February 17, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: R S

R S appeals an administrative determination of the Department of State that she expatriated herself on December 10, 1970 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Israel upon her own application. 1/

The Department determined in February 1971 that appellant expatriated herself. She entered an appeal from that determination in November 1987. An initial issue is presented: whether the Board may entertain an appeal so long delayed. For the reasons that follow, we conclude that the appeal is time-barred. Lacking jurisdiction to entertain a barred appeal, we dismiss it.

I

Appellant acquired United States nationality by birth at . She was educated in Michigan and became a school teacher, In November 1953 appellant went to Israel. There she married a United States citizen in 1955. The couple have four

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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 --
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> (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".

children, all born in Israel, whom she states she registered as United States citizens. The Embassy at Tel Aviv issued a passport to appellant's husband in 1959 in which appellant was included.

It appears that around 1960 appellant obtained employment as an elementary school teacher in the Israeli public school system, In 1970, she informed the Board, she was told by competent authority that in order to keep her job as a teacher she would have to acquire Israeli citizenship, (The record shows that appellant had not become an Israeli citizen when she moved to Israel: she "opted out" of Israeli citizenship in 1953.) Appellant wrote the Embassy in August 1970 to state that: "In order to keep my job as elementary school teacher I have had to take out Israeli citizenship. I trust that this will not affect my standing as an American citizen." In response to the Embassy's request that she call to clarify her citizenship status, she visited the Embassy in late December 1970. Meanwhile, on December 10, 1970, appellant received a certificate of Israeli naturalization after making the prescribed declaration of allegiance: "I will be a loyal citizen of the State of Israel."

On December 30, 1970, at the request of the Embassy, appellant completed a questionnaire to assist the State Department to make a determination of her citizenship status. Therein she explained that she had obtained naturalization as a condition to retain her teaching position; that she did not intend to abandon her allegiance to the United States but rather hoped she might obtain dual nationality through naturalization. However, to another question: "Did you intend ... to abandon your allegiance to the United States," she replied: "Yes, I had no choice." It is not clear from the record whether appellant was interviewed by a consular officer.

On December 31, 1970, in compliance with the provisions of section 358 of the Immigration and Nationality Act, a consular officer executed a certificate of loss of nationality in appellant's name. 2/ He

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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

certified that she acquired United States nationality by birth at [redacted]; obtained naturalization in Israel upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. In transmitting the certificate to the Department, the consular officer asserted that appellant was not dependent on her teaching position for a living and did not seek Embassy advice before applying for naturalization. He expressed the view that appellant came within the purview of section 349(a)(1) of the Immigration and Nationality Act, and recommended that the Department approve the certificate of loss of nationality.

The Department approved the certificate on February 24, 1971. Approval constituted an administrative holding or determination of loss of nationality from which a timely and properly filed appeal might be taken to the Board of Appellate Review. A copy of the approved certificate was sent to the Embassy to forward to appellant, and the Embassy was instructed to inform appellant, in accordance with the provisions of 8 Foreign Affairs Manual, 224.21 (procedures), that she might make an appeal to this Board. By letter dated March 2, 1971, the Embassy forwarded a copy of the approved certificate of loss of her nationality to appellant and enclosed information about appeals. Appellant acknowledged receipt of the Embassy's letter and enclosures on March 21, 1971.

Sixteen years later, on November 21, 1987, appellant entered an appeal from the Department's holding of loss of her citizenship, She contends that she

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2/ Cont'd.

> 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.

neither intended nor desired to relinquish her United States citizenship when she obtained naturalization in Israel. The fact that she "opted out" of Israeli citizenship in 1953 and had not obtained Israeli citizenship until seventeen years later demonstrated, in her view, lack of intent in 1970 to relinquish her United States nationality. She further maintains that she acted involuntarily because she had been required as a condition of continued employment to obtain Israeli citizenship.

II

The initial issue presented is whether the Board may consider and decide an appeal entered sixteen years after appellant received notice of the Department's administrative determination of loss of nationality. To exercise jurisdiction, the Board must conclude that the appeal was filed within the limitation prescribed by the governing regulations since the courts have generally held that timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960), Costello v. United States. 365 U.S. 265 (1961). If an appellant does not enter an appeal within the applicable limitation and does not show good cause for filing after the prescribed time, the Board would lack jurisdiction to consider and determine the appeal.

Under existing regulations, the time limit for filing an appeal from the Department's administrative determination of loss of nationality is one year "after approval by the Department of the certificate of loss of nationality or a certificate of expatriation," 3/ The regulations require that an appeal filed after one year be denied unless the Board determines for good cause shown that the appeal could not have been filed within one year after approval of the certificate. 4/ These regulations, however, were not in force on February 24, 1971, when the Department approved the certificate of loss of nationality that was issued in appellant's case.

The regulations in effect in 1971, with respect to the limitation on filing an appeal, prescribed that an appeal be taken "within a reasonable time" after receipt of notice of the Department's administrative holding of

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3/ 22 CFR 7.5(b) (1988).

4/ 22 CFR 7.5(a) (1988).

loss of nationality. 5/ We consider that this reasonable time limitation should—govern in appellant's case, rather than the limitation of one year after approval of the certificate of loss of nationality under existing regulations. It is generally accepted that a change in regulations shortening a limitation period operates prospectively, in the absence of an expression of a contrary intent to operate retrospectively. In cases where a certificate of loss of nationality was approved prior to November 30, 1979, the effective date of the present regulations, this Board has consistently applied the limitation of "within a reasonable time" after receipt of notice of the Department's holding of loss of nationality.

