February 20, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: R[redacted] G[redacted] E[redacted]

The Department of State decided on August 7, 1974 that R[redacted] G[redacted] E[redacted] n expatriated himself on November 19, 1973 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in the United Kingdom upon his own application. 1/ [redacted] entered an appeal on April 14, 1989.

A threshold issue is presented: whether the Board has jurisdiction to decide the appeal on the merits. For the reasons that follow, we conclude that the appeal is time-barred. It is therefore dismissed for lack of jurisdiction. The fact that the Board has dismissed the appeal for lack of jurisdiction does not, however, bar the Department from taking such further action it might find appropriate, if appellant were to request that the Department review its decision in his case.

I

Appellant, R[redacted] G[redacted] E[redacted] acquired United States citizenship by virtue of his birth at [redacted] on [redacted]. He lived in the United States until 1963 when he went to England. He has lived and worked in England as an artist and designer since that time. In 1964 he married a British citizen and has one son who was born in England in 1966. It appears that his son was documented as a U.S. citizen in 1988.

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; or ...

[redacted] applied to be naturalized as a citizen of the United Kingdom and Colonies, and on November 19, 1973 a certificate of British citizenship issued in his name. He made the prescribed oath of allegiance on November 26, 1973 and became a British citizen as from November 19, 1973. The oath of allegiance to which appellant subscribed reads as follows:

> I, A.B., swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, according to law.

The Home Office informed the Embassy at London on November 29, 1973 that appellant had obtained naturalization. In January 1974 the Embassy sent appellant a Uniform Loss of Nationality letter (ULN), informing him that by obtaining naturalization in a foreign state he might have expatriated himself; and that he might submit any comments or evidence he wished the State Department to consider in determining whether he had expatriated himself, specifically whether he acted voluntarily with the intention of relinquishing United States citizenship. He was offered an opportunity to discuss his case with a consular officer and asked to complete a form on the reverse of the ULN letter which required that he mark "X" in the applicable space. He apparently considered that the first space (text below) was applicable to his case. He did not so indicate by checking the box, but merely inserted the date upon which he was naturalized in the United Kingdom:

> I was naturalized/registered as a citizen of the United Kingdom and Colonies on 19-11-73. I further state that this was my free and voluntary act and that no influence, compulsion, force or duress was exerted upon me by any other person, and that it was done without any reservation and with the intention of relinquishing my United States citizenship.

He returned the form under cover of the following letter:

> Thank you for your communication of January 18th. As you request, I am returning the completed form.
>
> As I have resided in England for the past ten years and have made my home here with my English wife, I decided to accept the responsibilities that come with living in a country. This decision was not taken out of any lack of affection for my country, but

> was simply an act of respect for my future home. I could only wish that one could still have dual citizenship but assume that this is no longer possible.

On April 9, 1974, in compliance with section 358 of the Immigration and Nationality Act, a consular officer executed a certificate of loss of nationality in appellant's name. 2/ Therein he certified that appellant acquired United States nationality by virtue of his birth in the United States; that he obtained naturalization in the United Kindom on November 19, 1973; and thereby expatriated himself under the provisions of section 349(a)(1). In support of its execution of the certificate of loss of nationality, the Embassy submitted the statement of the Home Office advising that appellant had obtained naturalization; its ULN letter to appellant: and appellant's letter of January 26, 1974.

The Department approved the certificate on August 7, 1974, approval being an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

The appeal was entered on April 14, 1989.

II

The initial issue presented is whether the Board may consider and determine an appeal entered fourteen years after

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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.

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." 3/ 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 certificate. 4/ Those regulations, however, were not in force on August 7, 1974, when the Department approved the certificate of loss of nationality that was issued in appellant's case.

The regulations in effect in 1974, 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. 5/ We consider this reasonable time limitation should govern in appellant's case, rather than the limitation of one year after approval of the certificate of loss of nationality 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.

3/ 22 CFR 7.5(b)(1) (1989).

4/ 22 CFR 7.5(a) (1989).

5/ 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" 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.

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 August 1974. 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 states that when he obtained British nationality he was told he had lost his American citizenship. He understood he had no option to hold both. "I feel that I should again say," appellant stated in his reply to the Department's brief,

> ...that the reason was that, being an artist, I accepted what I was originally told by the American Embassy in London that when I became naturalized British I had no chance of having both nationalities. I am not efficient at paper work and spend my whole life painting (successfully). I mention this to illustrate that this is my life's work - my wife handles all my correspondence etc.

