May 8, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S[redacted] I[redacted] Po[redacted]

The Department of State made a determination on September 8, 1971 that S[redacted] I[redacted] P[redacted] expatriated himself on June 11, 1968 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining n[redacted]lization in Finland upon his own application. 1/ P[redacted] initiated an appeal from that determination in May 1989.

At the threshold we confront the jurisdictional question whether the Board may entertain this appeal filed nearly 18 years after the Department held that P[redacted] expatriated himself. For the reasons given below, we conclude that the appeal is time-barred. Since the prerequisite of timely filing has not been met, the Board lacks jurisdiction to hear and decide the appeal. It is accordingly dismissed.

I

Appellant P[redacted] acquired the nationality of the United States by birth at [redacted], [redacted] He received a B.A. After graduation he studied music in Rome for one year. From 1957 to 1962 he continued a musical education in the United States. He went to Finland in 1962 and in 1964 received a diploma in conducting from the Sibelius Academy.

Appellant applied to be naturalized in Finland in 1968. In a statement executed in January 1989, he stated

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

that the reasons he did *so* were personal and professional. He had applied to be a music director of the city of Oulu and had been given the position on the understanding that he would acquire Finnish citizenship. Further, he wished to adopt the two children of his Finnish wife; under Finnish law, he might do *so* only as a national of Finland.

Appellant's application was approved by the Ministry for Internal Affairs, and on May 31, 1967 the President of the Republic signed a certificate attesting that appellant had been granted Finnish citizenship. His naturalization took effect on June 11, 1968 upon registration of the certificate at the registry in the province where appellant lived.

In the summer of 1971 the United States Embassy at Helsinki began loss of nationality proceedings in appellant's case. It is not disclosed in the record what circumstances led to the proceedings. Possibly appellant himself informed the Embassy that he had obtained naturalization in order to comply with the requirement of Finnish law that an alien who is naturalized must show that he has been released from his former nationality. 2/ On August 10, 1971 appellant executed two documents at the Embassy. One was an affidavit of expatriated person in which he declared that he had obtained Finnish citizenship voluntarily with the intention of relinquishing United States citizenship. In his appeal statement, appellant said that "I was genuinely unhappy about having to sign the expatriation document. I did not agree to do *so* until it was assured to me that a letter, or affidavit of my writing would be included in the papers to be kept." The second document was an affidavit "offered in compliance with the request that a written explanation of why

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2/ Article 7 of the Act of May 1941 concerning the Acquisition and Loss of Finnish Citizenship provides that:

> Article 7. If an alien's application for Finnish citizenship is granted, and he has not already shown that he is released from his foreign citizenship by his admission to Finnish citizenship, then the order should make it a condition of his acquisition of Finnish citizenship that he shall within a period specified in the order be released from his foreign citizenship. In special circumstances an applicant may be admitted to Finnish citizenship without such a condition.

I applied for Finnish citizenship be supplied to the U.S. government offices involved in these matters." After setting forth the reasons why he applied for naturalization, appellant concluded:

> America surely understands that the millions of aliens that have become Americans did *so* primarily because they felt that they could best fulfill their lives in the United States, and not as uniform acts of betrayal and rejection toward the countries of their birth. I did not seek to become a non-American, but to become a Finn. I would have no objection to remaining an American citizen and would in fact like to remain one, but it is a law not of my making that one cannot have that right. The fact that through this declaration I must loose [sic] my official contact with the United States does not please me, but it is here given in compliance with the laws of that country.

In compliance with the statute, a consular officer executed a certificate of loss of nationality (CLN) in appellant's name on August 10, 1971 in which he certified that appellant acquired United States nationality by birth therein: that he acquired the nationality of Finland upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. 3/

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 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

The Department approved the certificate on September 8, 1971, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

Appellant left Finland in 1975. After spending a year in Sweden, he went to England in 1976 where he now lives. He has travelled on a Finnish passport ever since he surrendered his expired United States passport in 1971.

P[redacted] entered an appeal from the Department's determination of loss of his citizenship in May 1989.

