September 29, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: Ke[redacted] M[redacted] G[redacted]

This case is before the Board of Appellate Review on appeal by K[redacted] [redacted] G[redacted] from an administrative determination of the Department of State that he expatriated himself on August 15, 1977 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Sweden upon his own application. 1/

In July 1978 the Department approved a certificate of loss of nationality issued in appellant's name. He entered an appeal from that decision in August 1987. Appellant's delay of nine years in seeking review of the Department's decision presents a jurisdictional issue which the Board must resolve at the outset. For the reasons that follow, we conclude that the appeal is time-barred, and accordingly dismiss it for lack of jurisdiction.

I

[redacted] acquired United States nationality by birth at [redacted]. He graduated from

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1/ In 1977 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 (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 nationaiity:" after "shall lose his nationality by".

Xavier High School in New York City and St. Peter's College (New Jersey), and reportedly taught for several years in the New York public school system. In 1970 he toured Europe with an all-star American basketball team. Around 1973 he settled in Sweden where he was a basketball coach and player. He renewed his United States passport at the Embassy at Stockholm in 1975.

According to appellant, he was advised in 1977 by the president of his basketball club that in order to keep his job he would have to acquire Swedish citizenship. He states that in 1977 the limit on the number of foreign players on each team was reduced from two to one and that he was the foreigner on his team who had to acquire Swedish citizenship. In May 1977 [redacted] applied to the National Immigration and Naturalization Board to be naturalized. In acknowledging [redacted] application, the Board called his attention to Swedish policy against dual nationality, and asked him to sign the following statement: "I hereby pledge to renounce my American citizenship in the event my application for Swedish citizenship is approved." [redacted] signed the statement on July 18, 1977. He was granted Swedish citizenship on August 15, 1977 at age 31.

Having been informed of [redacted] naturalization by the Swedish authorities, the Embassy addressed the following letter to [redacted] on December 29, 1977:

> The Embassy has received from the Swedish Immigration Board a copy of your Certificate of Naturalization, indicating that you were naturalized in Sweden on August 15, 1977. Also received is a copy of your written statement that you will renounce your United States citizenship.
>
> Section 349(a) of the Immigration and Nationality Act of 1952 provides that 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.
>
> As a United States Consular Officer, I am required by law to report to the Department of State the facts in each case in which it is believed that loss of United States nationality may have occurred.

> Because the Swedish Government has informed us that you voluntarily gave up United States citizesnip to gain Swedish citizenship, the Embassy will prepare a Certificate of Loss of United States nationality to submit to the Department of State in Washington.
>
> In this connection it would be appreciated if you would complete the attached form and return it to the Embassy together with your United States passport.. ..2/
>
> However, if your application for Swedish citizenship was neither voluntary nor with tne intention of relinquishing United States nationality, you are welcome to submit any evidence regarding this matter.

[redacted] did not reply to the Embassy's letter. On May **9, 1978,** a consular officer executed a certificate of loss of nationality (CLN) in appellant's name, as required by law. 3/ The certificate recited that appellant acquired United States nationality by birth therein; that he acquired the nationality of Sweden by naturalization upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

2/ During oral argument on August 18, 1988, appellant recalled that the document enclosed in the Embassy's letter probably was an affidavit of expatriated person.

3/ 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

Believing that U.S. authorities had for all practical purposes cancelled his passport, he obtained a Swedish one in the spring of 1978 preparatory to travelling to the United States. He mailed his Swedish passport and application for a visitor's visa to the U.S. Embassy in Stockholm. 4/ Worried because the visa was not issued promptly, appellant telephoned the Embassy. The consular officer to whom he spoke was adamant that he would not issue appellant a visa. To appellant it seemed the officer was angry because he had not surrendered his United States passport or signed the document (presumably affidavit of expatriated person) enclosed in the Consul's December 1977 letter. He went to the Embassy on June 2, 1978. He was again told he would have to surrender his United States passport and sign the form containing renunciatory language which appellant maintains he consistently refused to do. A consular employee acted as intermediary. She said she might be able to help him if he would sign a statement about his intent when he obtained Swedish citizenship, "So she gave me, as I remember," appellant said, "just a regular piece of paper that I signed, the two points that I made on the papers that I took Swedish citizenship to be Swedish, not to get rid of my American citizenship. I needed that for my job, the Swedish citizenship." 5/ The consular employee left with appellant's statement and United States passport and returned with his Swedish passport in which was stamped a visitor's visa valid for one year. From testimony presented to the Board on August 18, 1988, it appears that in issuing a visa, U.S. consular authorities disregarded standing directives proscribing issuance of a visa to an individual claiming to be or appearing to have a claim to U.S. citizenship without assessment of that claim. In the

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3/ Cont'd.

