August 18, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: R[redacted] [redacted] C[redacted]

This is an appeal from an administrative determination of the Department of State, dated June 18, 1978, that R[redacted] [redacted] C[redacted] expatriated himself on April 29, 1975 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/ [redacted] entered an appeal from that determination in July 1988.

After the appeal was filed, the Department made a further review of the case and informed the Board it could not carry its burden of proving that appellant intended to relinquish his United States nationality when he acquired Canadian citizenship. Accordingly, the Department requested that the Board remand the case so that the certificate of loss of nationality might be vacated.

The Board is of the view that the appeal is time-barred and not properly before the Board. We therefore dismiss it for lack of jurisdiction. The fact that the Board has dismissed the appeal does not, however, bar the Department from taking further administrative action.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), provides that:

> **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 --
>
> > (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; or ...

I

An officer of the United States Consulate General at Calgary executed a certificate of loss of nationality in appellant's name on May 31, 1979, as required by law. 2/ The certificate recited that appellant acquired United States nationality by virtue of his birth at Fort Worth, Texas on November 8, 1939; that he resided in the United States from birth until 1965; that in 1979 he was resident in Edmonton, Alberta; that he acquired the nationality of Canada on April 29, 1975 by naturalization upon his own application; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department of State approved the certificate on June 18, 1979, approval being an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review under the provisions of 22 CFR 7.5(a) and (b). An appeal was entered on July 14, 1988 through the Consulate General at Calgary, which, through inadvertence, did not forward the appeal to the Board until the spring of 1989.

II

The Department of State on August 7, 1989 forwarded to the Board the record upon which its holding of loss of appellant's nationality was based and a memorandum requesting

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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.

that the Board remand the case so that the certificate of loss of nationality might be vacated. The Department stated its position as follows:

> The Department has carefully reviewed this case and has concluded there is insufficient evidence to meet the Department's burden of proving by a preponderance of the evidence that appellant intended to relinquish his U.S. citizenship under Section 349(a)(1) of the Immigration and Nationality Act. Although the appeal is untimely, the Department requests that the proceeding be remanded so that the CLN may be vacated.

The Department considers the following facts in the case to be pertinent.

-- Appellant took a non-renunciatory oath of allegiance when he obtained naturalization in Canada in 1975.

-- In a preliminary questionnaire appellant completed in 1978, he stated that he had not become a Canadian citizen with the intention of relinquishing United States citizenship, but because Canadian citizenship was a requirement of employment.

-- He did state, however, that he was prepared to relinquish his American citizenship should that be necessary.

-- After he completed the preliminary questionnaire, two citizenship questionnaires were sent to appellant in 1978; he did not respond.

-- After executing a certificate of loss of nationality in appellant's name in 1979, the consular officer involved recommended approval as he was persuaded by appellant's stated willingness to relinquish his citizenship if necessary.

-- In 1985 appellant requested that his case be reopened, but the Department affirmed its original holding on the grounds that he had been given ample opportunity to submit evidence of his intent in 1978 and failed to do so.

The Department maintains that the foregoing facts do not, when judged in the light of Afroyim v. Rusk, 387 U.S. 253 (1967) and Vance v. Terrazas, 444 U.S. 252 (1980), support a finding of intent to relinquish United States nationality.

The Department developed its argument for remand as follows:

> ...The only contemporaneous evidence of Mr. [redacted] intent was the taking of a non-renunciatory oath of allegiance to Canada, an insufficient basis upon which to find intent under present standards. The only other evidence relating to intent are the uncontroverted statements of Mr. [redacted] in 1978 and 1985 questionnaires in which he states that he did not intend to relinquish his U.S. citizenship when he became naturalized and that his purpose in becoming a Canadian was to secure employment. 1/
>
> Consul's reliance on Mr. [redacted] willingness to relinquish his U.S. citizenship in the event he were required to do so has not been shown to reflect on appellant's actual intent at the time he became naturalized. There is no indication that Mr. [redacted] believed that he was required to relinquish his U.S. citizenship and that he made a decision to do so at that time. His statement was a hypothetical one and thus not a basis for drawing conclusions about his actual intent.

1/ According to current Department procedures, a determination of loss of nationality may not be based on the failure of a subject to respond to inquiries. If this were not the case, the burden effectively could be shifted under the intent issue from the Department to the person involved.

III

To be able 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 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.

"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.

Appellant would excuse his nine year delay in seeking appellate review of his case by asserting that when he was notified in 1979 by the Consulate General at Calgary that he had lost his citizenship, he was advised that the only recourse he had was a legal appeal to this Board. "I did not at that time, nor do I have now, the financial resources to engage legal counsel for this process."

There is no doubt that when appellant received notice in 1979 of the Department's adverse decision regarding his nationality, he was also advised that there was a procedure for taking an appeal from that decision to this Board. The reverse of the certificate of loss of nationality that was sent to appellant carried such information, stating that an appeal might be presented through an American embassy or consulate or through an attorney or agent in the United States. The appeal information also noted that more information might be obtained by writing directly to the Board.

Plainly, appellant was on notice in 1979 that he might take an appeal to the Board and was not required to retain legal counsel. Possibly a consular officer told appellant that his only recourse to the Board was through legal counsel; if so, appellant was misinformed. However, there is no evidence in the record to support appellant's contention that he was given the advice he says he was given. In short, he had timely notice

that he could come directly to the Board or at least might get information by writing to the Board, but did not avail himself of that opportunity, until nine years after the Department made its decision in his case. On the evidence, he has not justified such a long delay in seeking relief from this Board.

In the circumstances, where there has been no evidentiary 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" cannot be deemed to extend to a delay of nine years.

IV

Upon consideration of the record before us, it is our conclusion that appellant's waiting for nine years to challenge the Department's determination of loss of his nationality was without legal justification. The appeal is time-barred and is hereby dismissed for lack of jurisdiction. 3/

3/ The fact that the Board has determined that the appeal is time-barred and dismissed it for want of jurisdiction, does not in itself bar the Department from taking further administrative action to correct manifest errors of law or fact.

> ...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.

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

Alan G. James, Chairman

Gerald A. Rosen, Member

George Taft, Member