II

The initial issue presented is whether the Board may consider and determine an appeal entered nearly 18 years after appellant received notice of the Department's administrative determination of loss of nationality. To exercise jurisdiction, the Board must be able to conclude that the appeal was filed within the limitation prescribed by the governing regulations, for the courts have generally held that timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). If an appellant does not enter an appeal within the applicable limitation and does not show good cause for filing after the prescribed time, the Board would lack jurisdiction to consider and determine the appeal and would have to dismiss it. See Costello v. United States, 365 U.S. 265 (1961).

Under existing regulations, the time limit for filing an appeal from the Department's administrative determination of loss of nationality is one year "after approval by the Department of the certificate of loss of nationality or a certificate of expatriation." 4/ The regulations require that an appeal filed after one year be denied unless the Board determines for good cause shown that the appeal could not have been filed within one year after approval of the certifi-

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3/ (Cont'd.)

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.

4/ 22 CFR 7.5(b)(1) (1989).

cate. 5/ Those regulations, however, were not in force on September 8, 1971, when the Department approved the certificate of loss of nationality that was issued in appellant's case.

The regulations in effect in 1971, with respect to the limitation on filing an appeal, prescribed that an appeal be taken "within a reasonable time" after receipt of notice of the Department's administrative holding of loss of nationality. 6/ We consider this reasonable time limitation should govern in appellant's case, rather than the limitation of one year after approval of the CLN under existing regulations, for it is generally accepted that a change in regulations shortening a limitation period operates prospectively, in the absence of an expression of a contrary intent to operate retrospectively.

"Reasonable time" is determined in light of all the facts and 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 (9th Cir. 1981). Similarly, Lairsey v. The Advance Abrasives Co., 542 F.2d 928 (5th Cir. 1976), quoting 11 Wright & Miller, Federal Practice & Procedure, Sec. 3866 at 228-29:

> '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.

5/ 22 CFR 7.5(a) (1989).

6/ 22 CFR 50.60 (1967-1979) 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 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 makes allowance for the intervention of unforeseen circumstances beyond a person's control that might prevent him from taking a timely appeal. Accordingly, appellant in the instant case has the burden to show that he initiated the appeal as promptly as he reasonably could after September 1971. The rationale for granting one a reasonable period of time within which to appeal an adverse citizenship is pragmatic and fair. It allows one sufficient time to prepare a case showing that the Department's decision was wrong as a matter of law or fact, while penalizing excessive delay which may be prejudicial to the rights of the opposing party, since passage of considerable time inevitably obscures the events surrounding performance of the expatriative act.

Appellant contends that he was never informed that he might take an appeal to this Board. Only in the spring of 1989, when his own son, born in Finland in 1970, inquired about his citizenship status at the Consulate in Florence, did it come to appellant's attention that he had the right to appeal. He further learned through his son that under the holding of the Supreme Court in Vance v. Terrazas, 444 U.S. 252 (1980) he might in an appeal raise the issue of whether he intended in 1968 to relinquish United States citizenship.

Since appellant allegedly did not know that there was an appeal procedure and since he was able to visit and work in the United States "when desired /he states that he received a visa from the American Embassy at Helsinki good for multiple entries/, the issue of expatriation receded." Furthermore, while living in Finland he had no plans to return to live and work in the United States; he has none now.

In reply to the Department's brief, appellant conceded that: "This appeal could have been made until one year from 1980 (Vance v. Terrazza /sic/ 1980 444 U.S. 252) which makes it eight years later than desired, and not seventeen. That is still a long time, if I would have heard of the Supreme Court ruling, but living abroad may have contributed to the fact that I did not."

> If the appeal had been made prior to 1980 it doesn't now, nor did it then, seem that there would have been a case for its success. Although I don't remember the conversations verbatum /sic/ at the American Embassy in 1971, it is my conviction that I was told then of a long-standing and irrevocable relationship between applying for any other passport and losing American citizenship.
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> The Supreme Court has decided that the government must prove my intent was to

> lose U.S. citizenship and I claim that I did not so intend. That is the issue to be determined - whether my passport was mistakenly or incorrectly taken from me considering the retroactive implications of the ruling. If it was, then protracted debate about what was the proper time for me to ask for redress, or about what my subsequent behavior inferred, and about what else I should have done, is less significant, to my mind, than making a fair decision about the original proceedings.

