April 7, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P[redacted] N[redacted] G[redacted]

The Department of State decided on April 16, 1970 that P[redacted] N[redacted] [redacted] expatriated himself on November 11, 1967 under the provisions of section 349(a)(3) of the Immigration and Nationality Act by serving in the armed forces of Israel. 1/ Eighteen years later [redacted] entered an appeal from that determination.

For the reasons given below, the Board concludes that the appeal was not timely filed. Since the Board lacks jurisdiction to hear and decide a time-barred appeal, the appeal must be and will be dismissed.

1/ In 1967, section 349(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(3), 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 --
>
> ...
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: ...

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

Pub. L. No. 99-653 also amended paragraph (3) of subsection (a) of section 349 by striking out "unless, prior to such entry" and all that follows in paragraph (3) and inserting in lieu thereof "if (a) such armed forces are engaged in hostilities against the United States, or (b) such person serves as a commissioned or non-commissioned officer, or";.

I

Appellant, P[redacted] became a United States citizen by virtue of his birth at [redacted] ort in May 1961 and went to Israel where he studied for one year. He renewed his passport in New York in March 1964 and returned to Israel to study but decided to remain permanently. According to a report the Embassy at Tel Aviv later sent to the Department, [redacted] had visited the Embassy in August 1967 to discuss his citizenship status. He submitted his United States passport which indicated that he had become a permanent resident of Israel on March 27, 1966, and since he had not "opted out" of Israeli citizenship, automatically acquired Israeli citizenship on the same date. 2/ Other documents [redacted] showed the Embassy were: (1) a statement from the Israeli Ministry of the Interior, notifying him of the necessity, as a permanent resident of Israel, to obtain from the Israeli Ministry of Defense a permit in order to leave Israel: and (2) a certificate from the Israeli Ministry of the Interior, confirming that he applied for an Israeli certificate of citizenship.

The Embassy's report continued:

> Mr. [redacted] acquisition of Israeli citizenship through failure to decline it does not affect his United States citizenship. He has also stated that he had been deferred from Israeli military service through his residence in a strategic Kibbutz. As far as the Embassy knows, he has committed no expatriative act. Therefore, the Embassy concludes that Mr. [redacted] is still a United States citizen. His expired passport was returned to him.
>
> ...
>
> Guidance is requested on what services may be given Mr. [redacted] if he applies for registration or a new passport.

2/ [redacted] acquired Israeli citizenship automatically unde 3(a) of the Law of Return which provides that a Jew who comes to Israel and thereafter expresses a wish to settle there may receive a certificate of citizenship.

Two months later (on October 13, 1967) the United States Attorney for the Eastern District of New York sent the Department a copy of a warrant for [redacted] arrest for violation of Title 50, U.S.C. App. sec. 462, by failing to report for induction into the armed forces. The United States Attorney requested that the Department "obtain or recall" [redacted] passport. In reply, the Department informed the United States Attorney that it had instructed the Embassy at Tel Aviv to refer any application [redacted] might make for a passport or registration to the Department for consideration. He did not, the Department stated, hold a valid United States passport.

Three years later, [redacted] again visited the Enmbassy in March 1970, apparently to clarify his. citizenship status. He filled out an application for a passport and completed a questionnaire to facilitate determination of his citizenship status. He also executed an affidavit in which he declared that he joined the Israeli Army and served from November 11, 1967 to December 1, 1967. He stated that he knew "I would be transferring my allegiance from the U.S.A. to Israel," and added: "I felt that living in Israel and being an Israeli citizen and serving in the Army would take away my allegiance from the United States."

As prescribed by law, a consular officer executed a certificate of loss of nationality in [redacted] name on March 27, 1970. 3/ Therein he certified that appellant

---

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 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

acquired the nationality of the United States by birth therein; acquired the nationality of Israel by becoming a permanent resident of that country: served in the Israeli army: and thereby expatriated himself under the provisions of sections 349(a)(3) of the Immigration and Nationality Act. In a covering memorandum, the Embassy referred to the Department's memorandum of October 19, 1967 (see above), and stated that [redacted] had told the consular officer he would inform his local draft board that he no longer considered himself to be a United States citizen.

