October 27, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: Ca[redacted] [redacted] Du[redacted]

The Department of State made a determination on July 10, 1970 that Ca[redacted] [redacted] Du[redacted] expatriated herself on June 18, 1970 under the provisions of section 349(a)(6), now 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 Bern, Switzerland. 1/ Appellant entered an appeal from that determination in August 1987, and subsequently retained counsel.

The long delay in appellant's taking the appeal raises a threshold issue: whether the Board may exercise jurisdiction to hear and decide the appeal. For the reasons that follow, we hold that the appeal is time-barred and not properly before the Board. Accordingly, it is dismissed for want of jurisdiction.

I

Appellant, Ca[redacted] [redacted] [redacted], acquired United States nationality by virtue of her birth at [redacted] [redacted] [redacted] on [redacted] [redacted] [redacted]. She lived in the United States until 1967 when she went to Switzerland. While attending college in Leysin, appellant met her future husband, [redacted] [redacted] a [redacted] national. In December 1967 appellant suffered a serious accident while skiing, breaking both her legs, and between 1967 and 1976 she underwent four major operations. In May 1970

1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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; or . . .

appellant and [redacted] were married. The Board takes note that Under article 3, section 1 of the Federal Citizenship Law, September 29, 1952, an alien woman acquires Swiss citizenship by marrying a Swiss man. Appellant thus became a dual national of the United States and Switzerland. In anticipation of a trip to the United States in June, [redacted] obtained a Swiss passport for appellant.

Appellant states that in June 1970 she went alone to Bern to inquire of the Embassy whether she might travel to the United States with her Swiss passport. Allegedly, she was under heavy medication at the time, in pain and using crutches. The following is appellant's version of what ensued at the Embassy (Appellant's Brief):

> ...The American consular official at Bern advised the appellant that she could not use her Swiss passport to enter the United States with her husband without a visa, and conversely that the Embassy was unable to issue a visa to the appellant because she was in possession of an American passport.
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> Upon learning that she could not travel with her husband under her new Swiss passport, appellant became very upset and began to cry because their scheduled departure for the United States was on June 20, 1970, two days away. The consular officer failed to advise her that she could nevertheless enter the United States with her American passport. As a result, the appellant was confused as to her eligibility to enter the United States at all, because she had been married in Switzerland. The consular officer changed his mind when he recognized that the appellant was obviously upset and he agreed to issue a visa to the appellant on condition that she sign some necessary papers.

Appellant states that she signed "some papers" which she did not understand, thinking them to be "just routine" applications for a visa. Upon execution of the papers, she was issued a visitors visa. Purportedly on the advice of the consular officer, she left her United States passport at the Embassy for safekeeping. She was not allegedly given a receipt for her passport, or a copy of the "papers" she signed.

The Department's record of the case shows that on June 18, 1970 appellant appeared at the Embassy in Bern "to renounce her United States citizenship." In the presence of two witnesses she executed a statement of understanding in which she declared, inter alia, that she had decided to exercise her right to renounce her citizenship; realized that by doing so she would become an alien toward the United States; had been afforded an opportunity to make a separate written explanation of her reasons for renouncing; and that the extremely serious nature of her contemplated act had been explained fully to her by the vice consul concerned and that she fully understood those consequences. Thereafter, the oath of renunciation was administered to her by the vice consul.

As required by law, the consular officer executed a certificate of loss of nationality in the name of Candice Ann [redacted] on June 18, 1970. 2/ Therein he certified that appellant acquired the nationality of the United States by virtue of her birth therein; that she acquired the nationality of Switzerland by virtue of marriage to a Swiss citizen; that she made a formal renunciation of United States nationality; and thereby expatriated herself under the provisions of section 349(a)(6) of the Immigration and Nationality Act.

The Embassy forwarded the certificate of loss of nationality under cover of a memorandum which read as follows:

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.

> Mrs. [redacted] called at the Embassy to renounce her citizenship on June 18. She is a dual national by reason of her marriage to a Swiss citizen.
>
> The seriousness and irrevocability of her action were explained to her at great length by the consular officer. The fact that her children (she has none as yet) would have no claim to citizenship was also explained. She refused to delay her decision, because she wished to travel to the US on her Swiss passport on June 20. Because she is Swiss and living here she did not wish to have any confusion over her nationality.
>
> The Department's approval of the attached Certificate of Loss of Nationality is requested.

The Department approved the certificate on July 10, 1970, approval constituting an administrative determination of loss of nationality from which an appeal might then as now be taken to the Board of Appellate Review.

