DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: W[redacted] T[redacted] H[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, W[redacted] T[redacted] H[redacted], expatriated himself on October 27, 1977, under the provisi of section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act, as amended, by making a formal renunciation of his United States nationality at the American Embassy in Caracas, Venezuela. 1/

The Department made its determination of loss Of nationality in appellant's case on April 27, 1978. The appeal was entered almost eleven years later on April 7, 1989. The initial issue thus confronting the Board is whether the appeal was timely filed under governing limitations. We conclude that the appeal is barred by the passage of time, and, accordingly dismiss it for lack of jurisdiction.

I

Appellant was born in [redacted], and acquired United States citizenship at birth. Through his parents, both citizens of [redacted] he also acquired the nationality of that [redacted]

1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), 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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> ...
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> (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 was taken to Venezuela by his family in 1957. He returned to tne United States to live with his grandparents in Washington, attending elementary school from 1965 to 1969. His grandfather was then serving as a consular officer at the Venezuelan Embassy and later became the Ambassador of Venezuela to Nicaragua. Appellant accompanied his grandparants to Nicaragua. He returned to Caracas in 1971.

On October 27, 1977, after having reached the age of 21, appellant visited the Embassy at Caracas and made a formal renunciation of his United States citizensip. The record shows that prior to taking the formal oath of renunciation he signed a statement of understanding in the presence of the Consul General and two witnesses. He declared in that statement that he decided voluntarily to renounce his United States citizenship, that the "extremely serious nature" of his contemplated act of renunciation has been "fully explained" to him by the Consul General and that he fully understood the consequences of his intended renunciation.

In a separate written sworn statement, appellant explained the reasons for his renunciation. He said that he decided to renounce his United States citizenship because his parents and grandparents were Venezuelan citizens by birth, he lived and studied in Venezuela, and he had already acquired Venezuelan nationality by virtue of his birth abroad to citizens of Venezuela.

The oath of renunciation which appellant subscribed and swore to before the Consul General at the Embassy read:

> I desire to make a formal renunciation of my American nationality, as provided by Section 349(a)(6) of the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

The Embassy then executed a certificate of loss of United States nationality (CLN) in appellant's name, as required by section 358 of the Immigration and Nationality Act. 2/ The Consul General certified that appellant acquired

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2/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

United States nationality by virtue of his birth in the United States; that he acquired the nationality of Venezuela by virtue of his birth abroad of Venezuelan citizen parents; that he made a formal renunciation of United States nationality before a consular officer of the United States; and that he thereby expatriated himself under the provisions of section 349(a)(6) now section 349(a)(5), of the Immigration and Nationality Act. The Department approved the certificate on April 27, 1978, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review. On May 2, 1978, the Embassy forwarded to appellant at his given Caracas address a copy of the approved CLN.

In April 1978 appellant went to the United States to attend college. After receiving a degree in business administration from the University of Miami in December 1981, he returned to Venezuela. He worked there for the next few years, and in 1988 he left to pursue graduate studies in the United States.

In December 1988, appellant applied for a U. S. passport at the Miami Passport Agency. Following a review of the Department's records, the regional director of the agency, on January 6, 1989, disapproved appellant's passport application because of the Department's earlier holding of loss of citizenship as a consequence of his formal renunciation of citizenship. The regional director also informed appellant of the existence of a Board of Appellate Review to consider appeals from administrative determinations of loss of United States nationality.

2/ (Cont'd.)

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.

On April 7, 1989, appellant entered an appeal from the Department's determination of loss of United States nationality. He contends that his renunciation was involuntary because of pressure from his parents and grandparents that he renounce his United States citizenship and because he was financially dependent upon his parents, who, he said, threatened to withhold financial support unless he renounced his United States citizenship. Appellant also contends that he did not intend to relinquish his citizenship.

II

We are faced initially with the issue whether this Board may consider and determine an appeal entered approximately eleven years after the Department's determination of loss of nationality. To exercise jurisdiction, the Board must conclude that the appeal was filed within the limitation prescribed by the governing regulations. The courts have generally held that timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960), Costello v. United States, 365 U.S. 265 (1961). 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 the appeal.