The Department approved the certificate on April 16, 1970, 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. By letter dated April 30, 1970 the Embassy sent [redacted] a copy of the approved certificate of loss of nationality. The Embassy also attached "a notice of the privilege of appeal," for his information.

After approving the certificate of loss of nationality, the Department informed the United States Attorney for the Eastern District of New York that appellant had expatriated himself.

In 1985 appellant's uncle wrote to the Board of Appellate Review to state that he wanted to take an appeal on his nephew's behalf, and set forth the reasons why he believed an appeal was warranted. The Board replied that if [redacted] wished to take an appeal, he would have to do so personally. We also explained the applicable appeal procedures. Three years passed. In October 1988 [redacted] entered an appeal. He contends that he lacked the requisite intent to relinquish United States citizenship. He was young at the time, alone in a foreign country, and "ill-advised." When he joined the Israeli army in 1967, he felt that he had no choice but to transfer his allegiance to Israel, and he believed he had to sign the affidavit that was put in front of him at the Embassy. In short, his loss of citizenship did not result from a clear-cut, voluntary relinquishment of citizenship within the meaning of Afroyim v. Rusk, 387 U.S. 253 (1967).

3/ Cont'd.

be directed to forward a copy of the certificate to the person to whom it relates.

II

As a preliminary matter, we must decide whether the Board has jurisdiction to hear and decide [redacted] appeal. The delay of 18 years in taking the appeal might, in itself, warrant the Board's dismissing it. Nevertheless, we are prepared to consider whether there are any circumstances in the case that might conceivably permit us to entertain the appeal.

Whether the Board may assert jurisdiction depends on whether the appeal was timely filed, that is, entered within the limitation prescribed by the applicable regulations, for timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if we conclude that the appeal was not filed within the applicable limitation, the only proper course would be to dismiss it.

The limitation on appeal prescribed by regulations presently in force is one year after approval of the certificate of loss of the affected person's nationality. Section 7.5(b)(1) of Title 22, Code of Federal Regulations, (1988), 22 CFR 7.5(b)(1). However, when [redacted] performed the expatriative act, the applicable regulations prescribed that:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law of 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.

Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60.

As we have done in previous cases where the expatriative act was performed prior to 1979, we will apply the limitation of "reasonable time" to the case before us,

The rule on "reasonable time" is well-established. Reasonable time is to be determined in light of all the facts and circumstances of the particular case, taking into consideration the interest in finality, the reason for 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 (1981). Similarly, Lairsey v. The Advance Abrasives Company, 542 F.2d 928, 940, quoting 11 Wright & Miller, Federal Practice and Procedures, Sec. 3866, at 228-29:

> '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.

Reasonable time makes allowance for the intervention of unforeseen circumstances beyond a person's control that might prevent him from taking a timely appeal. Accordingly, the burden is on appellant to show that his delay of 18 years was not unreasonable in the circumstances of his case. The rationale for allowing one a reasonable period of time within which to appeal an adverse citizenship decision is pragmatic and fair. It allows one sufficient time to prepare a case showing that the Department's decision was wrong as a matter of law or fact, while penalizing excessive delay which may be prejudicial to the rights of the opposing party, the Department, since passage of time inevitably erodes the memories of all concerned of the events surrounding performance of the expatriative act. The longer the citizenship claimaint's delay in seeking appellate review of the Department's decision, the greater the evidential difficulties to establish the validity of the aggrieved party's allegations.

