

June 22, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: F ■■■ C ■■■ S ■■■■

The Department of State made an administrative determination on January 7, 1981 that F ■■■ C ■■■ S ■■■■ expatriated himself on June 11, 1980 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Norway upon his own application. 1/ ■■■■ entered an appeal on February 22, 1989 from the Department's holding of loss of his nationality.

After appellant had set forth why he believed the Department erred in holding that he expatriated himself, the Department made a further review of the case, and informed the Board it was of the opinion that "there is insufficient evidence to meet the Department's burden of proving by a preponderance of the evidence" that appellant intended to relinquish his United States nationality when he acquired Norwegian nationality. The Department therefore requested that the Board remand the case so that it might vacate the certificate of loss of nationality.

For the reasons given below, the Board concludes that the appeal is time-barred and should be dismissed for want of jurisdiction. The fact that the Board has dismissed the appeal will not, in itself, however, preclude the Department from taking further administrative action in the matter.

1/ In 1980, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), provided in pertinent part that:

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. No. 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".

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I

An officer of the United States Embassy in Oslo executed a certificate of loss of nationality in the name of [REDACTED] on November 21, 1980, in compliance with the provisions of section 358 of the Immigration and Nationality Act, 2/ The officer certified that appellant acquired United States-citizenship by virtue of his birth in [REDACTED]; that he acquired the nationality of Norway by naturalization upon his own application on June 11, 1980; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. 3/

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.

3/ The record shows that appellant left the United States in 1969 and went to Norway. According to appellant, he applied for and was issued a work permit in 1973, and, allegedly without applying therefor, a Norwegian passport. At that time appellant held a valid U.S. passport issued in 1971 by the Embassy in Oslo. Appellant obtained a new U.S. passport in 1977. The circumstances under which appellant applied for Norwegian nationality are unclear, and apparently appellant himself cannot remember or does not know precisely what occurred. In any event, on June 11, 1980 the Royal Norwegian Ministry of Justice and Police informed the United States Embassy that appellant had that day acquired Norwegian nationality in accordance with paragraph 6 of the Norwegian Nationality Law. Based on the foregoing communication, the Embassy executed a certificate of loss of nationality in appellant's name.

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The Department approved the certificate on January 7, 1981, approval constituting an administrative holding of **loss** of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review pursuant to section 7.5(a) of Title 22, Code of Federal Regulations. A copy of the approved certificate was sent to appellant who acknowledged its receipt on October 30, 1981. 4/

In September 1981, appellant visited Seattle, Washington, where he applied for a passport which was erroneously issued to him. He returned to Norway shortly thereafter. In late 1987, upon applying for a new U.S. passport, appellant informed the Embassy that he intended to return to the United States. He surrendered his expired passport and was issued a non-immigrant visa in a Norwegian passport (obtained in 1984), and was informed that he might seek adjudication of his claim to United States citizenship upon his arrival in the United States.

██████████ initiated this appeal through counsel in February 1989.

II

In response to appellant's brief, the Department filed a memorandum, dated June 2, 1989, requesting that the Board remand the case so that it might vacate the certificate of **loss** of appellant's nationality.

The Department expressed the view that "the record evidence does not sustain a finding of intent to relinquish U.S. citizenship." Continuing, the Department observed that:

...It is unclear precisely what steps were required of applicants [for naturalization] generally and Mr. ██████████ specifically between 1973 and 1980 under Section 6 of the Norwegian Nationality Act. As a result, it cannot be presumed, nor is there evidence, that appellant took any steps to specifically renounce or surrender his U.S. nationality when he acquired Norwegian citizenship. The question thus becomes whether, in the absence of such a proven surrender, this acquisition [of foreign nationality] reflected an intent to relinquish U.S. citizenship.

4/ Why the certificate was not sent to appellant promptly after approval does not appear from the record.

Where, as here, the only contemporaneous evidence of intent is the acquisition of citizenship, the trier of fact may look to other circumstantial evidence of intent at the time the act was performed. ^{5/} In this case, the only such circumstantial evidence is appellant's acquisition and use of a U.S. passports. [sic] P [REDACTED] acquired U.S. passports in 1977 and then in 1981 after he acquired Norwegian nationality, and he applied for a U.S. passport in 1987. In the absence of other contemporaneous record evidence reflecting an intent to relinquish, we believe that these acts indicate that Mr. [REDACTED] did not have the requisite intent.

