November 30, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: O[redacted] N[redacted]e N[redacted]

The Department of State made a determination on April 21, 1975 that O[redacted] N[redacted] expatriated himself on December 19, 1974 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 his nationality before a consular officer of the United States at Cairo, Egypt. 1/ [redacted] entered an appeal from that determination in May 1989.

A threshold issue is presented: whether the Board has jurisdiction to hear and decide this appeal. For the reasons given below, we find that the appeal is barred by the passage of time, and accordingly dismiss it for lack of jurisdiction.

I

[redacted] was born at [redacted] on [redacted] and thus acquired the nationality of the United States. Since his father was a citizen of Egypt, he also acquired the nationality of Egypt at birth. When appellant was around 5 years old his parents took him to Egypt where he grew up and was educated. He applied for a United States passport in 1965, but, according to the Embassy, no passport was issued to him, as he had no plans to travel outside Egypt. In 1972 he registered for U.S. Selective Service.

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; or ...

On December 19, 1974 appellant made a formal renunciation of his United States nationality before a consular officer at the Embassy in Cairo. In the presence of two witnesses and the consular officer, appellant signed a statement under oath in which he declared that he wished to exercise the right to renounce his citizenship; did so voluntarily; understood he would become an alien toward the United States; that the serious, irrevocable consequences of renunciation had been explained to him by the consular officer and that he understood the consequences. He then made the oath prescribed by the Secretary of State for renunciation of nationality. Thereafter, in compliance with the statute, the consular officer executed a certificate of loss of nationality in appellant's name. 2/ The certificate set forth that appellant acquired the nationality of the United States by virtue of birth at Washington, D.C.; that he acquired the nationality of Egypt through his father; that he made a formal renunciation of United States nationality; and thereby expatriated himself under the provisions of section 349(a)(6) of the Immigration and Nationality Act.

The Department approved the certificate on April 21, 1975, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

In December 1977, appellant executed an affidavit at Cairo in which he stated that he wished to make a formal complaint "of being forced to renunciate my American

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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.

citizenship." Briefly stated, the burden of appellant's "complaint" is that he was accepted for employment at the Embassy at Cairo (USIS) in December 1974 on condition that he renounce his United States citizenship. He stated that the consular officer involved advised him that he could be hired (as a foreign service national employee) only if he were not a United States citizen.

For the better part of one year the Department gathered evidence concerning the circumstances surrounding appellant's renunciation. After reviewing the evidence, the Department informed the Embassy by telegram in September 1978 that it had concluded that:

> Affidavits of record show that efforts were made by Embassy officials to dissuade Mr. [redacted] from renouncing his U.S. citizenship but that these efforts were unsuccessful. These affidavits also show that Mr. [redacted] actions were performed voluntarily and that no force or coercion was exerted. The record shows further that Mr. [redacted] was made aware of the significance of his contemplated action.
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> The Department therefore believes that Mr. [redacted] claim that he was forced to [redacted] his U.S citizenship has not (repeat not) been substantiated. He should be advised accordingly in writing. Mr. [redacted] should also be informed of the appeal procedures as set forth in 22 CFR 50.60 to 50.72. 3/

The Embassy informed appellant of the Department's decision by letter dated October 19, 1978, expressly informing him that he had the right, "within a reasonable time" after receipt of notice of the Department's holding of loss of his citizenship, to take an appeal to this Board.

3/ The principal affidavit evidence, that of the consular officer who handled appellant's renunciation, states that appellant was determined to be hired as a foreign service local employee, a position for which U.S. citizens are ineligible. Although everyone in the Embassy with whom he discussed the matter discouraged him from renouncing his U.S. citizenship, he was adamant.

One year and a half later in June 1980, appellant applied for a passport at the Embassy in Sana. Referring his application to the Department, the Embassy noted that appellant had been travelling on an Egyptian passport which he stated he obtained upon the instructions of the Embassy at Cairo when he was working for ICA. The Department informed the Embassy that appellant was ineligible for a passport, having expatriated himself in 1974.

Eight and one half years later appellant wrote to the Department to request that the Department reconsider his case. The Department responded in February 1989 stating in part as follows:

> The Department believes that your claim that you were forced to renounce your U.S. citizenship is not substantiated. On the contrary, the record establishes that when confronted with a choice between keeping your United States citizenship or giving it up to be eligible for an Embassy job available only to foreigners, you knowingly and voluntarily opted to renounce your citizenship and obtain the job at the Embassy, after being warned about the ramifications of renunciation of your citizenship.
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> . . .
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> Therefore we confirm our previous finding of loss of nationality.
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> Please again be advised that any holding of loss of United States nationality may be appealed to the Board of Appellate Review of the Department of State. The regulations governing appeals are set forth at Title 22 of the Code of Federal Regulations, Part 7. [A copy was enclosed.]