> 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.

4/ Transcript of Hearing in the Matter of [redacted] Board of Appellate Review, August 18, 1988 (hereafter referred to as "TR"). 19-23.

5/ TR 23.

Board's view, however, that mistake on the part of consular officials does not affect the outcome of this case.

The Department on July 3, 1978 approved the CLN that the Embassy executed in [redacted] name, an action that constitutes 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 states that after returning to Sweden from a visit to the United States in September 1978 he found awaiting him a letter from the Embassy, dated July 18, 1978, enclosing a copy of the approved CLN on the reverse of which there was information about making an appeal. The Consul's letter also gave information auout making an appeal.

Appellant married a Swedish citizen in 1979. They have three children, all born in Sweden. In 1979 he applied for and received from the Embassy a new visitor's visa with unlimited validity. Appellant alleges that in 1982 he consulted the officer at the Embassy who had replaced the consular official who handled his case in 1977-1978. The new consular officer reportedly told appellant that there was nothing he could do about appellant's case, but suggested he ask his father to file an immigrant visa petition on his behalf.

In August 1987 [redacted] entered this appeal through counsel and requested oral argument which was heard on August 18, 1988.

II

A threshold issue is presented: whether the Board may entertain an appeal that was entered nine years after the Department of State determined that appellant lost his United States nationality.

To exercise jurisdiction, the Board must find that the appeal was filed within the limitation prescribed by the applicable regulations. This is *so* because timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960).

In 1978 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. 6/ Consistently with the Board's practice in cases where the certificate of loss of nationality was approved prior to November 30, 1979, the effective date of the present regulations, we will apply the limitation of "reasonable time" in this case.

"Reasonable time" is a term of settled meaning. Whether an action has been taken within a reasonable tine depends on the facts of the particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). Reasonable time has been held to mean as soon as circumstances will permit and with such promptitude as the situation of the parties will permit. The rule presumes that an appellant will prosecute his appeal with the diligence and prudence of an ordinary person. Dietrich V. U.S. Shipping Board Emergency Fleet Corp., 9 F.2d 733 (2nd Cir. 1926). A party may not determine a time suitable to himself. In re Roney, 139 F.2d 175 (7th Cir. 1943). In loss of nationality proceedings the limitation begins to run when the affected party receives notice that an adverse decision has been made with respect to his citizenship. In determining wnether an appeal has been taken within a reasonable time, the courts "take 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." Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). Reasonable time thus makes allowance for the intervention of unforeseen circumstances beyond a person's control that might prevent him from taking a timely appeal. Accordingly, appellant has the burden of showing that he initiated the appeal within a reasonable time after September 1978 when he received notice that the Department had determined that he expatriated himself.

The rationale for allowing one a reasonable period of time within which to appeal an adverse citizenship is pragmatic and fair. It allows such a person sufficient time to prepare a case showing that the Department's decision was wrong as a matter of law or fact, while

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6/ Section 50.60 of Title 22, Code of Federal Regulations which was in force from November 1967 to November 1979 when the limitation on appeal was revised. It now is "within one year after approval by the Department of the certificate of loss of nationality." 22 CFR 7.5(b)(1).

penalizing excessive delay which could be prejudicial to the rights of the opposing party; the passage of time inevitably obscures the events surrounding the citizen's performance of the expatriative act. It is also incontrovertible that passage of many years between performance of an expatriative act and the taking of an appeal can make it extremely difficult for the Board as trier of fact to make an objective, reasoned determination whether the act was done voluntarily with the intention of relinquishing United States nationaiity.

Summarily stated, it is appellant's contention that the Department and its agents, not he, are responsible for the fact that he did not take an earlier appeal. He was so discouraged by the information about appeal procedures on the reverse of the CLN and by what the consul wrote in his letter of July 18, 1978 about an appeal that he did not even contemplate filing an appeal until many years later.

