his naturalization invalid. The notation on the card continued:

> Since he was a minor when applying for naturalization in Germany his parents should have signed application, too. Mr. S. is now in possession of Alien ppt iss, by German authorities. Does not want to appeal loss of U.S. citship [sic] now - and does not know whether he will apply for German citizenship under new German law (through German mother).
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> Hold file longer - may come back with new ideas. 8/

8/ In February 1988, appellant submitted a letter which he had received from the authorities in Kassel, dated April 29, 1975, noting that a certificate of German citizenship was issued in his name on **August** 14, 1974. Curiously, the letter states that only when it became evident that [redacted] was not prepared to renounce American citizenship, did the competent authority allow him to withdraw his request for naturalization. He might, however, obtain German citizenship as from January 1, 1975 by making a statutorily required statement, provided his mother was a German citizen at his birth.

English translation procured by Counsel for appellant, source not cited.

procedure for recovery of citizenship; might he be told where to turn to get the information? A notation on the card the Consulate maintained on its citizenship dealings with appellant states that on June 16, 1982 he was informed (by informal note) that nothing could be done for him.

On January 5, 1983 appellant again wrote to the Consulate. His renunciation had been made in ignorance of the law and under pressure of other circumstances. He had been told by an employee of the Consulate that he would lose his United States citizenship at age 21 without more, if he was not prepared to live uninterruptedly in the United States for six years. At that time he was unemployed and had the possibility to get job with the Federal Government, provided he acquired German citizenship. He was thus in a great dilemma. In that situation and due to misinformation from a consular employee, he renounced his citizenship under great psychological pressure. His renunciation was therefore not valid. He wished accordingly to have his renunciation annulled. How might he **do** *so?*

The Consulate replied on January 12, 1983. He was reminded that in 1972 he expressed the wish to renounce his citizenship, and did so in 1974 after having been carefully counseled about that act. The Department approved his loss of nationality. His act was legally effective. He was 18 years old when he renounced his citizenship. Under the then relevant law concerning retention of citizenship he was required to live in the United States for two years between the ages of 14 and 28; thus in 1974 he had eight years to fulfill the statutory requirement for retention of citizenship. Renunciation was done freely since he wished to become a German civil servant. "A revocation in your case is not possible," concluded the Consulate's letter.

Appellant's protracted correspondence with United States authorities in Germany concludes with a letter he wrote to the United States Embassy at Bonn on November 17, 1985. He stated that he had written to the consular section of the Embassy two months previously but had no answer. He had been stripped of his citizenship by the Consulate at Frankfurt under conditions that were not explained to him. He would like to know whether there were regulations concerning legal exception of which he would avail himself. He contended that his renunciation was void. How might he petition for redress? It appears that the Embassy forwarded appellant's letter to the Consulate for appropriate attention. A copy of a slip of paper in the latter's records dated January 7, 1986 states that: "Gave him address of Dept. to inquire when he came in with his brother, re brother's case."

The Consulate's records conclude with the notation that on January 23, 1987 an American lawyer practicing in Frankfurt

(1967-1979), 22 CFR 50.60. 10/ 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. Thus, under the time limitation governing the instant case, if we conclude that appellant did not initiate his appeal within a reasonable time, the appeal would be time-barred and the Board would lack authority to entertain it.

Whether an appeal has been taken within a reasonable time after the affected party received notice of the Department's decision in his or her case depends upon the circumstances in each individual case. Generally, reasonable time means reasonable under the circumstances, Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). Courts take into account a number of considerations in determining whether the facts of a particular case indicate that the affected party moved within a reasonable time, including the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grbunds relied upon, and prejudice to the other party. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Security Mutual, Casualty Co. v. Century Casualty Co., 621 F.2d 1062, 1067-68 (10th Cir. 1980); and Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930-31 (5th Cir. 1976). 11/

10/ 22 CFR 50.60, provided that:

> 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.

11/ In Lairsey v. Advance Abrasives Co., the court quoted 11 Wright & Miller, Federal Practice & Procedure, section 2866 at 228-229:

> 'What constitutes reasonable time must of necessity depend upon the facts in each individual case.' 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.

542 F.2d at 930-31.

The rationale for allowing a "reasonable time" to appeal an adverse decision is to ensure that an appellant will have sufficient time upon receipt of such decision to assert his or her contentions that the decision is contrary to law or fact, and to compel appellant to take such action with minimal delay so as to protect the adverse party against a belated appeal that could more easily have been resolved when the recollection of events upon which the appeal is based is fresh in the minds of the parties involved. Unreasonable lapses of time cloud a person's recollection of events and also make it difficult for the trier of fact to determine the case, particularly where the record is incomplete or lost or obscured by the passage of time, Further, it should be noted that the period of a reasonable time begins to run with the receipt of notice of the Department's holding of loss of nationality and not at some subsequent time years later when an appellant, for whatever reason, may seek to regain or re-establish his or her United States citizenship status.

