July 3, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

The Department of State made a determination on March 25, 1975 that L[redacted] M[redacted] 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 by making a formal renunciation of his United States nationality before a consular officer of the United States at Toronto, Canada. 1/ F[redacted] entered an appeal through counsel in February 1989.

For the reasons given below, we conclude that the appeal is not timely, and therefore dismiss it for want of jurisdiction.

I

Appellant F[redacted] acquired the nationality of the United States by virtue of his birth at [redacted] Since his parents were Canadian citizens, he also acquired Canadian citizenship at birth under section 5(1)(b) of the Canadian Citizenship Act of 1946, as amended, subject to his birth being registered. According to a statement of the Canadian Citizenship Branch, dated August 21, 1989, appellant was issued a certificate of Registration of Birth Abroad on November 15, 1972. The statement also stated: "No oath taken. Canadian since birth."

1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads as follows:

> Sec. 349. (a) From and after the effective date of this Act 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 -
>
> . . .
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; ...

Appellant lived in the United States until July 1971 when he moved with his family to Canada.

In mid-September 1972 appellant allegedly telephoned the Consulate General at Toronto to make an appointment to discuss his United States citizenship status, and "the fact that I wished to become a Canadian citizen: My parents lived in [redacted]o, I was soon to marry a Candian woman, and there were many other personal reasons why I wanted to live in Canada and I needed to know how I could legally live there in peace." (Affidavit of July 26, 1989). On September 21, 1972, accompanied by his mother (he says he was told to bring a parent; he was then slightly over 20 years old), appellant went to the Consulate General.

In 1989 appellant has this recollection of the events of September 21, 1972 at the Consulate General (affidavit of July 26, 1989):

> ...
>
> 9. An official entered the waiting room and told me to come with him. He told my mother to wait there because 'she didn't have to come', as he put it.
>
> 10. I did not understand why my mother could not come with me after they told me to bring a parent, and my mother waited alone in the waiting room during the whole time that I was with the official.
>
> 11. When I entered the room the official asked me to sit down. I do not remember his name or I never learned his name, nor the name of another person also in the room.
>
> 12. He asked me why I was there and I told him that I wanted to know about dual citizenship and my strong desire to become a Canadian citizen.
>
> 13. After five minutes to ten minutes, I had already renounced my U.S. citizenship, and the remainder of my visit was used to sign copies of papers given me by the official,

The record shows that on September 21, 1972 in the presence of two witnesses appellant. swore that he had read and understood the contents of a statement of understanding. Therein he declared that he had decided voluntarily to renounce his United states nationality; acknowledged he would thereby become an alien toward the United States; had been afforded the opportunity to make a written statement of the reasons for renunciation and chose to do so; that the extremely serious nature of renunciation had been explained to him by the consular officer concerned and that he "fully understood the consequences of my intended action." Appellant also executed a short sworn statement of the reasons he renounced his citizenship. It read in pertinent part as follows: "I'm giving up my citizenship because I intend to live the rest of my life here. I am trying to get my Canadian citizenship and become a full Canadian citizen." Appellant then made the oath of renunciation.

The Consulate General took no action after appellant completed the formalities of renunciation of his United States nationality. As prescribed by section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, the consular officer concerned should have executed a certificate of loss of nationality (CLN) in appellant's name on or reasonably soon after the day appellant renounced his nationality, and forwarded it with supporting documents to the Department of State for adjudication. 2/

On January 31, 1975, the District Director (Detroit) of the Immigration and Naturalization Service (INS) addressed a letter to the Consulate General which read in part as follows:

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

Re: L[redacted] M[redacted] F[redacted]
DOB 5/19/52, Detroit, Michigan

Dear Sir:

This Service is conducting an investigation regarding the above-named subject. He is alleged to have renounced his United States citizenship at Toronto on September 21, 1972. This Service would like to obtain a certified copy of his renunciation to assist us in completing our investigation.

