DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: V[redacted] R[redacted] C[redacted]

The Department of State determined on November 20, 1974 that V[redacted] R[redacted] C[redacted] expatriated himself on December 16, 1970 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application. 1/ C[redacted] appeals that determination.

After the appeal was entered, the Department made a further review of the ,case and informed the Board that it could not carry its burden of proving that appellant intended to relinquish his United States nationality when he acquired Australian citizenship. Accordingly, the Department requested that the Board remand the case so that the certificate of **loss** of nationality might be vacated,

The Board is of the view that the appeal is time-barred and not properly before the Board. It is therefore dismissed for lack of jurisdiction. The fact that the Board has dismissed the appeal does not, however, bar the Department from taking further administrative action to correct manifest errors of law or fact.

1/ In 1970, 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. 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".

I

An officer of the United States Consulate General at Sydney executed a certificate of loss of nationality in appellant's name on June 29, 1971, as required by law. 2/ Therein the officer certified that appellant acquire3 United States nationality by birth at Detroit, Michigan on June 30, 1921; that he obtained the nationality of Australia upon his own application on December 16, 1970; 3/ and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

For the next three and one half years the Department held appellant's case in abeyance while it considered his contention, made through counsel, that due to a head injury sustained in 1969 and other causes he was confused and unable to appreciate the consequences of his obtaining naturalization in Australia for his United States citizenship. Late in 1971 appellant submitted some medical evidence suggesting that he was confused at the time he became naturalized. The Department was not

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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/ Applicants for naturalization in Australia were required in 1970 (as now) to make an oath (affirmation) of allegiance to Queen Elizabeth the Second that included renunciation of all other allegiance.

satisfied, however, that that submission was sufficient to show that appellant lacked the capacity to understand the nature of his act, and requested definitive medical evidence. Further evidence was submitted in March **1972**, and in June **1972** a psychiatrist made a diagnosis of appellant that concluded it was highly unlikely that appellant was able to judge the significance of his acts in **1970**.

Beginning in January **1973** appellant's attorneys and the Consulate at Sydney stressed to the Department that appellant's mental condition was deteriorating and that the delay in acting in his citizenship claim was causing him further distress.

In February of **1973** the Department requested extensive additional information from O[redacted] concerning, among other things, past employment and finances, marriage status, military service, property ownership, and tax and voting records. Information responsive to this request was submitted in June and October of **1973**.

In December **1973** the Department sent a communication to the Consulate at Sydney stating that: "In the circumstances of this case, we do not believe that Mr. O[redacted] intent to relinquish United States citizenship, enunciated by his naturalization in Australia, has been overcome by a preponderance of the evidence." Accordingly, the Department instructed the Consulate

> to advise him to present his allegations of lack of capacity, at the time of his naturalization as a citizen of Australia, to the appropriate Australian authorities with a view to having such authorities determine whether his proceedings toward naturalization in Australia might be set aside and declared null and void. If such action is taken by the Australian authorities, further consideration will be given to Mr. O[redacted] request for documentation as a citizen of the United States.

On November 20, 1974, having received no further communications from appellant, the Department informed the Consulate in Sydney:

> In the absence of a declaration by the Australian authorities setting aside Mr. Oi[redacted] naturalization on the

> basis of his lack of mental capacity, the Department adheres to its determination...that Mr. [redacted] expatriated himself on June 30, **1971** [Sic. Should read December 16, **19701** by obtaining naturalization in Australia with the intention of relinquishing his United States citizenship. **...**

The Department approved the certificate of loss of nationality on November **20, 1974,** 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.

In February **1983** appellant informed the Board that he wished to appeal the Department's determination of his expatriation. **4/** In reply the Board explained to appellant how he might appeal, and stressed that he should state precisely why he believed the Department's decision in his case was wrong, In June **1983** appellant replied with a rambling letter which did not, the Board informed him, constitute a proper appeal. It was suggested that appellant consult an American diplomatic or consular office or legal counsel if he was unable to state a proper appeal. Five years passed, In October **1988** appellant presented a coherent statement of appeal.

