October 23, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: Ma[redacted] L[redacted]

This is an appeal from an administrative determination of the Department of State, dated April 10, 1986, that appellant, Ma[redacted] L[redacted], expatriated herself on February 27, 1986 under the provisions of section 349(a)(5) of the Immigration and Nationality Act by making a formal renunciation of her United States nationality before a consular officer of the United States at London, England. 1/ Mrs. L[redacted] entered an appeal from that determination in February 1989.

For the reasons that follow, we deem the appeal timely and conclude that the Department has not carried its burden of proving that appellant intended to relinquish her United States citizenship. Accordingly the Department's determination of loss of appellant's citizenship is reversed.

I

Appellant, Ma[redacted] L[redacted], was born at Angerburg, East Prussia on February 3, 1903. She immigrated to the United States in 1950, and in 1956 was naturalized as a United States citizen in New York City. Sometime thereafter she moved to the Los Angeles area where she lived until 1983. In that year she and her son, Bernard Lee, moved to the United Kingdom, allegedly in part because of appellant's poor health (severe

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1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads as follows:

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality --
>
> . . .
>
> (5) 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; ...

allergies); he and she apparently expected to find a more salubrious environment for her in the United Kingdom. She and her son settled on the west coast of England, but soon encountered problems as temporary residents of the United Kingdom, as explained in a letter, dated February 6, 1989, drafted by her son and signed by them both:

> Shortly after we made up our residence over there, we were called to the Home Office every six months, and every time there was a big to-do, why we wanted to live in the UK and I had to go through a lot of harrassements [sic] and upsets. I was then advised to contact the MP for Bournemouth, Mr. Butterfill, whom I had a meeting with, and who advised me to give up US citizenship, as then we would be able to live in England without any problems, since Germany was considered EEC country.

John Butterfill, Member of Parliament for Bournemouth, by letter to appellant's son, dated June 8, 1989, attested to the foregoing as follows:

> I am happy to confirm the advice which I gave you nearly three years ago that you were then best advised to renounce your US citizenship and seek reinstatement of your German citizenship since this would mean that as an EEC citizen you and your mother would have no problems about residing permanently in the UK. 2/

Acting upon Mr. Butterfill's advice, appellant and her son went to the United States Embassy in London on February 27, 1986. The record shows that appellant read and signed under oath in the presence of two witnesses a pre-printed form titled "Statement of Understanding." In that statement appellant declared that she wished to exercise her right to renounce United States nationality; acknowledged that she would thereafter be an alien toward the United States; attested that the extremely serious nature and irrevocability of renunciation had been explained to her by the Vice Consul,

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2/ There is no indication in the record that appellant (and her son) obtained reinstatement of their German citizenship. Presumably they did, since they are living in the Federal Republic of Germany, apparently as German nationals.

and that she understood the consequences. Appellant signed the statement but did not or was not instructed to complete the last part of it which reads as follows:

> I (do not) choose to make a separate written explanation of my reasons for renouncing my United States citizenship.
> I (swear, affirm) that I have
> (Circle one verb)
> (read, had read to me) this Statement
> (Circle one verb)
> in the English language and fully understand its contents.

In any event, appellant did not make a statement of the reasons for her renunciation. After signing the statement of understanding, she was administered the oath of renunciation, the operative part of which reads as follows:

> That I desire to make a formal renunciation of my American nationality, as provided by section 349(a)(5) of the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely, renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

The formalities completed, the consular officer who presided executed a certificate of loss of nationality in appellant's name, as required by law. 3/ The officer certified that appellant acquired the nationality of the United States by virtue of naturalization; that she made a formal renunciation of United States nationality; and thereby

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3/ 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

expatriated herself under the provisions of section 349(a)(5) of the Immigration and Nationality Act.

Appellant was then 83 years of age.

The Embassy forwarded the certificate to the Department under cover of a memorandum which stated simply:

> Attached is CLN in the name Ma[redacted] L[redacted] who appeared at Embassy, London on February 27, 1986 to make a formal renunciation of her United States citizenship.
>
> Certificate of Loss of Nationality is being forwarded for the Department's approval.

The Department of State approved the certificate on April 10, 1986, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

Appellant's son summed up the three years following his and his mother's renunciation of citizenship in a letter to the Board, dated May 26, 1989, and signed by them both:

> After we had given up our citizenship, mother took ill in Bournemouth, had a kidney removed and developed terrible allergies. I then thought of what would be best for her health and where to live, so I flew to Germany, and decided that it would be fine, especially since the climate was good, mountenous [sic] area with good clean air, so we moved....

Living in Germany evidently was painful for appellant. As her son wrote in their joint letter of May 26, 1989,

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3/ (Cont'd.)

> 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.

