October 22, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: L[redacted] M[redacted] F[redacted]

On Motion for Reconsideration

The Board of Appellate Review dismissed the citizenship appeal of L[redacted] M[redacted] F[redacted] on July 3, 1990 on the grounds that it lacked uris on hear and decide the appeal, the Board having concluded that it was time-barred.

The Department of State made a determination on March 25, 1975 that F[redacted] expatriated himself on September 21, 1972 under the provisions of section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act, 8 U.S.C. 1481, by making a formal renunciation of his United States nationality before a consular officer of the United States at Toronto, Canada. F[redacted] entered an appeal from the Department's determination in February 1989. It was the Board's conclusion that appellant's delay of fourteen years in taking the appeal, for which in the Board's judgment no persuasive reason had been given; the evident prejudice to the Department that would result if the appeal were allowed; and the interest in finality all dictated that the appeal be dismissed.

Within the time allowed, counsel for F[redacted] moved for reconsideration of the Board's decision. 1/ The Department of State elected not to file a memorandum in opposition.

1/ Section 7.10 of Title 22, Code of Federal Regulations (1989), 22 CFR 7.10 provides that:

> The Board may entertain a motion for reconsideration of a Board's decision, if filed by-either party. The motion shall state with particularity the grounds for the motion, including any facts or points of law which the filing party claims the Board has overlooked or misapprehended, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Board by the party filing the motion. Oral argument on the motion shall not be permitted. However, the party in opposition to the motion will be given opportunity to file a memorandum in opposition to the motion

I

A brief recapitulation of the Board's reasons for dismissing the appeal is in order.

The record before the Board showed that on or about March 25, 1975, the date on which the Department approved the certificate of loss of nationality (CLN) that was executed in this case, the Department sent a copy of the approved CLN to the Consulate General at Toronto to forward to F[redacted], as required by section 358 of the Immigration and Nationality Act. 2/ On the reverse of the CLN was set forth detailed information on the right to take an appeal to this Board from the Department's determination of loss of nationality.

1/ (Cont'd.)

> within 30 days of the date the Board forwards a copy of the motion to the party in opposition. If the motion to reconsider is granted, the Board shall review the record, and, upon such further reconsideration, shall affirm, modify, or reverse the original decision of the Board in the case.

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 maintained that his appeal was timely because he allegedly never received notice of loss of his nationality and information about the right to appeal therefrom; the first he learned of his expatriation was in 1988 when, it appears, he consulted counsel about other legal matters.

There is no indication in the record whether a copy of the CLN was sent to F[redacted] by the Consulate General. In its opinion the Board noted that fact, but adverted to the legal presumption that public officials execute their official duties correctly and faithfully. The Board considered it reasonable to presume, in the absence of evidence to the contrary, that the CLN reached Toronto and that the Consulate General thereafter forwarded it to F[redacted]. The Board was unable to accept as sufficient evidence to overcome the legal presumption of regularity the statements of appellant and his mother that the Consulate General breached its legal duty by not forwarding the CLN to F[redacted] simply because they said it never reached him.

Since appellant in his own submissions acknowledged that he knew from the first that he had expatriated himself, the Board considered that it was incumbent on him, if the CLN did not reach him (after presumptively being sent to him by the Consulate General), and if he believed his renunciation was in some way flawed, to make an effort to'contest loss of his citizenship long before he did so.

II

In his motion for reconsideration, appellant contends that: "The Board's decision violates 8 U.S.C. section 1501, which mandates that a copy of the Certificate of Loss of Nationality shall be forwarded to the person to whom it relates." 3/ It was improper, appellant maintains, for the Board to reiy on the presumption of official regularity with respect to the forwarding to F[redacted] of the CLN. "The Board received credible testimony from appellant and his mother that no communications were received at his rural home in Ontario, Canada. The Board improperly relies on a presumption of proper agency action, which has-been rebutted by credible evidence."

Appellant adds that: "The Board may not dispense with this exacting statutory requirement. The burden of proof rests with the government. Nowhere does not /sic/ statute permit waiver of the statute. Neither may the burden of proof of service be shifted to appellant in the absence of proof that the agency properly complied with the law."

3/ See note 2 supra.