II

On January **5, 1989,** the Department forwarded to the Board the administrative record on which the Department's **1974** determination of **loss** of nationality was based, accompanied by a memorandum requesting that the Board remand the case so that the certificate of **loss** of appellant's nationality might be vacated. The Department stated that it had

> **...**carefully reviewed the record in this proceeding and is of the view that there is insufficient evidence to sustain the Department's burden of proving by a preponderance of the evidence that Virgil

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4/ Late in **1982** appellant wrote a disjointed letter to President Reagan asking for assistance in recovering his nationality. A reply was sent to appellant by the Consulate at Sydney which informed him of the procedures to take an appeal to this Board.

[redacted] intended to relinquish his U.S. citizenship. 5/ Rather, the record indicates that it is likely that he lacked the mental and emotional capacity to form the requisite intent.

The Department supported the foregoing conclusion with these arguments:

> The preliminary issue for determination is whether Mr. [redacted] had the mental capacity to form the intent to relinquish his U.S. citizenship. This determination, in our view, appropriately should be made by the Department, whose burden it is to prove by a preponderance of the evidence that appellant had the intent to relinquish his nationality.
>
> The medical evidence of record is sufficient, we believe, to raise a serious question as to appellant's capacity to form an intent to relinquish his U.S. citizenship at the time of his Australian naturalization. The most persuasive evidence in this regard is Dr. Degotardi's statement [he made the psychiatric profile of appellant in June 1972] in which he concluded that it was highly unlikely that Mr. [redacted] was able to understand the consequences of his naturalization. This evidence, which is uncontroverted by any other record evidence, is buttressed by the opinion of appellant's doctor and appellant's own statements.

5/ In loss of nationality proceedings, the government bears the burden of proving by a preponderance of the evidence that the citizen intended to relinquish United States nationality when he or she performed the expatriative act in question. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

III

To be able to remand the case, the Board must first establish that it has jurisdiction to entertain the appeal. If the Board determines that the jurisdictional requirements 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).

Consistently with the Board's practice, we will apply here not the present limitation on appeal but the one prescribed by regulations in effect at the time the Department approved the certificate of loss of nationality issued in appellant's name, namely, section 50.60 of Title 22, Code of Federal Regulations (effective November 29, 1967 to November 30, 1979), 22 CFR 50.60. That section provided as follows:

> 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.

"Reasonable time" is to be determined in light of all the 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.2dx 1053, **1055** (1981). Similarly, Lairsey v. The Advance Abraisives 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.

While we will accept that appellant's submissions in 1983, however disjointed, tolled the limitation on appeal, we note that by then nine years had elapsed after the Department approved the certificate of loss of his nationality, and presumably (he has not alleged to the contrary), he received a copy thereof. The question is whether a delay of nine years in seeking review of his case is reasonable. We do not think it is.

Appellant suggests that depression, anxiety, and mental disorder prevented him from taking an appeal before he finally did so. While this may be so, appellant has not supported these suggestions in his submissions to the Board.

In the circumstances, where there has been no evidentiary showing of a requirement for an extended period of time to prepare an appeal or any obstacle beyond appellant's control to moving much sooner, the norm of "reasonable time" cannot be deemed to extend to a delay of nine years.

IV

Upon consideration of the record before us, it is our conclusion that appellant's waiting for nine years to challenge the Department's determination of loss of his nationality was without legal justification. The appeal is time-barred and is hereby dismissed for lack of jurisdiction. 6/

6/ The fact that the Board has determined that the appeal is time-barred and dismissed it for want of jurisdiction, does not in itself bar the Department from taking further administrative action to correct manifest errors of law or fact.

> ...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

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

Alan G. James, Chairman
Alan G. James, Chairman

Edward G. Misey, Member
Edward G. Misey, Member

George Taft, Member

6/ Cont'd.

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.