Appellant'concedes in his affidavit of June 5, 1987 that a considerable amount of time has passed since he renounced his nationality, but asserts it was only in 1936 that "I realized an injustice might have been done to me by my expatriating act."

Through his counsel, appellant argues that his appeal should be deemed timely. The documents submitted by the Consulate to the Board at its request show that appellant clearly wished to appeal the Department's determination of loss of his nationality, counsel states. In reviewing every letter the Consulate sent appellant, according to counsel's memorandum of February 26, 1988, "one can notice the clear omission of telling Mr. [redacted] about where he could send his appeal. Not one correspondence told him about the Board of Appellate Review." If this had been done in 1975, counsel states, "Mr. [redacted] could have sent his appeal to the Board in 1975, rather than getting waylaid at the **U.S.** Consulate in Frankfurt." He adds that in light of appellant's appearance at the Consulate in February 1975 and the letter he wrote the Consulate on March 16, 1976, the Board could "legitimately" find that appellant made efforts to appeal as early as three to seventeen months after his expatriation was approved. From the foregoing, counsel asserts that appellant made a good faith effort to discover the appeal process, and "should not be penalized by the Consulate's inability to steer him in the right direction."

Another aspect of the underlying problem, counsel states, is that the Consulate failed to explain appellant's appeal rights to him properly. Throughout the letters the Consulate sent appellant is the assertion that his action in renouncing his citizensihp was final and "there was no recourse to correcting his mistake." Counsel refers in particular to the Consulate's March 30, 1976 letter that in order to reacquire United States citizenship he would have to immigrate and to its

letter of September 27, 1976 that "your right to enter an objection is void," Rather than defer a final judgment to the Board, as would have been appropriate, counsel states, "the officials acted as final arbiters in whether the expatriation process was valid or not." Counsel concludes by asserting that "the confusion by which the petitioner expatriated himself was undoubtedly carried forward into appellate stage and resulted in his delayed appeal to the Board."

The dispositive question is whetner there is any basis to conclude that the Consulate failed in its duty to advise appellant where he might file an appeal and whether on the basis of correspondence that passed between appellant and the Consulate after his visit in early March 1975 appellant was so discouraged from appealing that he was effectively precluded from moving sooner than he did.

We do not consider that appellant's arguments are legally sufficient to excuse such a long delay in seeking restoration of his United States citizenship. There can be no doubt that appellant received a copy of the approved certificate of loss of his nationality within a reasonable time after it was sent to him by registered mail on December 17, 1974. And, as we have seen, the procedures for taking an appeal to the Board of Appellate Review were spelled out on the reverse of the certificate; the address of the Board was noted, as was the fact that an appeal might be entered through an embassy or consulate, or thorough an agent in the United States. In brief, appellant had due legal notice about the grounds for an appeal and how to enter one.

Furthermore, according to contemporary records of the Consulate, as noted, appellant, accompanied by his father, informed the Consulate on February 18, 1975, that he wanted to appeal, and was told that if he were to draft an appeal the Consulate would forward it to Washington. We also note that on March 4, 1975 when appellant again visited the Consulate he is reported as saying that he did not want to appeal loss of his citizenship "now."

In light of the foregoing, we are persuaded that in 1975 appellant was fully and correctly apprised of his rights and clearly understood them.

As we have also seen, appellant wrote a number of letters to the Consulate from 1976, making varied inquiries about his status and what he might do to recover it. He received what we can only describe as discouraging replies. The Consulate, in our view, should have reminded him that he had a right to appeal and that the procedures had been communicated to him previously. But while we fault the Consulate, we are also of the view that in the circumstances appellant had a larger responsibility to follow up his inquiries with appropriate

questions; for example: "I understood I had a right of appeal. Do you mean I do not now have such a right?" He was not far from the Consulate and could have gone there for a discussion, but he did not do so. Or he could have consulted competent legal counsel, or at least asked a person of affairs to assist him in clarifying his status and rights with United States authorities. He did none of those things. We are therefore unable to consider that he is entitled to shelter behind admittedly unhelpful advice he subsequently received. Basically, he was the author of his delay in taking this appeal, not the Consulate.

In the circumstances, we believe appellant's delay of over twelve years in attempting to recover his United States nationality was unreasonable.

III

Upon consideration of the foregoing, we concude that the appeal is time-barred. Since timely filing is mandatory and jurisdictional, we lack authority to hear and decide theappeal. It is accordingly hereby dismissed.

Alan G. James, Chairman

Edward G. Misey, Member

Frederick Smith, Jr., Member