May 29, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D[redacted] M[redacted] P[redacted] M[redacted]

The Department of State made a determination on October 9, 1957 that D[redacted] M[redacted] P[redacted] (now Mrs. M[redacted]) expatriated herself on July 2, 1954 under the provisions of section 349(a)(4)(A) of the Immigration and Nationality Act, by accepting employment with an agency of the government of Canada. 1/ In August 1989 Mrs. M[redacted] wrote to the Board of Appellate Review to state that she wished to appeal from the Department's determination of loss of her nationality.

For the reasons that follow, we find the appeal untimely and accordingly dismiss it for lack of jurisdiction. The fact that the Board has dismissed the appeal does not, however, in itself bar the Department of State from taking such further action in the premises as may be appropriate in the circumstances.

I

Appellant, Mrs. M[redacted], acquired United States citizenship under the provisions of section 1993 of the Revised Statutes of the United States by birth of a United

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1/ Section 349(a)(4)(A) of the Immigration and Nationality Act, 8 U.S.C. 1481, provides that:

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, sl lose his nationality by voluntarily performaning an of the following acts with the intention of relinq- uishing United States nationality - 11
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> ...
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> (4)(A) accepting, serving in, or performinc the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attain- ing the age of eighteen years if he has or acquires the nationality of such foreign state;

states citizen father in Canada on June 10, 1932. 2/ Since she was born in Canada, she became a Canadian citizen as well.

On July 2, 1954 appellant obtained employment with the National Research Council of Canada, an instrumentality of the government of Canada. On that occasion she made the following oath of allegiance: "I, ...DONNA-MAE CATHERINE PREEDOM..., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to law. So help me God." She also made the prescribed oath of secrecy and office. Appellant states that during her employment with the National Research Council - July 1954 to August 1955 - she performed the duties of a secretary in the research laboratory.

On August 15, 1957, as required by law, an officer of the United States Embassy at Ottawa executed a certificate of loss of United States nationality in the name of Donna Mae Preedom. 3/ The officer certified that she acquired the

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2/ In 1932, section 1993 of the Revised Statutes read as follows:

> Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

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

nationality of the United States by virtue of her birth in Canada of a United States citizen father; that she accepted a position with the National Research Council of Canada; and thereby expatriated herself under the provisions of section 349(a)(4)(A) of the Immigration and Nationality Act.

The Department of State approved the certificate on October 9, 1957, approval constituting an administrative determination of loss of nationality. In 1957 an adverse determination with respect to nationality might be appealed to the Board of Review of the Passport Office of the Department of State, predecessor of the Board of Appellate Review. A copy of the approved certificate was sent to Mrs. Meikle by the Embassy in November 1957. In its covering letter, the Embassy informed appellant that she had the right to make an appeal to the afore-mentioned Board of Review, and outlined the grounds on which an appeal might be based.

In August 1989 appellant gave notice to this Board that she wished to take an appeal from the Department's holding that she expatriated herself.

II

As an initial matter, we must determine whether the Board may entertain the appeal. 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. Costello v. United States, 365 U.S. 265 (1961).

In 1957 there was no specific limitation on the right of appeal to the Board of Review of the Passport Office. Nor was there any until 1966 when federal regulations were promulgated which provided that a person whom the Department

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3/ (Cont'd.)

> 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.

determined expatriated himself might take an appeal "within a reasonable time" after receipt of notice of the Department's decision. When the Board of Appellate Review was established in 1967 federal regulations were promulgated which also prescribed the "reasonable time" limitation on appeal. 4/ In conformity with the Board's customary practice in cases where a certificate of loss of nationality was approved prior to the effective date of the present regulations (November 1979), we will apply the standard of reasonable time to the instant case. Thus, under the time limitation governing the instant case, if we conclude that appellant did not initiate her appeal within a reasonable time after she received a copy of the approved certificate of loss of nationality, the appeal would be time-barred and the Board would lack authority to entertain it.

Appellant pointed out to the Board in her letter of August 14, 1989, that no time limit to make an appeal was stipulated in the Embassy's letter of November 19, 1957. In a subsequent communication, she reiterated that fact, and stated that she married a Canadian citizen in 1957. "Consequently, living in Canada all these years, I had no reason to change my status regarding citizenship, so for this reason, I did not seek review of my case before now."

The reasons appellant gives for not moving sooner to seek review of the Department's decision plainly are insufficient to excuse such a long delay. She received specific information about how to seek relief from the Department's adverse decision. It was incumbent on her to act and act promptly on that information, if she believed the Department had erred in holding that she expatriated herself. There is no evidence of any circumstances beyond appellant's control that prevented her from acting sooner. Absent any such circumstances, a delay of 32 years scarcely could be considered reasonable.

4/ 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 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.

The appeal is time-barred, and accordingly, is dismissed for lack of jurisdiction. 5/

III

The fact that the Board has dismissed the case for want of jurisdiction does not in itself bar the Department of State from taking further administrative action in the matter in order to correct manifest errors of law or fact. 6/

Alan G. James, Chairman

Howard Meyers, Member

George Taft, Member

5/ Although we do not reach the merits of the appeal, we are impressed that there is no substantial evidence that appellant intended to relinquish her United States citizenship. Appellant's case closely resembles Matter of Becher, 12 I & N Dec. 380 (1967). In Matter of Becher, the Attorney General ruled that a dual national of the United States and Canada who obtained employment as a teacher in the public school system of Ontario did not lose her United States citizenship by obtaining such employment because there was no evidence she intended to relinquish citizenship. As the Attorney General later said, "it is obviously not enough to establish [intent to relinquish] citizenship that an individual accepts employment as a public school teacher in a foreign country...A different case would be presented by an individual's acceptance of an important political post in a foreign government." 42 Op. Atty Gen. 397, 401 (1969).

6/ Where the Board of Appellate Review has dismissed an appeal in a citizenship case as time-barred that fact standing alone does not bar the Department of State from taking appropriate further administrative action, where the circumstances favoring reconsideration clearly outweigh the interest in 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.