Prompted by the INS letter, an officer of the Consulate General executed a CLN in F[redacted] name on February 6, 1975, as should have been done in September 1972. (See note 2, supra.) The officer certified that appellant acquired United St nationality by virtue of his birth in the United States; and that he made a formal renunciation of United States nationality on September 21, 1972, thereby expatriating himself under the provisions of section 349(a)(6) of the Immigration and Nationality Act. The Consulate General forwarded the CLN to the Department of State under cover of a memorandum which read in pertinent part as follows:

> Upon receipt of tne enclosed letter from the United States Department of Justice the subject's file was pulled, it was noted at that time that no Certificate of Loss of Nationality had been prepared in the subject's name.
>
> The Consulate General regrets this error and would appreciate your cooperation in forwarding a copy of the Certificate of Loss of Nationality, when approved, to the United States Department of Justice. 3/

2/ (Cont'd.)

> office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

3/ Asked by the Department to explain the delay in execution of the CLN, an officer of the Consulate General reported simply "I can only assume that the subject's case was inadvertently filed before the Certificate of Loss was prepared. The consular officer at the time of renunciation is no longer at this post."

The Department approved the CLN on March 25, 1975, approval being an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review. A copy of the approved certificate Mas sent to the Consulate General to forward to appellant and a copy was sent to the Department of Justice for the information of the INS.

Appellant states that when he went to the Consulate General in September 1972 he was not aware that he held Canadian citizenship. It was not until November 1972 "when I received my first Certificate of Registration of Birth Abroad, a citizenship card." The card, titled "Certificate of Registration Abroad," certified that F[redacted] (date and place of birth Mere set forth) "is a Canadian citizen pursuant to Section 5(1)(b) of the Canadian Citizenship Act." 4/

Sometime after he renounced his citizenship, appellant married a Canadian citizen. They were divorced in 1979. In 1983 he married another Canadian citizen. In late 1988 when appellant retained counsel in connection with other matters (presumably relating to immigration), a Freedom of Information Act request to the INS led to the production of a copy of the CLN that was approved in appellant's name. It was then, allegedly, that appellant became aware that he had been the subject of an adverse determination with respect to his United States nationality. The appeal followed in February 1989.

II

This case presents a jurisdictional issue that must be determined before we may proceed. The Board has been asked to consider and determine an appeal that was brought approximately fourteen years after the Department held that appellant expatriated himself. The question is whether the Board has authority to entertain such an appeal.

It is settled that 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

---

4/ Appellant has submitted a copy of a letter from the Department of the Secretary of State, Canadian Citizenship Registration Branch, dated November 15, 1972, addressed to his father. The letter stated that there were enclosed certificates of Registration of Birth Abroad for appellant and his two sisters. According to appellant, he never saw that letter until his mother sent it to his present attorney in July 1989.

limitation, the appeal must be dismissed for want of jurisdiction. Costello v. United States, 365 U.S. 265 (1961).

In 1975 when the Department determined that appellant expatriated himself, the limitation on appeal to the Board of Appellate Review was "within a reasonable time" after the affected person received notice of the Department's determination of loss of citizenship. 5/ Consistently with the Board's practice in cases where the certificate of loss of nationality was approved prior to the effective date of the present regulations (November 30, 1979), we believe it fair and appropriate to apply the limitation of "reasonable time" in this case.

The rule on reasonable time is well settled. Reasonable time is to be determined according to the facts in each case and in accordance with generally recognized principles. These include the following elements: the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon for the adverse decision, and prejudice to the other party. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Security Mutual Casualty Co. v. Century Casualty Co., 621 F.2d 1062, 1067-68 (10th Cir. 1980); and Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930-31 (5th Cir. 1976). 6/

The rationale for allowing a reasonable time to bring an appeal is that one should be permitted sufficient time to prepare a case showing wherein the Department's holding of loss of nationality is allegedly contrary to law or fact. At the same time, the rule presumes that one will prosecute an appeal with the diligence of an ordinary prudent person. An essential purpose of a limitation on appeal - whether it be fixed or indeterminate - is to compel the exercise of a right of action within a span of time that will protect the adverse party against belated appeals that could more easily have been

---

5/ Section 50.60 of Title 22, Code of Federal Regulations, (1967-1979), 22 CFR 50.60. Those regulations were in force from November 29, 1967 until November 30, 1979, when the limitation on appeal was revised. The limitation now is "within one year after approval by the Department of the certificate of loss of nationality." 22 CFR 7.5(b)(1).