Appellant entered the appeal pro se in August 1987, and subsequently retained counsel who filed a brief in support of the appeal in December 1988. Summarily stated, it is appellant's contention that the Department erred in holding that she expatriated herself. She did not, she maintains, renounce her nationality voluntarily with the requisite intent to relinquish citizenship because she was under emotional and physical duress at the time she performed the expatriative act.

II

The threshold issue presented is whether the Board may exercise jurisdiction over this appeal which was entered seventeen years after the Department of State determined that appellant expatriated herself.

We may consider the case on the merits only if we are able to conclude that the appeal was taken within the limitation prescribed by the applicable regulations, for timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if an appellant, providing no legally sufficient excuse, fails to take an appeal within the prescribed limitation, the appeal must be dismissed for want of jurisdiction. See Costello v. United States, 365 U.S. 265 (1961).

Under federal regulations promulgated on November 30, 1979, the limitation on an appeal from an administrative determination of loss of nationality is one year after approval of the certificate of loss of nationality. 3/ The regulations further provide that an appeal filed after the allowable time shall be denied unless the Board determines, for good cause shown, that the appeal could not have been filed within the prescribed time.

In 1970, when the Department determined that appellant expatriated herself, the limitation on appeal was "within a reasonable time" after the affected party received notice of the Department's adverse decision regarding his citizenship. Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60. 4/ In conformity with the Board's practice in cases where the certificate of loss of nationality was approved prior to 1979, we will apply the limitation of "reasonable time" to the appeal now before us. Thus, under the time limitation governing the instant case, if we conclude that appellant did not initiate her appeal within a reasonable time, the appeal would be time-barred and the Board would lack authority to entertain it. 5/

3/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b) (1988).

4/ 22 CFR 50.60, provided that:

> 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.

5/ 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.

Whether an appeal has been taken within a reasonable time after the affected party received notice of the Department's decision in his or her case depends upon the circumstances in each individual case. Generally, reasonable time means reasonable under the circumstances. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). Courts take into account a number of considerations in determining whether the facts of a particular case indicate that the affected party moved within a reasonable time: 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 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). 6/

In her brief, appellant submits that her appeal should be deemed to have been filed within a reasonable time after she received notice of the Department's holding of loss of her citizenship. "The Board of Appellate Review has jurisdiction to hear the appeal since appellant was kept in the dark and acted reasonably when she found out seventeen years later that she has expatriated herself." argues appellant. "I found out for the first time that I lost my American citizenship in August 1987," appellant has stated, "when the American Embassy in Geneva refused to renew my American Passport...." Appellant alleges that she was not given a copy of the certificate of loss of nationality that was approved in her name. The only reason she did not appeal the Department's determination in 1970 allegedly was that she was not made aware "as required" (emphasis in brief) that by her execution of the documents at the Embassy she expatriated herself. In her opinion, the Department is not prejudiced by the appeal.

5/ (Cont'd.)

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

6/ 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

The record shows that after approving the certificate of loss of nationality that the Embassy at Bern executed in appellant's name, the Department sent copies thereof to the Immigration and Naturalization Service, for its information, and to the Embassy at Bern to forward to appellant. In the absence of evidence to the contrary, it may be presumed that the certificate reached the Embassy and that the Embassy duly forwarded it to appellant, as required by law. Public officials are presumed to execute their official duties faithfully and correctly, absent contrary evidence. See Boissonnas v. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1951).

As noted above, a person who was the subject of an adverse determination with respect to his nationality had the right in 1970 (as today) to appeal to this Board. In 1970 the Department's instructions to consular officers concerning advice about making appeals provided that: "When an approved certificate of loss of nationality is given to the expatriate, the expatriate shall be notified in writing of the entitlement to appeal to the Board of Appellate Review." 8 Foreign Affairs Manual 224.21 (1970). Consular officers were required to send the expatriate a detailed letter about taking an appeal, the form of which was set forth in the Foreign Affairs Manual. Absent evidence to the contrary, it would also be reasonable to presume that the Embassy at Bern sent appellant a letter to inform her of her right to take an appeal to the Board.

There is no evidence of record, however, to establish whether a copy of the approved certificate of loss of nationality and information about the right of appeal were received by appellant. But given the well-known efficiency of the Swiss post, it would be strange if those papers did not reach appellant at Leysin where she had lived since 1967 and where her husband had presumably lived even longer. Nonetheless, at this remove from 1970, we cannot establish with any certitude the disposition of the certificate and the letter about an appeal.