The information on the reverse of appellant's CLN read in pertinent part as follows:

APPEAL PROCEDURES

> Any holding of loss of United States nationality may be appealed to the Board of Appellate Review in the Department of State. The regulations governing appeals are set forth at Title 22 Code of Federal Regulations, Sections 50.60 - 50.72. The appeal may be presented through an American Embassy or Consulate or through an authorized attorney or agent in the United States.
>
> 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 the facts in your case it is unlikely that an appeal will be successful.
>
> Your appeal must clearly show the basis upon which it is made....
>
> For additional information about appeals and to obtain copies of the provisions of the Code of Federal Regulations, consult the nearest American Embassy or Consulate or the Board of Appellate Review, Department of State, Washington, D.C. 20520.

The Consul's letter transmitting the CLN read in pertinent part as follows:

> You are hereby notified that you are entitled to appeal to the Board of Appellate Review in the Department of State with regards to the decision that you have lost your United States nationality. If you have new or additional evidence to submit or if you contend that the holding of loss of nationality in your case is contrary to law or fact, you may present an appeal through an American Foreign Service Office or a duly authorized attorney or agent in the United States. It should be emphasized that unless your appeal is based on these grounds, it will not be accepted.
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> Your appeal must state clearly the basis upon which you claim that the Department's holding of loss of United States nationality should be reversed. ...
>
> No formal application for reconsideration need be made, but the appeal to the Board of Appellate Review must be made in writing within a reasonable time after receiving notice of the Department's administrative holding of loss of nationality, supported by such documentary evidence as may be available.
>
> If you have questions regarding the enclosed document, I shall be glad to discuss it with you at your convenience.

Appellant stated that when he read the information regarding the filing of an appeal set forth on the reverse of the CLN and in the consular officer's letter, he thought there was nothing he could do, as he had no additional evidence to submit. 7/ Although he never believed that he had voluntarily surrendered his United States citizenship, he assumed that nis citizenship "had been taken away from me and I kind of presumed that they could do that, I guess. I didn't see any real appeal that I could make here because I didn't have any evidence. 8/

7/ TR 26, 27.

8/ TR 27.

He first realized he had been wronged, he said, when he read an article in Newsweek about Rabbi Kahane. "He was a dual citizen of Israel and America," appellant observed, "and it said that the Supreme Court had ruled twice that an American citizen has a constitutional right to remain American and his citizenship can't be taken away unless he voluntarily renounced it." 9/

Interpolating appellant's testimony, his counsel submitted that the government should be held accountable for the way tne information about appeals was formulated. "[I]f you are going to say things to mislead or say, 'it is unlikely that you will be successful,' that is certainly not the American way." 10/ Since the consular officer repeated the misleading information about appeals in his letter to appellant of July 18, 1978 and went on to say that the appeal would not be accepted unless it was based on the grounds stated in the appeal information, the government should not, counsel submitted, be permitted to bar appellant from redressing a wrong. 11/

We find appellant's explanation for the delay in taking the appeal insubstantial.

Appellant had ample cause, even before the Department made its decision in his case, to dispute a finding that he expatriated himself. The consular officer's letter of December 1977 advising appellant that he might have expatriated himself stated that because the Swedish government had informed the Embassy that appellant had voluntarily given up his United States citizenship, the consular officer was required to submit a certificate of loss of nationality to Washington. However, it went on, if he had not voluntarily applied for Swedish nationality with the intention of relinquishing his United States citizenship, he was welcome to submit evidence to that effect. Appellant stated at the hearing that he had never intended to relinquish his citizenship. 12/ He did not like the conclusion of the consular officer's letter; "it was never my purpose to give up my American citizenship." 13/

9/ Id.

10/ TR 74.

11/ Id.

12/ TR 27.

13/ TR 33.

Plainly, appellant believed a mistake was being made in his case, yet did not act then or for years later. His failure to object to the Embassy's proposed action is all the more difficult to understand since he protests that he consistently refused to sign an affidavit of expatriated person precisely because he never had tne intention of relinquishing his United States citizenship.

