October 20, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] H[redacted]

This is an appeal from an administrative determination of the Department of State, that J[redacted] H[redacted], n[redacted], expatriated herself on July 10, 1951 under the provisions of section 401(f) of the Nationality Act of 1940 by making a formal renunciation of her United States nationality before a consular officer of the United States at London, England. 1/

The Department made its determination of appellant's expatriation in 1952. She entered an appeal therefrom through counsel in 1988. We face at the outset the issue whether the Board has jurisdiction to entertain the appeal. For the reasons given below, we conclude the appeal is time-barred and consequently that the Board is without jurisdiction to hear and decide it. The appeal is therefore dismissed.

I

After appellant filed a brief in August 1988, the Board requested that, within the time allowed by the applicable regulations, the Department file a brief and the record upon which it based its decision that appellant expatriated herself. After requesting and being granted several extensions of time to file, the Department filed a brief on January 25, 1989, and informed the Board that after "an exhaustive search,"it could not find the record in this case. The Department contended,

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1/ Section 401(f) of the Nationality Act of 1940, 54 Stat. 1169, provided that:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
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> . . .
>
> (f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State.

however, that there appeared to be sufficient basis for sustaining appellant's loss of nationality. In April 1989, after being asked by the Board to intensify its search for the record, the Department stated that:

> This office has requested another search of the file in this proceeding. We hold out little hope that the record will be found, however, since previous searches for it have been exhaustive and the renunciation took place some thirty-seven years ago.
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> As indicated in our brief in this proceeding, although the record has not been found in this case, there appears to be ample basis for sustaining appellant's loss of citizenship.

The Board subsequently requested that the Department make a further effort to locate the record, and suggested that the Department ask the Immigration and Naturalization Service (INS) if it held any documents pertaining to appellant's loss of nationality. The Department informed the Board by memorandum dated September 29, 1989 that INS had sent it copies of the certificate of loss of nationality that was approved in appellant's name and a copy of her oath of renunciation of United States nationality and enclosed copies thereof. Those documents are hereby incorporated into the record in this matter.

Although the Board considers it deplorable that the Department's record cannot be located, we are of the view that the above-cited documents and appellant's own submissions provide a sufficient record to enable us fairly to proceed in the matter.

II

Appellant, born Ju[redacted]a [redacted] acquired the nationality of the United States by birth at [redacted]y on [redacted] Her mother was a United States citizen, her father a citizen of the Republic of Ireland.

Appellant described in her opening brief the circumstances leading up to the renunciation of her United States nationality:

> ...In 1951 when she was 19 years old and while her father was stationed at the Irish Passport Office in London, Ms. [redacted] entered a contest called The Festival of Great Britain. She was selected from an entrance quota of

> approximately four thousand young girls to represent Great Britain as a type of secular ambassador travelling the world as a typical British girl. The prize also included a wardrobe of fashionable British designer clothes and all cash expenses.
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> The contest had been sponsored by the J. Arthur Rank Film Organization, at the time one of the leading motion-picture production companies in the world. The contest was widely publicized and the winner, Ms. Heffernan, instantly projected into a position of prestige and fame. Unfortunately, however, the sponsors of the contest were less than happy with the fact that the winner, Ms. Great Britain 1951, was in fact an American. Apparently to avoid any appearance of anything less than British authenticity, which would prove an obvious embarrassment, the organizers prevailed on Ms. Heffernan to renounce her U.S. citizenship in order to obtain a British passport. Her parents also persuaded her to follow this course of action, urging her not to give up this coveted prize, a once-in-a-lifetime opportunity to travel the world.

Appellant made a formal renunciation of her United States nationality on July 10, 1951 at the Embassy in London, and thus expatriated herself under the provisions of section 401(f) of the Nationality Act of 1940. As required by section 501 of the Nationality Act of 1940, a consular officer of the United States Embassy at London executed a certificate of loss of nationality in the name of Julia Ann Breen on July 11, 1951. 2/ The

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2/ Section 501 of the Nationality Act of 1940, 54 Stat. 1171, provided that:

> 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 IV of this Act, he shall certify the facts upon which such belief is based to the Department of State,

Department approved the certificate on February 13, 1952. The Department's approval of the certificate constituted an administrative holding of loss of nationality from which an appeal might be taken to the then Board of Review of the Passport Division. 3/

In October 1981, appellant, who since the late 1950's had been living in Ireland, made an application for a United States passport at the Embassy in Dublin which was denied on the grounds of non-citizenship.