> Of course, I had been very short sighted and did not think, that Germany would bring back bad memories for mother, as my sister, nephew, brother-in-law, aunt, and many other relatives and friends were put in the Gas Chamber of Auschwitz. Whenever we went shopping or into town, mother could not look at the Germans, as she thought this one or that one may have murdered my children etc.... Of course, I did not realize that before I decided on the move. All I can point out to you is, that I had been extremely foolish or shall I say stupid in having done all these changes.

It would be reasonable to assume that appellant's unhappy experience of living in Germany caused appellant and her son to consider how they might recover their United States citizenship. By letter dated February 6, 1989, signed jointly by appellant and her son, B[redacted] L[redacted], whose appeal we also decide today, appellant entered an appeal from the Department's holding of loss of her nationality.

II

As an initial matter, we must determine whether the Board may assert jurisdiction over this appeal. The Board's jurisdiction depends on whether the appeal was filed within the applicable limitation, for timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1961). With respect to the limit on appeal to the Board of Appellate Review, section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), provides that:

> A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval by the Department of the certificate of loss of nationality or a certificate of expatriation.

22 CFR 7.5(a) provides in pertinent part that:

> ... An appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time.

The Department approved the certificate that was issued in this case on April 10, 1986. The appeal was not entered until February 1989, one year and 10 months after the allowable time for appeal. We must therefore determine whether appellant has shown, or may be deemed to have shown, good cause why she could not take the appeal within the limitation prescribed by the applicable regulations.

"Good cause" is a term of settled import. It means a substantial reason, one that affords a legally sufficient excuse. Black's Law Dictionary, 5th Ed. (1979). Generally, to meet the standard of good cause, a litigant must show that failure to file an appeal or brief in timely fashion was the result of some event beyond his immediate control and which to some extent was unforeseeable.

Invited by the Board to explain why she did not take an appeal within the limitation, appellant responded by letter, dated March 8, 1989, drafted by her son, and signed by them jointly, which read in part as follows:

> At the time, we did not realize the consequences this stupid decision may have, and after we left the American Embassy in London on the day of renunciation, we were confused and terribly upset that we never looked at the forms that were given to us by the Embassy, but put them in a safe place. Therefore, we missed the time limit of re-appealing for US citizenship.

Presumably, reference is made to documents the Embassy gave appellant and her son when they renounced and to the approved certificates of loss of nationality the Embassy later sent them, on the reverse of which were set forth the one year limit on appeal and the appeal procedures.

On its face, the explanation proferred is insufficient to excuse a delay of nearly two years over the limitation on appeal. We are of the view, however, that the reason for

appellant's delay in moving for review of her case lies not in her inaction but rather in her son's. We strongly doubt that appellant knew about the right of appeal or the limitation on appeal because her son, through negligence, confusion or inattentiveness, made no effort for several years to ascertain how they might undo acts which upon reflection he later considered to have been ill-advised.

The central consideration leading us to place the onus on appellant's son is that he acknowledges that he makes all decisions for his mother. The following excerpts from letters written by appellant's son and signed jointly are revealing and credible:

> 'I am writing on behalf of my mother as well as myself, as mother is in her eighties, and depending on me for everything.'
>
> '...my mother depends on my decisions for everything, so she is not to be blamed for this outcome, but me.'
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> 'I was then advised to contact the MP for Bournemouth, Mr. Butterfill, whom I had a meeting with....Stupidly I did follow the advise [sic] of this man....'
>
> 'I decided that it would be fine [to live in Germany].'

In response to the Board's request that he submit a sworn statement regarding the circumstances leading up to their renunciation and his own part in the decision, appellant's son made the following declaration on September 25, 1989, which he describes as "sworn" but which technically is not. Nonetheless, we consider it entitled to fair evidential weight on the issue whether appellant's delay may be excused on the grounds that constructively she had no free choice in whether or when to take an appeal.

> 1. I made one visit to the Embassy and on the second visit took my mother to renounce our citizenship. As I have mentioned before, my mother is often confused due to one kidney only, therefore, I make practically all decisions for her. Neither one of us was fullly aware of the grave consequences this decision could bring. Statement from Mr. Butterfill, the MP for Bournemouth, explained it all.

> 2. When at the Embassy, we were spoken by [sic] several employees, and after all the paper work had been concluded, a lady consul came and we had to swear that we understood the outcome of this matter, which in reality we really did not grasp the true fact of it all. We were terribly upset and in a sort of daze.
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> 3. I had the appointment alone with Mr. Butterfill and mama did not attend this meeting. I then told her that we must go to London to the Embassy and straighten out some formalities. Up to this day, I am really not sure whether she understood it at all, as she is telling me respectively complaining what I had done, whenever a letter arrives from the Board of Appellate Review.
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> 4. I have no documents which show that I make all decisions for her, but I can only state that this is true and correct.

Since there is reason to doubt that appellant had any chance to make a considered judgment about whether to appeal, we believe we must resolve that doubt in favor of allowing the appeal.

For the foregoing reasons, we concude that there has been a showing of good cause why the appeal could not be filed within the prescribed limitation. Accordingly, we will proceed to consider the appeal on the merits.