Under federal 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 CLN 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/ These regulations, however, were not in force on

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3/ 22 C.F.R. 7.5(b) (1989) reads:

> (b) Time limit on appeal. (1) A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval of the Department of the certificate of loss of nationality or a certificate of expatriation.

4/ 22 C.F.R. 7.5(a) (1989) reads:

April 27, 1978, when the Department approved the CLN that was issued in appellant's case.

The regulations that were in force in April 1978 prescribed that an appeal be taken "within a reasonable time" after receipt of notice of the Department's of loss of nationality. 5/ Thus an appellant who contends that the Department's holding of loss of nationality is contrary to law or fact, is required to take an appeal from such holding within a reasonable time after receipt of notice of such holding. If an appeal is not initiated within a reasonable time, the appeal would be barred by the passage of time and the Board would have no alternative but to dismiss it for lack of jurisdiction. The limitation of "within a reasonable time" is fundamental to the Board's exercise of jurisdiction in this case. 6/ In accord

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4/ (Cont'd.)

> (a) Filing of appeal. A person who has been the subject of an adverse decision in a case falling within the purview of sec. 7.3 shall be entitled upon written request made within the prescribed time to appeal the decision to the Board. The appeal shall be in writing and shall state with particularity reasons for the appeal. The appeal may be accompanied by a legal brief. An appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time.

5/ 22 CFR 50.60 (1967-1979), which was in effect until revised on November 30, 1979, provided:

> 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.

6/ The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

> The Secretary of State did not confer upon the Board [of Appellate Review] the power to.. .review actions taken long ago. 22 C.F.R. 50.60, the jurisdictional basis of the Board, requires

with the Board's practice in cases where a CLN was approved prior to the effective date of the present regulations (November 30, 1979), we will apply the limitation period of "within a reasonable time" to the case before us.

The question whether an appeal has been taken within a reasonable time depends on the facts and circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). It has been held to mean as soon as circumstances will permit and with such promptitude as the situation of the parties will allow. This does not mean however, that a party be allowed to determine "a time suitable to himself." In re Roney, 139 F.2d 175, 177 (1943). What is a reasonable time also takes into account the reason for the delay, whether the delay is injurious to another party's interest, and the interests in the repose, stability, and finality of the prior decisions. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981); Lairsey v. Advance Abrasives Co., 542 F.2d 928, 940 (5th Cir. 1976). The reasonable time limitation thus makes allowance for the intervention of unforseen circumstances beyond a person's control that might prevent him or her from taking a timely appeal.

Here, as we have seen, the Department approved the CLN on April 27, 1978 and, on May 2, 1978, the Embassy mailed to appellant at his Caracas family address a copy of the approved certificate. The reverse side of the certificate had information about appeal procedures. Appellant states that at that time he was attending school in the United States and had no knowledge of the existence of such a document. He said that the certificate that the Embassy mailed to him in Caracas was not forwarded to him in the United States and that it was not until February 1989, when he was preparing this appeal, that he obtained from his parents the Embassy's letter of May 2, 1978, with its enclosed copy of the CLN. Appellant, however, does not disclose what his parents may have said to him in 1978 after receiving the Embassy's letter and the CLN. Since, as appellant maintains, his parents never approved of his United States

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6/ (Cont'd.)

> specifically that the appeal to the Board be made within a reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expatriation.

Office of the Attorney General, Washington, D.C. File: CO-340-P, February 7, 1973.

citizenship status in the first instance and threatened to withhold financial support if he did not renounce his citizenship, we find it difficult to believe that his parents would have remained silent in the circumstances.