We have difficulty accepting appellant's contention that he was never informed of the right to take an appeal to this Board. We note that on September 14, 1971 when the Department of State sent a copy of the approved CLN to the Embassy to forward to appellant, the Department instructed the Embassy: "Inform of appeal right under 8 FAM (Foreign Affairs Manual) 224.21, Procedures." That section of the FAM referred to the customary letter sent by a diplomatic or consular office to an expatriate with the CLN citing the applicable federal regulations (see above in this opinion), explaining how to frame an appeal and stating that additional information about making an appeal might be obtained from a diplomatic or consular office or by writing directly to the Board.

Appellant does not contend that he did not receive a copy of the approved CLN. It may therefore be presumed in the absence of evidence (appellant's unsupported recollection is not evidence) to the contrary, that the Embassy complied with the Department's instruction and sent to appellant the pro forma letter about the right of appeal and the CLN. See Boissonnas v. Acheson, 101 F. Supp. 139 (S.D.N.Y. 1951), citing U.S. v. Chemical Foundation, 272 U.S. 1, 14-15 (1926): "The presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties."

On the basis of the record and bearing in mind the presumption of official regularity, we believe appellant probably was informed that he had the right of appeal, and that by being referred to the applicable regulations (22 CFR 50.60), he was on notice that he had a "reasonable time" after he received the CLN to take an appeal. His allowing nearly 18 years to elapse before seeking review of his case, plainly was unreasonable, since no factor beyond his control has been adduced and proved that would excuse such a long delay.

Assume, however, for purposes of analysis that despite the Embassy's best efforts appellant did not receive notice of the right of appeal. Would that fact justify his not acting sooner? We do not think *so.* There can be no doubt that he knew he had lost his citizenship. That information was sufficient in itself to lead him (if he were So disposed) to make inquiry about what he could do to try to reverse the Department's decision. Thus it could be said that appellant had implied notice that he might take an appeal. It is settled that implied notice of a fact is legally sufficient to impute actual notice to a party. The law imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it. U.S. v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (1939).

Had he inquired in 1971 or reasonably soon thereafter he would have learned (a) that he had a right of appeal and (b) the grounds on which he could base an appeal. He would have been informed that under the decision of the Supreme Court in Afroyim v. Rusk, 387 U.S. 252 (1967) and the Attorney General's 1969 opinion on how that decision should be applied in administrative loss of nationality proceedings, he might take an appeal based on the contention that he did not intend to surrender his United States citizenship. The Afroyim decision was a historic one, All diplomatic and consular offices were carefully instructed about it and the interpretive opinion of the Attorney General. It is scarcely conceivable that if appellant had been diligent, and made inquiries, he would not have been informed that he might, in a loss of nationality appeal, argue lack of intent to relinquish his citizenship.

With notice of appeal or without it, appellant was not justified in remaining passive for so long. There was no evident obstacle in his way to ascertain what he could do about his lost citizenship. He, not another, was responsible for his inaction.

Appellant permitted a substantial period of time to elapse before entering his appeal. Whatever the meaning of the term "within a reasonable time" may be, we do not believe that the term contemplates a delay of nearly eighteen years in taking an appeal, especially since appellant has not adduced a legally sufficient reason for his tardiness.

On its face, appellant's delay in taking the appeal raises the issue of prejudice to the Department if we were to allow the appeal. Under Vance v. Terrazas, supra, the Department bears the overall burden of proving that a person who performed an expatriative act did *so* with the intention of relinquishing United States citizenship. The passage of twenty-one years from the date when he obtained Finnish

citizenship places obvious obstacles before the Department to undertake its burden of proof.

In the instant circumstances the interest in finality and repose dictates that the appeal be dismissed as untimely.

III

Upon consideration of all the evidence, we conclude that the appeal was not taken within a reasonable time after appellant received notice of the Department's administrative determination of loss of his nationality. The appeal is time-barred, and, as a consequence, the Board lacks jurisdiction to consider the case. The appeal is hereby dismissed.

Given our disposition of the case, we do not reach the other issues that may be presented.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Howard Meyers, Member