^{5/} Mr. [REDACTED] actions with respect to both his U.S. and Norwegian citizenship appear to have been confined to acquisition of passports.

- III

To be able to remand this case, the Board must first establish that it has jurisdiction to entertain the appeal. If the Board determines that the jurisdictional prerequisites have not been met, the only proper course is to dismiss the appeal, for timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if we find that the appeal was not entered within the applicable limitation and no legally sufficient excuse therefor has been presented, the appeal must be dismissed for want of jurisdiction. Costello v. United States, 364 U.S. 265 (1961).

In its submission, the Department recognized that the Board might find the appeal untimely and thus time barred. Whether the appeal is barred, is a threshold question we must answer.

The limitation on appeal to this Board is within one year after the Department's approval of the certificate of **loss** of nationality. Section 7.5(b)(1) of Title 22, Code of Federal Regulations (1988), 22 CFR 7.5(b)(1). An appeal not filed within one year shall be denied, unless the Board determines, for good cause shown, that the appeal could not have been filed within the allowable time. 22 CFR 7.5(a).

Has appellant shown good cause why he did not appeal within one year after the Department approved the certificate of **loss** of his nationality?

"Good cause" is a term of undisputed meaning. It is defined in Black's Law Dictionary, 5th Edition, 1979, as a substantial reason, one that affords a legal excuse." Good cause depends on the circumstances of the case, and **is** generally held to require that the party who did not perform a required action in a timely way show that he **was** prevented from doing so by circumstances over which he had not control and which were to some degree unforeseeable.

Appellant submits that the appeal should be deemed timely. There is no indication in the record, he contends, that the Embassy advised him of his right of appeal when the certificate of **loss** of nationality was sent to him in October 1981. "Certainly, there is no evidence that Mr. [REDACTED] was at any time advised of his right of appeal until he communicated with the undersigned [his attorney] in 1988," he maintained in his brief.

The regulations prescribe that a person who has been the subject of an approved certificate of **loss** of nationality shall be informed of the right to appeal the adverse decision within one year after such approval. 22 CFR 50.52. Information about the limitation on appeal and how to appeal is set forth on the reverse of certificates of **loss** of nationality. That information was unquestionably on the copy of the approved certificate of **loss** of nationality that was sent to appellant who received it in October 1981, as attested by the postal receipt signed by him.

Possibly, the Department is correct in suggesting appellant may have been confused about his precise citizenship status when he received the certificate of **loss** of nationality, in view of the fact that a United States passport has been issued to him (erroneously, of course) just one month before he received the certificate, and therefore took no action to appeal. Nonetheless, the certificate clearly put him on notice that he was held to have expatriated himself and gave him information about how he might challenge that holding. Ordinary prudence should have prompted him to inquire about his status at the Embassy where he was no stranger. He took no action, however, until eight years passed.


In the circumstances we are unable to accept that appellant was prevented by legally sufficient reasons from entering an appeal if not within one year after approval of the certificate, at least within one year after he received the certificate.

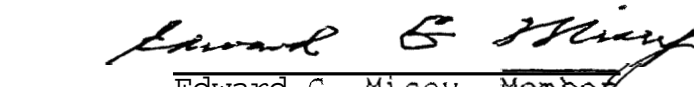
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IV

Upon consideration of the evidence presented to us, it is our conclusion that appellant's delay challenging the Department's determination of loss of nationality was without legal justification. The appeal is time-barred and is hereby dismissed for lack of jurisdiction, 5/

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


 Alan G. James, Chairman


 Edward G. Misey, Member


 Howard Meyers, Member

5/ The fact that the Board has determined that the appeal is time-barred and has dismissed it on the grounds that it lacks jurisdiction, does not in itself bar the Department from taking further administrative action.

ε . . . where the Board of Appellate Review has dismissed an appeal in a citizenship case as time barred, that fact standing alone does not preclude the Department from taking further administrative action to vacate a holding of **loss** of nationality. This continuing jurisdiction should be exercised, however, only under certain limited conditions to correct manifest errors of law or fact, where the circumstances favoring reconsideration clearly outweigh the normal interests in the repose, stability and finality of prior decisions.

Opinion of Davis R. Robinson, Legal Adviser of the Department of State, December 27, 1982. Excerpted in American Journal of International Law, Vol 77 No. 2, April 1983.