III

Section 349(a)(5) of the Immigration and Nationality Act prescribes that a United States citizen shall expatriate himself by voluntarily making a formal renunciation of nationality before a consular officer of the United States in a foreign state in the form prescribed by the Secretary of State with the intention of relinquishing United states nationality. 4/

4/ See note 1 supra.

There is no dispute that appellant made a formal renunciation in the manner and form prescribed by the statute and regulations issued by the Secretary of State. The first issue we address therefore is whether she performed the expatriative act voluntarily.

In law, a person who performs a statutory expatriating act is presumed to do so voluntarily, but the presumption may be rebutted upon the actor's showing by a preponderance of the evidence that the act was not voluntary. 5/

Appellant has made no submission to rebut the presumption that she renounced her citizenship voluntarily. She has merely contended in letters drafted by her son and signed by her and him that she made a mistake in 1986 and hopes the Board will restore her citizenship.

It is thus obvious that she has not rebutted the presumption that she surrendered her citizenship of her own free will.

IV

Finally, there is the question whether appellant intended to relinquish her United States nationality when she made a formal renunciation. The government bears the burden of proving by a preponderance of the evidence that such was her intention. Section 349(b) of the Immigration and Nationality Act (note 5 supra) and Vance v. Terrazas, 444 U.S.

5/ Section 349(b) of the Immigration and Nationality Act, 8 U.S.C. 1481(b), reads as follows:

> (b) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

252 (1980). Intent may be proved by a person's words or found as a fair inference from proven conduct. Id. at 260.

Formal renunciation of United States citizenship in the manner mandated by law and in the form prescribed by the Secretary of State is, on its face, unequivocal and final. "A voluntary oath of renunciation is a clear statement of desire to relinquish United States citizenship." Davis v. District Director, Immigration and Naturalization Service, 481 F.Supp. 1178, 1181 (D.D.C. 1979). Intent to abandon citizenship is inherent in the act.

Nonetheless, it is also the Department's burden to prove by a preponderance of the evidence that appellant knowingly and intelligently renounced her citizenshp, specifically, that she was fully aware of the consequences of her actions. This we believe the Department has failed to do.

The sole evidence the Department adduces to show that appellant knowingly and intelligently performed the expatriative act is the statement of understanding appellant signed on February 27, 1986. We do not consider that that statement establishes conclusively that appellant grasped fully all the consequences of renunciation. The statement is of questionable evidential value because one important part was not completed. As noted above, the pre-printed form concluded as follows:

> I (do not) choose to make a separate
> written explanation of my reasons for
> renouncing my United States citizenship.
> I (swear, affirm) that I have
> (Circle one verb)
> (read, had read to me) this Statement
> (Circle one verb)
> in the English language and fully
> understand its contents.

Although we do not consider it of particular significance that appellant did not indicate whether she wished to explain why she was renouncing, we think the fact that she did not indicate that she swore/affirmed that she had read/had read to her the statement and fully understood its contents raises a material question whether appellant fully comprehended what she was doing.

The foregoing view is reinforced by the fact that the consular officer made no report about the facts and circumstances surrounding appellant's renunciation. Appellant's son candidly acknowledged in his declaration of September 25, 1989, quoted above, that he made all decisions for his mother regarding their renunciation of United States citizenship (and in all other matters) and even withheld from

her precisely why he took her to the Embassy. Being contrary to interest, his statements have credibility.

Furthermore, at the time appellant was 83 years old and allegedly in poor health. We do not believe that she necessarily had diminished capacity, but she was undoubtedly confused about what was going on and plainly was acting under the guidance and direction of her son. The evidence her son has adduced on her behalf has not been contradicted by the Department. The Department cannot point to a single contemporary statement by the consular officer who presided over appellant's renunciation which would attest that although of great age, appellant seemed clear headed, alert, fully cognizant of her actions. The Department cannot do so precisely because the consular officer concerned did not take the time or consider it necessary to make even a brief report about the apparent condition and demeanor of this elderly citizen.

In short, with respect to the issue whether appellant intended to relinquish her United States nationality, we find that the record such as it is raises doubts about whether appellant knowingly and intelligently forfeited her United States citizenship. Consistently with the injunction of the Supreme Court, we resolve those doubts in favor of retention of citizenship. 6/

It follows that the Department has not carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States nationality when she made a formal renunciation of it.

6/ The Supreme Court has said that, in actions instituted for the purpose of depriving one of the precious right of citizenship previously conferred, the facts and the law should be construed as far as reasonably possible in favor of the citizen. Nishikawa v. Dulles, 356 U.S. 129, 134 (1958); Schneiderman v. United States, 320 U.S. 118, 122 (1943).

V

Upon consideration of the foregoing, the Department's determination that appellant expatriated herself is hereby reversed.

Alan G. James, Chairman

Edward G. Misey, Member

Gerald A. Rosen, Member