It appears that appellant has travelled to the United States since 1981 on visas issued by the Embassy in Dublin. In October 1986 appellant expressed the wish to that Embassy to be informed if there was some way she might recover her United States citizenship. She retained counsel who gave notice of appeal on her behalf in May 1988. Appellant submits that the Department's determination of loss of her nationality should be reversed for the following reasons:

> The events surrounding a person's renunciation of U.S. citizenship have been given close scrutiny by the Board in evaluating voluntariness and intent. In Re. K.M.M. State Department Dec. (B. App. R. Mar., 16, 1983). Thus age, purpose and motivation and the Embassy's attitude to the renunciation vis-a-vis that person's awareness

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2/ (Cont'd.)

> 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 Department of Justice, for its 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/ A Foreign Service Serial, dated September 13, 1949, informed diplomatic and consular offices that: "Persons who do not accept the Department's holding that they have expatriated themselves may be informed that appeal may be made to the Board of Review of the Passport Division." The primary purpose of the Board, the Serial stated, was to consider appeals from adverse administrative holdings of the Department in nationality cases. As the Serial indicated, the procedure to be followed in making an appeal was relatively informal and easy.

> of the consequences of renunciation are factors to be considered on appeal. Id. at 10-11. In the instant case appellant was nineteen years old living with her parents in post-war London, the capital city of a country of which neither appellant nor her parents were citizens. Although Ms. Heffernan formally committed an expatriating act, it is contended, under such circumstances that both the voluntariness requirement of Nishikawa' v. Dulles 356 U.S. 129 (1958) and the intent requirement of Vance v. Terrazas 444 U.S. 252 (1980) are lacking.

III

This case presents a jurisdictional issue that must be determined before we may proceed. The Board has been asked to consider and determine an appeal that was brought approximately thirty-seven years after the Department held that appellant expatriated herself. The question is whether the Board has authority to entertain such an appeal.

In 1951, when the Department approved the certificate of loss of appellant's nationality, the Board of Appellate Review did not exist. There was, however, a review body titled the Board of Review of the Passport Divsion, which had jurisdiction to hear appeals from adverse determinations with respect to nationality. See note 3 supra. There was no specified limitation on appeal. However, under the common law rule where no limitation is specified, the limitation is considered to be "within a reasonable time" after the affected party received notice of the adverse determination with respect to his citizenship.

The Board of Review evolved into the Board of Review on the Loss of Nationality. In 1966 Departmental regulations were promulgated prescribing that an appeal to the Board of Review on the Loss of Nationality be made "within a reasonable time." 4/ When the Board of Appellate Review was established in 1967, regulations promulgated at that time adopted the "reasonable

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4/ Section 50.60, Title 22, Code of Federal Regulations (1966), 22 CFR 50.60, 31 Fed. Reg. 13539 (1966).

time" limitation. 5/ The regulations of the Board of Appellate Review were further revised in November 1979, and now require that an appeal be filed within one year of approval of the certificate of loss of nationality. 6/ Since it is generally accepted that a change in regulations shortening the time limit on appeal should not apply retrospectively, the standard of "reasonable time" will govern in the instant case.

Timely filing is mandatory and jurisdictional. 7/ Thus, if we find that the appeal was not entered within a reasonable time after appellant had notice of the Department's holding of loss of her nationality, the appeal would be time barred and the Board would lack jurisdiction to entertain it.

The rule on reasonable time is well settled. It is to be determined according to the facts in each case and in accordance

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

6/ Section 7.5(b), Title 22, Code of Federal Regulations, 22 CFR 7.5(b).

7/ United States v. Robinson, 361 U.S. 220 (1970).

The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

> The Secretary of State did not confer upon the Board [of Appellate Review] the power to...review actions taken long ago. 22 C.F/R. 50.60, the jurisdictional basis of the Board, requires specifically that the appeal to the Board be made within a reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expatriation.

Office of the Attorney General, Washington, D.C. File: Co-340-P, February 7, 1973.

with generally recognized principles. These include the following elements: the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon for the adverse decision, and prejudice to the other party. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Security Mutual Casualty Co. v. Century Casualty Co., 621 F.2d 1062, 1067-68 (10th Cir. 1980); and Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930-31 (5th Cir. 1976). 8/

The rationale for allowing a reasonable time to bring an appeal is that one should be permitted sufficient time to prepare a case showing that the Department's holding of loss of nationality is contrary to law or fact. At the same time, the rule presumes that one will prosecute an appeal with the diligence of an ordinary prudent person. Reasonable time begins to run from the time [redacted] of loss of nationality -- not sometime later for whatever reason a person is moved to seek restoration of his or her citizenship.