This appeal followed in May 1989.

II

A threshold issue is presented: whether the Board may entertain an appeal entered fourteen years after the Department of State determined that appellant lost his United States nationality.

To exercise jurisdiction, the Board must find that the appeal was filed within the limitation prescribed by the applicable regulations. This is so because 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. Costello v. United States, 365 U.S. 265 (1961).

In 1975, when the Department determined that appellant expatriated himself, the limitation on appeal to the Board of Appellate Review was "within a reasonable time" after the affected person received notice of the Department's determination of loss of citizenship. 4/ Consistently with the Board's practice in cases where certificate of loss of nationality was approved prior to the effective date of the present regulations (November 30, 1979), we will apply the limitation of "reasonable time" in this case.

What constitutes reasonable time depends upon the facts of each case. The courts take account of the following considerations to determine whether an action has been taken within a reasonable time: the interest in finality, the reason for the 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). Reasonable time begins to run from the date an expatriate received the certificate of loss of nationality, not sometime later when it becomes convenient to appeal. Although the question of a reasonable time will vary with the circumstances, it is clear that it is not determined by a party to suit his or her own purpose and convenience.

In acknowledging receipt of his appeal, the Chairman of the Board of Appellate Review informed appellant on May 2, 1989 that the limitation the Board would apply in his case would be the one of reasonable time. "Whether a delay of 14 years in entering an appeal may be deemed reasonable," the Chairman wrote, "depends on the facts of your case. Therefore when you submit a legal brief or personal statement of appeal you should explain fully why you did not take an appeal much earlier. You should support any statements you make about this matter with the best evidence you can obtain."

4/ Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60. These regulations were in force from November 1967 to November 1979, when the limitation on appeal was revised. It now is "within one year after approval by the Department of the certificate of loss of nationality." 22 CFR 7.5(b)(1).

Appellant offered this explanation for his delay (letter of June 2, 1989):

> ...May I state that the 14 years you mentioned were not idle on my part. Through those years, I made numerous pleas at the American Consulate in Cairo. To say that I was met with a complete indifference to my predicament is an understatement. I also submitted documents which were either not forwarded to you, or lost on the way. I was never given a written acknowledgement of the papers I presented. The usual curt answer to my queries was 'go to Washington, hire an American lawyer, and fight it in court', which was, and still is financially impossible for me.
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> I also wrote to many American friends asking for advice, among them, Dr. Robert Bauer, Mr. James Halsema, Mr. George Wishon, and Pearl Bailey, whom I met during my work at the Embassy. I also asked I [sic] friend who now works as a doctor in the States, to take all my papers and consult a lawyer, and so he did. His name is Dr. Mohsen Rashdan, and that was three years ago, and the answer was 'You have a good case, so come and fight for it', which takes me back to square 1.

In December 1977 when appellant sought to reopen his case, the Embassy and the Department handled his request as one for administrative review. In October 1978 the Embassy informed appellant that the Department would not reverse its decision that he expatriated himself, and expressly informed appellant that he might take an appeal to the Board of Appellate Review. It was not until eleven years later that appellant requested that the Board review the Department's determination of loss of his nationality.

Although the limitation of reasonable time began to run when appellant received the approved certificate of loss of nationality (presumably around May 1975), we will consider that his request for administrative review of his case tolled the limitation. Thus the issue is whether a delay of eleven years in seeking appellate review is reasonable. In our view, it is not. The reasons appellant adduces for not moving until 1989 are legally insufficient to excuse an eleven-year delay.

In 1978 he was given notice of the right of appeal. If he was uncertain how to proceed, he could have written directly to the Board or made inquiries at the Embassy. He did neither. Only after he was informed in February 1989 that the Department would not reverse its adverse decision in his case and again reminded that there is a Board of Appellate Review did he turn to the Board. It is evident that no circumstances that appellant was unable to foresee or beyond his control prevented him from pursuing an appeal in 1978 or reasonably soon thereafter. He must bear the onus for not taking a timely action.

A limitation on the time to take an appeal is designed not only to encourage the prompt ascertainment of legal rights but also to protect the opposing party against actions where the evidence to rebut an appellant's claims is forgotten, or is no longer fresh or even obtainable. It is therefore understandable that the Courts do not look with favor upon long delayed appeals. As the court declared in Maldonado-Sanchez v. Shultz, memorandum opinion, Civil No. 87-2654 (D.D.C. 1989):

> The Court agrees with defendant's [Department of State] 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, we believe that the interest in finality and repose of administrative decisions requires that the appeal be dismissed as untimely.

III

Upon consideration of the foregoing, we hold that the appeal is time-barred. Since timely filing is mandatory and jurisdictional, we lack jurisdiction to entertain the appeal and accordingly dismiss it for want of jurisdiction.

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Gerald A. Rosen, Member