Appellant further contends:

> The burden rests on the government to prove its case. The Board may not forgive the State Department the statutory requirements set forth in section 1501.
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> ...
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> A U.S. citizen is deprived of the right of redress, nullified, unless the government can show that it provided the U.S. citizen with notice of the right to appeal the issuance of a CLN. It is fundamental to the case and the Board should not go out of its way to waive the statutory requirement.
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> There is no evidence of proof of service in the CLN. It is a basic and simple matter to retain clear records with respect to service of the CLN. If the State Department cannot proffer evidence of service, it should not be allowed to benefit from its failure to properly maintain records.

III

As the foregoing discussion shows, appellant's motion does not disclose any facts or points of law which the Board overlooked or misapprehended in concluding that appellant had not adequately explained the long delay in taking his appeal. Nonetheless, because appellant makes serious allegations about the Board's handling of this appeal, we deem it necessary to address the allegations in some detail.

It should be evident that the Board did not in any sense exempt the Department of State from complying with the mandate of section 358 of the Immigration and Nationality Act. The Board made quite clear that the Department and the Consulate General had a legal duty to ensure that appellant was informed of loss of his citizenship. We had and have no reason to believe that the Department and the Consulate General did not make a bona fide effort to comply with the statute. In the absence of records showing the disposition of the CLN after the Department of State forwarded it to Toronto, it was proper for the Board to presume, absent evidence to the contrary, that the CLN reached the Consulate General and that that office

forwarded it to appellant at his last known address, thus fulfilling its duty under the statute. 4/

The government does not bear the burden to prove that it forwarded the CLN to appellant; the government benefits from a well-settled legal presumption that its agents complied with the statute. Rather, the cases make clear that the burden was on F[redacted] to establish that the government's agents did not comply with the statute. See Boissonnas v. Acheson, 101 F. Supp. 138, 153 (S.D.N.Y. 1951). There the court stated the proposition that there is a presumption of regularity of the official acts of public officers and made clear that the burden is on one who contests that the required official duty was not discharged. In support, the court cited 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 official duties" /emphasis added/; and also Sabin v. U.S., 44 F.2d 70, 76 (Ct. Cl. 1930): "It is presumed that public officials act correctly in accordance with the law and their instructions until the contrary appears."

The statements that appellant and his mother made in 1989, fourteen years after the event, are self-serving and standing alone entitled to very little probative value. They

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4/ As appellant points out, there is no record of proof of service of the CLN on him. That fact alone does not, however, establish that the Consulate General did not perform its duty to forward the CLN to him. The statute does not prescribe how a CLN shall be communicated to the affected party; it merely requires that the office which made the report of possible expatriation be instructed to forward a copy of the approved document to the person to whom it relates. Neither the federal regulations nor the departmental guidelines which were applicable in 1975 specified a particular method of forwarding the CLN, or stipulated that the concerned consular office need prove that the CLN actually reached the affected party.

Moreover, fourteen years after the event, can one be confident that the Consulate General did not make a record that it despatched the CLN to appellant on a certain date and later destroyed it? The Consulate General was under no legal duty to preserve its records indefinitely. See Maldonado-Sanchez v. Shultz, 706 F. Supp. 54, 57, 58 (D.D.C. 1989), where the court stated that a substantial delay in taking an appeal places a trememdous burden on the government to produce witnesses and documents years after the relevant events and to preserve documentation indefinitely.

are thus insufficient to overcome the legal presumption that the Consulate General sent the CLN to appellant. Of course, we cannot be sure at this distance from 1975 whether the CLN, although duly dispatched, ever reached appellant. In our original opinion we posited that if even it did not reach him, case law makes it clear that it was incumbent on him in the circumstances of his case to act much sooner than he did to assert a claim to United States citizenship and dispute the Department's adverse decision. Appellant performed the most unequivocal of all expatriative acts. In an affidavit executed in July 1989, he acknowledged he knew in 1372 that he had performed an act that terminated his citizenship. In a word, from 1972 he had facts that should have led him to protect his interests with reasonable celerity. To absolve appellant of all responsibility to take any action where there is no persuasive evidence that the government was derelict in its duty would be to reward passivity where cogent reasons dictated action.

IV

Having carefully considered appellant's motion for reconsideration of the Board's decision on his citizenship appeal, we are of the opinion that it does not state any facts or points of law that the Board overlooked or misapprehended. Accordingly, we hereby deny the motion.

Alan G. James, Chairman

Warren E. Hewitt, Member

Frederick Smith, Jr., Member