One essential purpose of a limitation on appeal - whether it be fixed or indeterminate - is to compel the exercise of a right of action within a span of time that will protect the adverse party against belated appeals that could more easily have been resolved when the recollection of events upon which the appeal is based is fresh in the minds of the parties involved.

Appellant argues in her brief that her appeal should be deemed timely because of the particular circumstances of her case.

> Ms. [redacted] renounced her U.S. citizenship at the U.S. Embassy in London in July 1951. She neither sought, nor

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8/ In Lairsey v. Advance Abrasives Co., the court quoted 11 Wright & Miller, Federal Practice & Procedure, section 2866 at 228-229:

> '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.

542 F.2d at 930-31.

> was she provided with any legal advice either before or immediately after her renouncement; her parents, who, while urging her to renounce, minimized the significance of the act. Until 1982 when she applied for a U.S. passport, she did not fully realize the extent of her decision of years before. (Exhibit B). Again in 1986 Ms. [redacted] requested assistance from the U.S. Consulate in Dublin as to how, if at all, she could reestablish her U.S. citizenship (Exhibit C). All this time, in fact since the late 50's, Ms. [redacted] resided in Ireland. She was unable to consult with an attorney experienced in U.S. citizenship law and absent any guidelines from the U.S. Consul in Dublin was practically precluded from pursuing the matter. Under these unique circumstances it is contended that Ms. [redacted] has brought her appeal within a reasonable time, and the uniqueness of the facts compels review by the Board.

We are not persuaded that appellant has presented a legally sufficient reason for not moving much sooner to seek review of the Department's holding of loss of her nationality.

It is reasonable to presume that after the Department approved the certificate of loss of nationality, it instructed the Embassy at London to forward it to appellant, and that the Embassy did so. A presumption of regularity attaches to the official acts of public officials. Boissonnas v. Acheson, 101 F.Supp. 138 (S.D.N.Y. 1951). In the absence of any corroborative evidence, it is impossible now to be certain about the disposition of the certificate. Nor is it evident whether the Department or the Embassy at London informed appellant that she might take an appeal to the Board of Review of the Passport Division. Nonetheless, there can be no reasonable doubt that appellant knew that she had performed an expatriative act, for formal renunciation of United States citizenship is the most categoric act of denationalization. She therefore had facts sufficient to lead her to ascertain whether there was any way she might attempt to recover her citizenship, assuming, of course, that its loss was a matter of concern to her. We cannot accept that residence in Ireland was a sufficient obstacle to relieve her of the obligation to obtain that information in a timely manner.

In short, assuming arguendo that appellant did not receive actual notice of loss of her citizenship and of the right to take an appeal therefrom, it was incumbent upon her to take an initiative much earlier than she did to challenge the Department's decision in her case. It is settled that the law imputes knowledge where opportunity and interest coupled with reasonable care would necessarily impart it. United States v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (4th Cir. 1939). Knowledge of facts putting a person of ordinary prudence on inquiry is the equivalent of actual knowledge, and if one has sufficient information to lead him to a fact, he is deemed to be conversant therewith, and "laches" is chargeable to him if he fails to use the facts putting him on notice. McDonald v. Robertson, 104 F.2d 945 (6th Cir. 1939).

To allow the appeal would plainly place an unreasonable burden of proof upon the Department. After the elapse of thirty-seven years the Department cannot possibly adduce evidence to address appellant's contention that she renounced her citizenship under the pressure of others. The comment of the court in Maldonado-Sanchez v. Shultz, memorandum opinion, Civil No. 87-2654 (D.D.C. 1989), about long delayed appeals is pertinent here:

> The Court agrees with defendant's [State Department] argument that to allow plaintiff to challenge his renunciation some twenty years after the fact is contrary to public policy. It places a tremendous burden on the government to produce witnesses years after the relevant events and to preserve documentation indefinitely. Moreover, a reasonable statute of limitations period serves the important function of mandating a review of the issuance of the CLN when the relevant events are fresh in the minds of the participants.

In the circumstances here, the interest in finality and stability of administrative determinations must be served.

IV

We conclude that appellant's delay of thirty-seven years in bringing an appeal from the Department's holding of loss of her nationality was clearly unreasonable. The appeal is

time-barred. Accordingly, we hereby dismiss it for want of jurisdiction.

Alan G. James, Chairman

Gerald A. Rosen, Member

Frederick Smith, Jr., Member