Auqust 31, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

THE MATTER OF: D[redacted] A[redacted] R[redacted]

This is an appeal from an administrative termination of the Department of State that appellant, vid A[redacted] R[redacted], expatriated himself on September 9, 70 under the provisions of section 349(a)(l) of the migration and Nationality Act by obtaining turalization in Australia upon his own application. 1/

The State Department made its determination of loss appellant's nationality on Marcn 7, 1978. R[redacted] tered an appeal therefrom on April 8, 1988. As an itial matter we must determine whether the Board has risdiction to entertain an appeal *so* long delayed. For asons given hereafter, we conclude that the appeal is me-barred and not properly before the Board. It is cordingly dismissed for lack of jurisdiction.

I

Appellant became a United States citizen by virtue his birth at [redacted], and ved in the United States until 1960 when he went to stralia. Appellant stated to the Board that he was ployed in 1970 by the Commonwealth Scientific and dustrial Research Organization (CSIRO), a body wholly nded by the Australian government. CSIRO allegedly erted "considerable pressure" on appellant to become an stralian citizen. Accordingly, he applied for

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In 1970, section 349(a)(l) of the Immigration and tionality Act, 8 U.S.C. 1481(a)(l), read 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 --
>
> (l) obtaining naturalization in a foreign state upon his own application, ...

Pub. L. 99-653 (approved Nov. 14, 1986), 100 Stat. 58, amended subsection (a) of section 349 by inserting oluntarily performing any of the following acts with the tention of relinquishing United States nationality:" ter "shall lose his nationality by".

ustralian citizenship and was granted a certificate of ustralian citizenship on September 9, 1970.

The only evidence that appellant obtained aturalization in Australia is the certification of a onsular officer on the certificate of loss of nationality hat the officer executed in appellant's name in 1976 hich reads as follows: "The evidence of such action onsists of the following: Official confirmation from the ustralian Department of Immigration V70/2669 dated June 8, 1974." There is no copy in the record of that ommunication from the Australian government. Nor is here any record of the circumstances surrounding ppellant's naturalization or the naturalization ceremony n which he presumably participated. The Board takes ote, however, that applicants for naturalization in ustralia in 1970 were required to make the following oath r affirmation of allegiance as prescribed by schedule 2 f the Australian Citizenship Act of 1948-69:

> I, ..., renouncing all other allegiance, swear by Almighty God [solemly and sincerely promise and declare] that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Australia, Her Heirs and Successors, according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen.

Having been informed by the Australian government's)mmunication of June 1974 that appellant had obtained ıturalization, the Consulate General at Melbourne wrote) him on October 8, 1974 to state that he might have (patriated himself. He was offered an opportunity to ıbmit evidence for the Department to consider in :teriming his citizenship status, and asked to complete a)rm on the reverse of the letter regarding his :rformance of the expatriative act. The Consulate :neral wrote appellant again on December 10, 1974 to note ıat he had not replied to its letter of October 8th and)uld have 60 days to do *so;* failure to reply by that time)uld be taken to mean that he intended to relinquish his ıited States nationality when he obtained Australian tizenship. Appellant informed the Consulate on :cember 19, 1974 that he had not received its letter of :tober 8th. His letter continued:

> Regarding the content of your recent letter: I was not aware that there was any alternative to relinquishing my U.S. citizenship when I became a

> naturalized Australian citizen. Do you mean that this is not the case? In any event, I have a permanent job here and there is little likelihood of my wishing to return permanently to the United States. There is one matter tnat does concern me. My parents, who are retired, live in Florida. If I should ever have to visit them on very short notice (illness or death), would there be any difficulty in my obtaining a visitor's visa in a hurry?

The Consulate General replied to appellant on anuary 8, 1975 as follows:

> The letter attached is a replacement for the Consulate General's letter of October 8 which you did not receive. A prompt reply would be appreciated.
>
> Former United States citizens are treated the same as any other alien visa applicant. If it is determined that you have lost your United States citizenship, it will not prejudice future applictaions for visitor visas.