Appellant maintains that the "appeal deadline'' should be waived because he never received any written notice that he might take an appeal. In the spring of 1985 he went to the Embassy at Tel Aviv with his uncle, who was then visiting Israel, to find out what he might do to reverse the Department's decision in his case. It appears that the Embassy showed appellant and his uncle its file, and gave them a copy of the letter the consular officer wrote to [redacted] on April 30, 1970. [redacted] asserts that he never received the letter, and points out that there is no evidence in the Embassy's files to prove that he did. By way of further explanation why he took no action between 1970 and 1985 to seek reversal of the Department's decision, appellant submits that: ''I was led to believe, and thought I had done something that could not be revoked."

As we have seen, after returning from Israel, [redacted] uncle attempted to enter an appeal on his behalf in 1985. At that time, the Board informed him that his nephew would have to act personally, and explained how he might initiate a proper appeal. [redacted] did not at that time or for three years thereafter act on the information the Board had sent his uncle to forward to him.

why had he waited three more years after his uncle's intervention to initiate an appeal? "I personally had a strong inner feeling that an appeal without proper representation did not have much of a chance of being accepted," [redacted] informed the Board.

The reasons appellant gives for not moving much sooner to contest the Department's adverse decision are patently insufficient to excuse such a substantial delay in taking the appeal.

True, there is no proof in the record that appellant received the consular officer's letter of April 30, **1970** which transmitted the approved certificate of loss of [redacted]'s nationality and information about making an appeal. And there is no way now to prove whether the letter and its enclosures ever reached appellant. We do not think, however, it is material that the letter might not have reached appellant. He knew that he had lost, or in all likelihood had lost, his United States citizenship, for he acknowledged in an affidavit executed in **1970** that he had transferred his allegiance from the United States to Israel.

First of all, in **1970** there was no rule or regulation with the force of law, as there is at the present time, that prescribes that the Department should inform an expatriate of the right of appeal to this Board. Furthermore, since he knew that he probably lost his citizenship, appellant remained passive about contesting the Department's decision of its loss at his peril. For, in the circumstances, [redacted] plainly had a responsibility to ascertain in timely fashion what recourse was open to him, assuming, of course, he regretted the loss of his nationality. The general rule is that the law imputes knowledge (here, of the right of appeal) where opportunity and interest coupled with reasonable care would impart it. United States v. Shelby Iron Co., **273** U.S. **571 (1926).** In short, it would be impermissible to allow [redacted] to shelter behind the allegation, now unsusceptible of proof, that he did not receive notice of the right of appeal. He has made no showing that he did not have opportunity to ascertain from the Embassy the facts about obtaining review of his case. And obviously he did not exercise the care to protect his interests that one would expect of a reasonable man genuinely concerned about loss of his citizenship.

Even less substantial is appellant's explanation that he did not appeal sooner because he feared he had done something that was irreversible. He has not explained who or what led him to believe that the consequences of the expatriative act were irreversible and has not established that he had any rational basis for so believing. Had he exercised a modicum of initiative and diligence he would

have learned that he did have recourse. On the facts presented to us, it therefore seems apparent that nothing outside of appellant's control prevented him from ascertaining much sooner what he might do to try to reverse the Department's adverse decision and to act on the basis of that information.

We consider it incontrovertible that if we were to allow the appeal, the Department would be unfairly burdened to prove, as it is required to do by the statute and the cases, that appellant acted voluntarily with the intention of relinquishing citizenship. The record sheds very little light on the facts and circumstances surrounding appellant's entering and serving in the Israeli armed forces. The consular officer who processed his case apparently is no longer in the Foreign Service. How after so many years would the Department be able to address the substantive issues appellant has raised?

There comes a point when litigation must end. That point was long since reached in the case before us. Therefore deference must be shown to the interest in stability and repose.

After weighing the evidence presented, we find that appellant's delay in appealing was unreasonable in the premises.

III

Upon consideration of the foregoing, it is our conclusion that the appeal is time-barred and not properly before the Board. As a consequence, the Board is without jurisdiction to consider the case. The appeal is hereby dismissed for want of jurisdiction.

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

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member