Assume, arguendo, that those papers did not reach appellant and that she thus did not receive notice of the Department's decision on loss of her nationality and the right to appeal that decision. Would lack of notice excuse such a long delay in taking an appeal? We do not think it would in the

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6/ (Cont'd.)

consider whether the moving party had some good reason for his failure to take appropriate action sooner.

542 F.2d at 930-31.

circumstances of this case, for we are of the view that it is improbable that appellant did not, as she alleges, comprehend the significance of the act she performed on June 18, 1970. It is not that we question appellant's sincerity, but memory can be a self-serving, if unwitting, instrument.

We will accept that on June 18, 1970 appellant was still suffering the effects of her accident, was in pain and taking medication. But we note she acknowledges that she was able to go to the Embassy at Bern unaccompanied. The only evidence appellant has submitted regarding her condition in June 1970 is a medical certificate, dated November 9, 1988, which reads as follows:

> MEDICAL CERTIFICATE
>
> The undersigned doctor declares to have followed up on the above named patient from 1967 to 1984 for various kinds of ailments. [sic].
>
> In particular, as the result of the serious fractures of both of her legs which occurred in December, 1967, these fractures caused many surgical operations, of which the last one took place in October, 1976. Due to the long periods of time during which the patient had to take medication, she had suffered psychological stress of her ailments which lasted for a long time and took an unforeseeable course.
>
> In conclusion, I estimate that a worsening of the patient's conditions may be partially attributed to thse [sic] pathological but transitory fractures.
>
> [(Signature of Dr. J. P. Bonzon)]

The foregoing certificate does not, in our opinion, establish that appellant was suffering from diminished mental capacity in June 1970.

The only contemporary record of the circumstances of appellant's renunciation is the one prepared on June 19, 1970 by the consular officer who processed appellant's case. The consular officers's statement indicates that appellant took the initiative, that it was she who expressed the wish to renounce United States citizenship. We are impressed by the fact that the consular officer recorded that he explained "at great length" to appellant the serious consequences of renunciation, emphasizing in particular that any children born

to appellant would have no claim to American citizenship. It is also revealing that the officer stated that appellant "refused to delay her decision" to renounce. Thus, his report leaves little room for doubt that he took pains to represent clearly the consequences of renunciation to appellant. Objective evidence of what occurred on June 18, 1970 is also found in the statement of understanding of the consequences of renunciation which appellant swore to and in the oath of renunciation itself. We fail to understand how appellant could have confused the portentious words of the oath of renunciation which the consular officer would have her recite with a swearing to the truth of statements in an application for a visa.

Appellant has adduced no convincing evidence to support her claim that on June 18, 1970 she did not grasp the gravity of her act. Her latter-day statements cannot conceivably be given the same evidential weight as the documents she signed on that date and the contemporary evidence of the consular officer. We must therefore presume that the officer executed his duties precisely as he said he did in the report which he wrote on the day after her renunciation.

Since we are unable in the face of the evidence to accept that appellant was unaware that she had performed an expatriative act, it follows that she must have had knowledge which should have moved her to seek appellate review of her case long before she did so. 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).

No evidence has been presented to call into question our assumption that for seventeen years appellant held herself out as an alien toward the United States. By her own admission, she has travelled frequently to the United States, using only a Swiss passport with a multiple entry visa. If she believed that she had performed merely a routine act on June 18, 1970 and not expatriated herself, one would assume that she would have offered evidence at least to show that after 1970, in various business matters where a statement of her citizenship status was required, she had represented herself as a United States citizen who also enjoyed the citizenship of Switzerland. She has presented none.

For appellant now to challenge the Department's adverse decision on her nationality poses the inevitable issue whether there would be prejudice to the Department if we were to allow

the appeal. Plainly, because of appellant's long delay, the Department would be unfairly burdened in undertaking its statutory burden to prove that appellant voluntarily, knowingly and intelligently made a formal renunciation of her United States nationality. Why it would be prejudiced to allow a long delayed appeal was succinctly stated by the court in Maldonado-Sanchez v. Shultz, memorandum opinion, at 10, Civil No. 87-2654 (D.D.C. 1989)

> 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 absence of a legally sufficient reason to excuse the seventeen-year delay in taking the appeal and in light of what we perceive would be clear prejudice to the Department, we think that the interest in finality and stability of administrative decisions dictates denial of the appeal.

III

Upon consideration of the foregoing, we hold that the appeal is time-barred. Accordingly, it is hereby denied for lack of jurisdiction.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Frederick Smith, Jr., Member