6/ In Lairsey v. Advance Abrasives Co., the court quoted 11 Wright & Miller, Federal Practice & Procedure, section 2866 at 228-229:

resolved when ths recollection of events upon which the appeal is based was fresh in the minds of the parties involved.

As stated above, under the limitation of "reasonable time," a person who was the subject of an adverse determination with respect to citizenship was allowed a reasonable time after he received notice of the Department's adverse determination to file an appeal

Appellant here argues that ne never received notice of loss of nationality from the Department of State or any other agency .of government. He first learned that a CLN had been approved in his name when his counsel advised him of that fact in the autumn of 1988. "If notice is construed to include any form of notification, such as constructive receipt of the certificate of loss of nationality from the 1988 FOIA request made by counsel," appellant maintains in his brief, "this appeal was filed promptly after receipt and should be deemed to be timely." His brief continues that the Department has produced no proof of service on appellant of the CLN which carried information about making an appeal on the reverse. It is pointed out that the Department had a duty to inform appellant that it had made an adverse decision in his case, citing section 358 of the INA (see note **2** supra). Appellant states that although he lived at the same address from 1973 to 1975 and his parents continue to reside there, neither he nor his parents ever received any notice or other written or verbal communication from the Department of State. It is appellant's contention that:

> The State Department haphazardly, without considering the constitutional, statutory and regulation-mandated rights of a native-born **U.S.** citizen, perfunctorily processed a certificate of loss of nationality, thereby terminating the U.S. citizenship rights of L[redacted] M[redacted] l F[redacted],

---

6/ (Cont'd.)

> '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.

542 F.2d at 930-31.

> The State Department had a legal obligation to provide notice to L[redacted] F[redacted]. Notice was essential to enable L[redacted] F[redacted] to appeal the flawed State Department action. Failure to do so deprived appellant of Due Process of law, a fundamental Constitutional right of U.S. citizenship.
>
> The Department of State has not tendered any proof of service to L[redacted] F[redacted] and, therefore, the certificate of loss of nationality is without effect and void.

The Department of State was legally obligated under section 358 of the Immigration and Nationality Act to inform appellant of its decision that he had expatriated himself. We begin by examining what the record shows with respect to the disposition of the CLN after it was approved by the Deparmtent on March 25, 1975. On the Department's file copy of the CLN there is the notation that a copy of the approved CLN was sent to the Consulate General and to the Department of Justice. It is reasonable to presume that the CLN reached the Consulate General. Although there is no postal receipt in the record, it is also reasonable to presume that that office complied with the law by forwarding it to appellant at the address he gave in 1972 when he visited the Consulate General to renounce his citizenship. In the absence of evidence to the contrary, it is presumed that public officials carry out their official duties correctly and faithfully. Boissonnas V. Acheson, 101 F.Supp. 138 (S.D.N.Y. 1951).

Appellant submits that since there is no proof of service on him of the CLN, his mother's and his own declarations that neither he nor his parents ever received a CLN are sufficient *to* establish that he did not receive notice of the Department's holding of loss of his citizenship. Given the presumption of official regularity, we must proceed from the premise that the Consulate General sent a copy of the approved CLN to appellant. In light of the lapse **on** the part of the Consulate General to execute a CLN in 1972, it would not be unreasonable to assume that that office would have been especially attentive in 1975 to complete correctly the required steps in the expatriative process. So many years later, however, it would be impossible to establish whether a communication from the Consulate Genera; ever reached appellant.

Assume, for the sake of argument, that the CLN, althougn duly dispatched, never reached appellant. Would lack of receipt of notice of loss of his citizenship justify his taking no action to make inquiry about loss of his citizenship?