Whether an appeal has been taken within a reasonable time depends on the facts and circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). ,It has been held to mean as soon as circumstances will permit and with such promptitude as the situation of the parties will allow, This does not mean, however, that a party be allowed to determine "a time suitable to himself." In re Roney, 139 F.2d 175, 177 (1943). In loss of nationality proceedings, the limitation begins to run when the citizen claimant receives notice of the Department's holding of loss of nationality in his or her case, What is a reasonable time also takes into account the reason for the delay, whether the delay is injurious to another party's interest, and the interests in the repose, stability, and finality of the prior decision. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981): Lairsey v. Advance Abrasives Co., 542 F.2d 928, 940 (5th Cir. 1976). The reasonable time limitation thus makes allowance for the intervention of unforseen circumstances beyond a person's control that might prevent him or her from taking a timely appeal.

Appellant bears the burden of demonstrating that she had good cause not to take an earlier appeal. In her

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5/ 22 CFR 50.60 (1979), which was in effect until revised on November 30, 1979, provided:

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

submissions, she acknowledged that a great deal of time has passed since the Department made its adverse determination in her case, However, when she received the certificate of loss of nationality in 1971, she thought an appeal would be futile. She noted that the Embassy gave her the following advice regarding an appeal:

> You are hereby notified that you are entitled to appeal to the Board of Appellate Review in the Department of State....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....It should be emphasized that unless your appeal is based on these grounds it will not be entertained.

She did not discover the actual grounds on which the Embassy based its position that she expatriated herself until September 1987 when she went to the Embassy. to investigate the possibility of recovering her citizenship. Until then she believed that a finding of loss of citizenship had been made on the basis of law, not of fact. In 1970/1971, she assumed that the Embassy knew she was a salaried employee of the Israeli school system and as such liable to dismissal if she did not obtain Israeli citizenship. As noted above, she learned much later that the Embassy understood she was unsalaried, and concluded that her naturalization thus was voluntary. Since she assumed in 1970/1971 that the facts were known and "I had nothing to add, and since I believed the decision was based on law, I believed I had no known grounds to appeal."

Granted, the information about making an appeal that the Department gave in 1971 to persons who had expatriated themselves was not felicitiously phrased. We are unable to accept, however, that an ordinary prudent person would be deterred by such instructions from moving reasonably promptly to contest loss of his or her nationality. Scores of persons whom the Department held expatriated themselves have taken timely appeals after receiving precisely the information given to this appellant. 6/ After all, what was at issue for appellant

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6/ See, for example, <u>Matter of V.S.H.C.,</u> decided by the Board September 2, 1988. The appellant there, an elderly

was her United States citizenship, a right United States courts have repeatedly described as an American's most precious right.

Discouraging or not, the information given to appellant put her on legal notice that she had a right of appeal.

Nothing of record shows that appellant had any dealings with the Embassy or a consular office from December **1970** when her case was processed to **1987.** To put the matter bluntly: if appellant genuinely regretted loss of her United States citizenship, we believe she would not have remained passive 'for as long as she did. Receipt of the certificate of loss of nationality should have been a call to action, at least to discuss her case further with a consular officer to find out why the Department reached the decision it did and whether there was any possibility to challenge that decision. Instead, she accepted loss of her nationality without demurrer. We see no obstacles beyond appellant's control that barred her from challenging loss of her United States citizenship.

If we were to allow the appeal, appellant's failure to take an appeal within a reasonable time after she received notice of loss of her nationality would handicap the Department in attempting to carry its statutory burden of proving that appellant obtained naturalization voluntarily with the intention of relinquishing her United States nationality. How reconstruct the events of sixteen years ago after the passage of so much time? Further, because appellant did not move sooner to request that her case be reviewed, the Board assuredly would find it difficult to make a reasoned judgment about the substantive issues in the case.

In this case where there has been no showing that appellant had reason not to take an earlier appeal and there is arguably prejudice to the Department, the Board believes that the interest in finality and stability of administrative decisions must be respected.

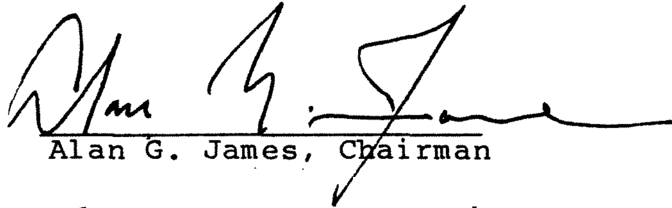
6/ Cont'd.

woman of apparently limited education, received a letter from the Embassy at Stockholm in **1987** transmitting a certificate of loss of nationality on which was printed information about taking an appeal identical to that this appellant received. V.S.H.C. filed an appeal six months later.

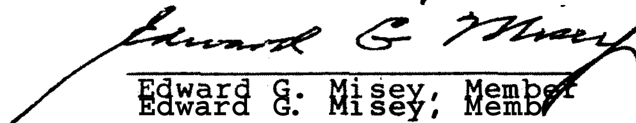
III

Upon consideration of the foregoing, we conclude that the appeal is time-barred and not properly before the Board. We accordingly dismiss it for want of jurisdiction.

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



Alan G. James, Chairman



Edward G. Misey, Member
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George Taft, Member