Nor can we agree that because the information on the reverse of the CLN about taking an appeal was inartfully phrased, appellant was denied procedural due process. The appeal instructions stated plainly that an expatriate had a right of appeal to this Board, and explained how and where to file an appeal. It also stated an obvious and incontrovertible proposition -- unless one presented new or additional evidence or alleged that the Department was wrong in law or fact, an appeal was not likely to succeed. Appellant could not have read the instructions carefully if he believed that he would be barred from taking an appeal unless he had new or additional evidence. Obviously, he might proceed on the grounds that he simply believed the Department's decision was wrong. Nor do we see prejudice to appellant in the consular officer's letter stating that unless appellant could base an appeal on one of the two general grounds cited in the instructions, the Board would not accept his appeal. It is an elemental fact of the appellate process that the Board will not accept an appeal that does not either raise new matters not previously considered or adduce errors of law or fact in the Department's determination; failure to do either of these things means that one has not stated a cause of action. In any event, even if one were to consider the statements in the consular officer's letter prejudicial, the officer's invitation to appellant to discuss his case cured any prejudice.

Not only has appellant not persuaded us that he was denied procedural due process, but he has not shown that he acted reasonably in not initiating an appeal promptly after receiving notice of the Department's determination of his expatriation. An ordinary prudent man intending to maintain United States nationality is not likely to remain passive after learning of a decision by the Department of State that he has lost his U.S. citizenship. If such a person had no intention of transferring his allegiance to a foreign state, as appellant here protests was the fact in his case, surely he would not have been deterred by somewhat discouraging language about filing an appeal, but would promptly

challenge the Department's decision. 14/ Appellant states that he is educated; he is also presumably no less wordly-wise than an ordinary prudent man. Yet, nothing of record shows that he discussed his case with a consular officer or made any inquiry for many years about how he might obtain a review of the Department's decision in his case. 15/ Since he now claims that he always considered himself an American citizen, we find it inexplicable that he did not seek redress much sooner tnan he did. It is thus clear that appellant, not the State Department, was responsible for the fact that the appeal was not timely filed. In brief, the reason appellant gives for not moving sooner is patently insufficient to excuse a delay of nine years.

Furthermore, the Department incontestably would be prejudiced if we were to allow the appeal. The Department bears the burden of proof on the issues of voluntariness and intent to relinquish United States nationality. Its ability now to marshall and present evidence to meet its burden of proof is compromised by appellant's allowing so much time to pass between his performance of the expatriative act and the entry of the appeal. As the Department stated in its brief, appellant's argument against the Department's decision is based on allegations not supported by the available records. It is regrettable that the Embassy did not make a full, prompt report to the Department about appellant's June 2, 1978 visit to the

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14/ We are constrained to observe that in a recent case, Matter of V.S.H.C., decided by the Board September 2, 1988, the appellant, an elderly woman of apparently limited education, received a letter from the Embassy at Stockholm in 1987 transmitting a CLN with language about appeals identical to that received by [redacted] in 1978. She, however, filed an appeal six months [redacted]

15/ As noted in the statement of facts, appellant alleges that in 1982 he consulted an Embassy officer about his case, but was not advised about taking an appeal; the officer reportedly merely suggested tnat appellant ask his father to file an immigrant visa petition on his behalf. Without challenging appellant's recollection of his alleged consultation at the Embassy in 1982, we can merely note that nothing of record substantiates appellant's claim that he was not given appeal information. Even if he was not given appeal information at the time, he had been on actual notice since 1978 that he had a right of appeal.

Embassy and forward the statement he allegedly made that he did not intend to relinquish his United States nationality. Although the Embassy was remiss in this regard, appellant cannot be absolved of responsibility. Had he promptly challenged the Department's adverse decision, evidence of his June 1978 visit to the Embassy would have been available and could have been properly weighed by the Board. An account of that visit is not now available, having been destroyed a number of years ago as prescribed by the Department's guidelines.

Under any fair interpretation of the rule of reasonable time, the nine-year delay in taking the instant appeal is unreasonable. The interest in finality, stability and repose is therefore over-riding.

III

Upon consideration of the foregoing, we conclude that the appeal is time-barred and not properly before the Board. It is accordingly dismissed for lack of jurisdiction.

Given our disposition of the case, we are unable to reach the substantive issues presented.

Alan G. James, Chairman

Edward G. Misey, Member

Mary Elizabeth Hoinkes, Member