It is appellant's contention that lapses by the Consulate General left him "for years without any hope or opportunity of appeal." Plainly, the Consulate General erred in not executing a CLN in appellant's case in 1972. But we do not perceive prejudice to appellant from that fact. Our reason for so stating is that appellant performed an unambiguous expatriative act; he made a formal renunciation of his United States citizenship, and knew from the day he performed the act that he had done so. He read and signed a statement of understanding in which he acknowledged that the serious consequences of formal renunciation had been explained to him by a consular officer and that he understood those consequences. He made an affidavit stating why he renounced his citizenship. And after making the oath of renunciation he told his mother that he had "denounced" his citizenship. So even if he never received a copy of the approved CLN, appellant had knowledge of a fact which should have led him to inquire about his status. If after discussing the matter with his mother, he believed that the consular oficer who administered the renunciation oath had misunderstood his inquiry and led him, contrary to his wishes, to renounce his citizenship, he would presumably have made inquiries or tried to lodge a protest or taken some action to evince concern about what he had done. If, as he states, he went to the Consulate General in September 1972 because he was uncertain whether he was a Canadian citizen and wished to inquire about the possibility of holding dual nationlity, and if he believed that he would have to renounce his United States citizenship to become Canadian, surely he would have reacted to try to recover his U.S. citizenship after he received a certificate from the Canadian authorities attesting that he had actually been a Canadian citizen since birth. One would imagine that he would have immediately communicated with the Consulate General to say that a mistake had been made, that his renunciation had been unnecessary and that he wished to undo it because he had just learned that he was a Canadian citizen.

Was appellant prejudiced by the fact that the Consulate General did not communicate with him before the CLN was executed in 1975? We do not think so. Although a CLN should, of course, have been executed at the time appellant performed the expatriative act, the Consulate General had no legal duty to advise appellant that it was belatedly carrying out its statutory responsibility to advise the Department of appellant's aation. Of course, if the Embassy had spoken to appellant in 1975 before a CLN was executed, appellant would have been apprised that he probably lost his citizenship. But the key consideration is that he had ample reason without any communication from the Embassy after 1972 to believe he expatriated himself.

In the circumstances, and since it cannot be established that notice of the Department's determination that he expatriated himself reached appellant, we consider it was incumbent on appellant to take an early initiative to investigate his citizenship status. He knew he had lost his United States citizenship because he formally renounced it. In a sense, the Department's approval of the CLN, which he asserts he never received, was merely confirmatory of appellant's own action of terminating his citizenship.

Appellant may have been for years without any hope or opportunity of appeal, but it does not appear to us that the blame should be placed on the Department or the Consulate General. It is settled that the law imputes knowledge where opportunity and interest coupled with reasonable care would necessarily impart it. United States v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (4th Cir. 1939). Knowledge of facts putting a person of ordinary prudence on inquiry is the equivalent of actual knowledge, and if one has sufficient information to lead him to a fact, he is deemed to be conversant therewith, and "laches" is chargeable to him if he fails to use the facts putting him on notice. McDonald v. Robertson, 104 F.2d 945 (6th Cir. 1939). Appellant has not persuaded us that he was justified to wait so long before taking action to assert a claim his United States citizenship.

The delay in appealing raises the perennial issue whether the Department of State would be prejudiced if we were to allow the appeal. There seems little doubt that to allow the appeal would place an unfair burden on the Department.

Appellant makes numerous allegations which the Department would obviously find it difficult to address precisely because so many years have passed since appellant renounced his citizenship. For example, in his affidavit of July 26, 1989, appellant asserted that "I was unfairly rushed into my decision," and that "I was not given any accurate information, since the official did not understand Canadian laws and should not have advised me with respect to dual citizenship and Canadian citizenship." These are serious charges. How evaluate them fairly and impartially after so much time has elapsed? The consular officer who spoke to appellant and administered the oath of renunciation in 1972, evidently a senior officer (he was not a vice consul but a consul), is no longer in the Foreign Service and is anavailable to testify.

Since appellant has not shown good cause why the Board should entertain his appeal, it would be contrary to sound

public policy to allow it. The observation about long-delayed appeals made by the court in Maldonado-Sanchez v. Shultz, 706 F.Supp. 54, 57, 58 (D.D.C. 1989) is pertinent:

> The Court agrees with defendant's [State Department] argument that to allow plaintiff to challenge his renunciation some twenty years after the fact is contrary to public policy. It places a tremendous burden on the government to produce witnesses years after the relevant events and to preserve documentation indefinitely. Moreover, a reasonable statute of limitations period serves the important function of mandating a review of the issuance of the CLN when the relevant events are fresh in the minds of the participants.

In the instant appeal, the interest in finality and stability of administrative determinations must be served.

III

Since the appeal is time-barred, the Board lacks jurisdiction to consider and decide it. The appeal is accordingly dismissed.

Alan G. James, Chairman

Warren E. Hewitt, Member

Frederick Smith, Jr., Member