February 23, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: K[redacted] W[redacted] R[redacted]

K[redacted] W[redacted] R[redacted] entered an appeal in August 1988 from an administrative determination of the Department of State, dated June 1, 1962, that she expatriated herself on March 8, 1962 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in the United Kingdom. 1/

After appellant had set forth why she believed the Department erred in holding that she expatriated herself, the Department made a further review of the case, and informed the Board that it was of the opinion it could not carry its burden of proving that appellant intended to relinquish her United States nationality when she acquired British nationality. The Department therefore requested that the Board remand the case so that it might vacate the certificate of loss of appellant's nationality,

For reasons given below, the Board concludes that the appeal is time-barred and not properly before the Board. Accordingly, it is dismissed for lack of jurisdiction. The fact that the Board dismisses the appeal does not, in itself, however, bar the Department from taking further administrative action,

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1/ In 1962, section 349(a)(1) of the Immigration and Rationality 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 Embassy at Brussels executed a certificate of loss of nationality in appellant's name on April 24, 1962, in compliance with the provisions of section 358 of the Immigration and Nationality Act. 2/ The officer certified that appellant acquired the nationality of the United States by birth at Roanoke, Virginia on April 3, 1921; that she obtained naturalization in the United Kingdom on March 8, 1962 upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on June 1, 1962, approval constituting an administrative determination of loss of nationality from which appellant had the right to take an appeal to the Board of Appellate Review, Appellant initiated this appeal on August 26, 1988, twenty-six years after the Department approved the certificate of loss of nationality that was approved in her name.

II

After appellant set forth grounds for appeal, the Department filed a memorandum, dated February 1, 1989, in which it requested that the Board remand the case so that the certificate of loss of nationality might be vacated. Despite the fact that it acknowledged that the appeal

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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.

was untimely, the Department was of the view that the evidence of record warranted remand and cancellation of the certificate of loss of nationality. At the time appellant obtained British nationality, the Department noted, she made it clear that she did not intend to relinquish her American citizenship. In this connection, the Department called the Board's attention to a memorandum from the Embassy at Brussels to the Department, dated october 25, 1961, wherein the Embassy informed the Department that appellant was married to an officer of the British Embassy in Brussels. Appellant wished to have the Department's opinion as to whether she might travel with her husband on a British travel document, "as she does not wish under any circumstances to endanger her right to American citizenship," the Embassy reported. On March 8, 1962 appellant became a British citizen after making the prescribed oath of allegiance in the British Embassy at Brussels.

In its memorandum to the Board, the Department pointed out that although the holding of loss of appellant's nationality pre-dated Afroyim v. Rusk, 387 U.S. 253 (1967) and Vance v. Terrazas, 444 U.S. 252 (1980) the Department was of the opinin that

> ...when judged in light of Afroyim and Terrazas, the record does not sustain a finding that [redacted] intended to relinquish her U.S. citizenship, The oath of allegiance she took was a non-renunciatory one and thus taken by itself would not be held to reflect an intent to relinquish citizenship under present standards. Moreover, until she received the CLN she was scrupulous in documenting her citizenship status through registration when living abroad with her husband. And, upon being informed that it would be preferable if she and her children were to travel to China with British documentation, she sought Department counsel and clearly and unequivocably stated that she did not want to endanger her U.S. citizenship.

III

To remand this 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.2d 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.

After the appeal was filed, the Chairman of the Board asked appellant to explain why she delayed so long in seeking review of the Department's holding of loss of her nationality. Appellant responded by stating that for many years after 1966 (she and her husband separated in that year) she was preoccupied with divorce, child support, and custody proceedings in English courts. An American attorney who advised appellant in those proceedings wrote to the Board that after appellant's divorce had been filed, it seem to him that "she was on the right track." "It was then [no date given] my feeling that this was not the right time to apply for restoration of her U.S. citizenship." Whether he counseled appellant not to institute proceedings on her loss of citizenship is unclear. Appellant apparently gave no thought to contesting the Department's decision on loss of her citizenship until sometime in the period from 1980 to 1988 when her children moved away to establish their own careers, and she and they had lost virtually all ties to the United Kingdom. She gives us to infer that only then had she decided it was propitious to try to recover her citizenship.

Appellant's reasons for doing nothing for more than twenty-five years to try to recoup her United States citizenship are patently insufficient to excuse the elapse of so much time. Loss of her United States citizenship apparently was not a matter of first concern for many years, although we concede that for a long time she may have been beset by many other problems. In any event, she had not shown that any unforeseen factors beyond her control prevented her from moving to seek timely review of the Department's determination of loss of her nationality.

IV

In the circumstances of this case, where there has been no 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" should not be deemed to extend to a delay of twenty-six years.

Upon consideration of the evidence presented to us, it is our conclusion that appellant's delay challenging the Department's determination of loss of her nationality was without legal justification. The appeal is

time-barred and is hereby dismissed for lack of jurisdiction. 3/

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member

Geor e T t, Member

3/ 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.

> ...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.