> It was not until last year when my son obtained his dual nationality that the Embassy in London told me then that I also could apply for it, which I am now doing.

We note that the Department sent a copy of the approved certificate of loss of nationality to the Embassy on April 7, 1974 to forward to appellant in compliance with the provisions of section 358 of the Immigration and Nationality Act. (Note 2 supra.) Appellant does not allege that he did not receive the certificate. On the reverse of the certificate there was set out the following information about making an appeal to this Board:

> APPEAL PROCEDURES
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> Any holding of loss of United States nationality may be appealed to the Board of Appellate Review in the Department of State. The regulations governing appeals are set forth at Title 22 Code of Federal Regulations, Sections 50.60 - 50.72. The appeal may be presented through an American Embassy or Consulate or through an authorized attorney or agent in the United States.
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> ...
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> For additional information about appeals and to obtain copies of the provisions of the Code of Federal Regulations, consult the nearest American Embassy or Consulate or the Board of Appellate Review, Department of State, Washington, D.C. 20520.

It is evident that appellant received timely notice that he had the right to appeal the Department's adverse decision in his case, how to file an appeal and how to obtain more information if he required it. Yet he took no action to protest loss of his citizenship until he chanced to learn in 1988 that citizenship is not lost automatically by performing an expatriative act.

Appellant has not substantiated his claim that when he obtained naturalization in the United Kingdom some one at the American Embassy informed him he might not hold both United States and British citizenship. The ULN letter did not so inform him. The letter made it quite clear that although obtaining foreign naturalization is expatriative, citizenship is

not lost unless the act was done voluntarily with the intention of relinquishing citizenship. And there is no indication in the record that he had a conversation with a consular officer. Indeed, it appears that appellant simply replied to the ULN letter and did not visit the Embassy. As he has noted, "everything was done by correspondence." If he had sought official advice after he received the certificate of loss of nationality, either by inquiring at the Embassy or writing to the Board, as the appeal information invited him to do, he would have learned that although the United States generally takes a dim view of its citizens holding dual nationality, U.S. citizenship is not automatically lost when one obtains the nationality of a foreign country upon one's application. In short, he would have learned that if he filed an appeal and were successful, he might retain U.S. citizenship as well as British. But appellant allowed apparently sketchy information about expatriation law to deter him from challenging loss of his citizenship until he chanced to learn many years later that merely obtaining foreign naturalization would not necessarily cost him his citizenship. Appellant had all the information he required in 1974 to initiate an appeal. He could easily have learned about the grounds on which he might base an appeal. The only conclusion one can draw from his actions is that he was not prudent or diligent about protecting his American citizenship.

Obviously, no circumstances beyond appellant's control prevented him from coming to the Board long before he did so. His delay in seeking appellate relief must be laid at his doorstep, not at anyone else's,

Furthermore, on its face, appellant's delay in taking the appeal is prejudicial to the Department.

In this case, the principal criteria of "reasonable time" have not been met. Whatever the meaning of the term "within a reasonable time", as found in the regulations, may be, we do not believe that the term contemplates a delay of fifteen years in taking an appeal. Appellant has not offered a legally sufficient reason to justify the delay. In our view, his inadequately explained delay in taking an appeal was unreasonable in the circumstances of this case.

III

Upon consideration of the foregoing, we are unable to conclude that the appeal was taken within a reasonable time after receipt of the Department's administrative holding of loss of nationality. The appeal is time-barred, and, as a consequence, the Board is without jurisdiction to consider the case. The appeal is hereby dismissed for want of jurisdiction.

Given our disposition of the case, we do not reach the other issues that may be presented. 6/

Alan G. James, Chairman

Edward G. Misey, Member

Gerald A. Rosen, Member

6/ In its brief, the Department, while maintaining that the appeal was time-barred and that the Board lacked jurisdiction to hear and decide it, expressed the view that given the paucity of evidence of record regarding appellant's intent "there is a serious question as to whether the Department would be able to sustain its burden under the intent issue, if the issue were to be considered by the Board." The Department noted that appellant might "seek review of his loss of citizenship directly with the Department once the Board no longer has jurisdiction or determines that it lacks jurisdiction in this proceeding."

If appellant were to request that the Department review its decision in his case, the fact that the Board has decided that it lacked jurisdiction over the appeal would not bar the Department from taking such action as it considered appropriate to correct any manifest errors of fact or law. Opinion of Davis R. Robinson, Legal Adviser of the Department of State, December 27, 1982, excerpted in 77 Am. J. of Int'l. L. 298 (1983).