On January 15, 1975 appellant answered the nsulate General's letter by completing the form on the verse of that letter, a facsimile of which follows:

1. ☒ I was naturalized as a citizen of Australia on _____ I further state that this was my free and voluntary act and that no influence, compulsion, force or duress was exerted upon me by any other person, and that it was done without any reservation and with the intention of relinquishing my United States citizenship.

2. ☐ I would like to discuss my possible loss of United States citizenship with a consular officer. I request an appointment on _____ (date and time)

3. ☐ I will be unable to come to your office but I wish to submit evidence to show why I should not be held to have lost United States citizenship.

   A. ☐ The evidence I wish to submit is attached. It consists of: _____

B. ☐ I will forward the evidence to your office within sixty days.

4. ☒ I do not wish to submit *any* evidence or contest a decision that I have lost United States citizenship by obtaining naturalization in Australia with the intention of relinquishing my United States nationality thereby.

5. ☐ I would like to make the following statement explaining my reasons for performing the act to which you have referred and my motives and purposes in doing so as they relate to my allegiance to the United States and my intent to retain or to relinquish my United States citizenship. (Statements of others or documentary evidence should be attached.)

I AM A PERMANENT RESIDENT IN AUSTRALIA AND THEREFORE I DECIDED TO TAKE AUSTRALIAN CITIZENSHIP

It was not until fourteen months later that the onsulate General took any further action in appellant's sse. On March 25, 1976 a consular officer executed a ertificate of loss of nationality in appellant's name, as equired by section 358 of the Immigration and Nationality ct. 2/ Therein the officer certified that appellant

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/ Section 358 of the Immigration and Nationality Act, 8 .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.

cquired the nationality of the United States by birth herein; that he acquired the nationality of Australia by aturalization upon his own application; and thereby xpatriated himself under the provisions of section 49(a)(1) of the Immigration and Nationality Act. The ecord does not disclose why the State Department did not eceive the certificate until March 3, 1978. A few days ater on March 7, 1978 the Department approved the ertificate, approval constituting an administrative etermination of loss of nationality from which a timely nd properly filed appeal may be taken to the Board of ppellate Review.

Ten years later on April 8, 1988 appellant entered his appeal.

II

A threshold issue is presented: whether the Board ay entertain an appeal that was entered ten years after ne Department of State determined that appellant lost his nited States nationality. Although the passage of so any years might of itself warrant dismissal of the appeal s untimely, we will examine the case to determine whether nere are any circumstances that might warrant our llowing the appeal.

To exercise jurisdiction, the Board must find that ne appeal was filed within the limitation prescribed by ne applicable regulations. This is *so* because timely ling is mandatory and jurisdictional. United States v. obinson, 361 U.S. 220 (1960). Thus, if an appellant, roviding no legally sufficient excuse, fails to take an ppeal within the prescribed limitation, the appeal must e dismissed for want of jurisdiction. Costello v. United tates, 365 U.S. 265 (1961).

In 1978 when the Department determined that ppellant expatriated himself, the limitation on appeal to ne Board of Appellate Review was "within a reasonable ime" after the affected person received notice of the epartment's determination of loss of citizenship. 3/

/ Section 50.60 of Title 22, Code of Federal egulations, 22 CFR 50.60. These regulations were in orce from November 1967 to November 1979, when the imitation on appeal was revised. It now is "within one ?ar after approval by the Department of the certificate : loss of nationality." 22 CFR 7.5(b)(1).

nsistently with the Board's practice in cases where the rtificate of loss of nationality was approved prior to e effective date of the present regulations (November , 1979), we will apply the limitation of "reasonable me" in this case.

"Reasonable time" is a term of settled meaning. ether an action has been taken within a reasonable time pends on the facts of the particular case. Chesapeake d Ohio Railway v. Martin, 283 U.S. 209 (1931). asonable time has been held to mean as soon as rcumstances will permit and with such promptitude as the tuation of the parties will permit. The rule presumes, wever, that an appellant will prosecute nis appeal with e diligence and prudence of an ordinary person. etrich v. U.S. Shipping Board Emergency Fleet Corp., 9 2d 733 (2nd Cir. 1926). A party may not determine a me suitable to himself. In re Roney, 139 F.2d 175 (7th r. 1943). In loss of nationality proceedings reasonable me begins to run when the affected party receives notice at an adverse decision has been made with respect to his tizenship. In determining whether an appeal has been ken within a reasonable time, the courts "take into isideration the interest in finality, the reason for the lay, the practical ability of the litigant to learn clier of the grounds relied upon, and prejudice to other rties." Ashford v. Steuart, 657 F.2d 1053, 1055 (9th r. 1981). Reasonable time thus makes allowance for the tervention of unforeseen circumstances beyond a person's ntrol that might prevent him from taking a timely appeal.

The rationale for allowing one a reasonable period time to appeal an adverse decision with respect to tizenship is pragmatic and fair. It allows such a rson sufficient time to prepare a case showing that the partment's decision was wrong as a matter of law or t, while penalizing excessive delay which may be ejudicial to the rights of the opposing party because e passage of considerable time has obscured the events rrounding the citizen's performance of the expatriative t. It is incontrovertible that passage of many years tween performance of an expatriative act and taking an peal can make it difficult if not impossible for the ard as trier of fact to make an objective determination ether the act was done voluntarily with the intention of inquishing United States nationality.

Appellant in this case states that his delay in ing this appeal is attributable to two reasons.

> The first concerns the paragraph on on the back of the Certificate of Loss of Nationality, under the title 'Appeal

> Procedures', which reads as follows: 'Unless you have new or additional evidence to submit, or you believe that the holding of loss of nationality was contrary to the law or to the facts in your case it is unlikely that an appeal will be successful.' This statement does little to encourage the appelant [sic] to procede [sic] with an appeal! The second reason concerns the fact that the situation has changed, as witness the Supreme Court cases that are cited in extracts from the 'Code of Federal Relations' [sic] that you sent me with your reply to my letter. While I was still in Australia, in the process of immigrating to the country of my birth, I was told that the situation has altered from what it had been previously and that I should look into making an appeal when I reached the United States. It is clear to me from the cases of Afroyim v. Rusk and Vance v. Terrazas, especially the latter, that unless the person who performed the expatriating act intended [emphasis appellant's] to relinquish citizenship of the United States, by that person's words or proven conduct, then the Constitution does not give the Government the right to deprive an American citizen of his/her birthright.

These reasons are patently insufficient to excuse a ten-year delay in seeking redress from this Board.

Perhaps the phraseology of the appeal information in 1978 was infelicitous, but the affected party was aiso informed that even if he had no new or additional evidence to submit an appeal might be based on allegations that the Department's decision was wrong as a matter of law or fact. One who attached value to his citizenship and was genuinely concerned about an adverse decision might reasonably be expected to lodge a timely protest and would not be deterred from appealing by somewhat discouraging official language. In any event, appellant was duly apprised by the information on the reverse of the certificate that an appeal procedure was available to him and that he could obtain additional information about

ppeals from the Board. Yet, he did not act until ten ears later.

We now consider appellant's second reason. That he ay have learned of the Supreme Court's decisions in froyim v. Rusk, 387 U.S. 253 (1967) and Vance v. errazas, 444 U.S. 252 (1980) only recently cannot excuse is delay. As a matter of law appellant could have based n appeal either in 1978 or 1980 on the grounds that he id not intend to relinquish his United States nationality hen he obtained naturalization in Australia. Had he been iligent about seeking restoration of his citizenship and ddressed inquiries to the Board or to the Consulate eneral about what he might do, he would have ascertained hat he might raise the issue of his intent when he erformed the expatriative act.

Reviewing the record, it is clear that appellant is not prevented by unforeseen circumstances that he ould not control from moving much earlier to contest the ss of his United States nationality. Indeed, he and he .one was responsible for the delay. For the Board to .low the appeal obviously would be prejudicial to the .ate Department which bears the overall burden of proving hat appellant voluntarily obtained naturalization in stralia with the intention of relinquishing his United ates nationality.

Appellant's unexcused delay of ten years in taking e appeal is unreasonable under any objective criterion. is accordingly time-barred and not properly before the ard.

III

Since the Board lacks jurisdiction to consider an peal that is time-barred, we hereby dismiss this peal. Given our disposition of the case we do not reach e other issues presented.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Mary Elizabeth Hoinkes, Member