According to appellant, it was not until his return to Venezuela in 1982 that he "started conversations with various U.S. Government and Embassy officials" about regaining United States citizenship. Although there is no evidence of record regarding such discussions in 1982, appellant stated that he was advised "that the best way to solve this matter, was to get legal advice, and that my presence in the U.S. was a plus." Appellant's mother, in a letter to the Board, dated November 19, 1989, stated that upon his return to Venezuela in 1982 he was informed of the Department's approval of his loss of citizenship and that her son had "conversations with several officials of the U.S. Embassy, but no one ever told him that there was such a thing as an Appeal Committee, because if he would have known he would have appealed immediately since he was able to work and support himself with his Bacherlors /sic/ Degree in Business Administration."

The record shows that in April 1987, appellant requested the Department to send him two copies of his CLN, which the Department did. The reverse side of the copies that he received, however, were blank; the front side stated "SEE REVERSE FOR APPEAL PROCEDURES." Following receipt of the copies of his CLN, it appears that appellant then inquired through an intermediary at the Embassy about appeal procedures. He alleged that the information he received from the Embassy was erroneous. The alleged misinformation was given in a memorandum from Ronald A. Harms, a U.S. consular officer, to Jim Athanas, U.S. AID/MGT, dated November 9, 1987. It read:

> I have received the papers you sent me concerning Mr. H[redacted] renunciation of U.S. citizenship and have carefully examined the applicable law. Unfortunately the only way for Mr. H[redacted] to become a U.S. citizen again is through the same Naturalization process that applies to any alien. His renunciation met all the requisites of the law and is a final act. As much as I would like to help him, the law leaves me with no discretion on this,

We do not find the information to be inaccurate on its face. Nine years had elapsed since the Department approved appellant's loss of nationality in 1978. The formal renunciation was made in the form prescribed by law; the Department's determination of loss of nationality was based on law. In these circumstances, appellant's renunciation could be

said to have met all the requisites of the law and could properly be designated as a "final act." Further, there is no basis in the memorandum that would support appellant's claim that he was also erroneously informed "that no appeal procedures existed."

Appellant maintains it was not until he received the letter of the regional director of the Miami Passport Agencyrin 1989, that he was informed of the existence of the Board of Appellate Review; and not until he received the letter of the Chairman of the Board in February 1989, that he was informed of the proper appeal procedures.

Appellant essentially argues that he first received in 1987 notice of his right to appeal when he obtained copies of his CLN, which he claimed to be defective in part. He also argues, mistakenly in our view, that when he thereafter inquired about appeal procedures, the Embassy erroneously informed him that there were none, that he had no right of appeal. He further argues that it was only in early 1989 that he was informed of the existence of the Board of Appellate Review and of the appeal procedures. Given these circumstances, appellant contends that his appeal should be considered timely as he "has proven that he filed within a reasonable time."

We are not persuaded that the appeal was taken within a reasonable time. The record shows that the Department approved the CLN in April 1978, and that the appeal was entered in April 1989. Even if appellant, as he alleges, did not actually receive the notice of the Department's holding of loss of nationality that the Embassy mailed to him in May 1978, he was, in our view, aware from the first of loss of his nationality as a consequence of his formal renunciation of United States citizenship. Appellant performed the most unequivocal act of expatriation. He was not an unknowing person; he knew that he gave up his United States citizenship.

Moreover, the fact that appellant also did not receive the information relating to appeal procedures, which was printed on the reverse side of the CLN, is not of material significance. He was not ignorant of the loss of his United States citizenship as a consequence of his renunciation. He had ample cause to have been put upon inquiry to find out whether any recourse was open to him or what right of redress he might have, as appellant could have ascertained at the Embassy at Caracas or at the Deprtment of State if he were in the United States. In failing to make any inquiries until 1982, five years after his renunciation, he cannot be said to have exercised reasonable care or shown interest in recovering his United States citizenship. It is firmly 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).

The rationale for requiring that, an appeal be filed within a reasonable time is to compel the taking of such an action within a reasonable time when the recollection of the circumstances OK events upon which the appeal is grounded is fresh in the minds of parties concerned and sufficient evidence of record is still available to enable an appellate body to consider and determine the appeal. Limitations are also designed to insure the finality and repose of decisions. Unreasonable lapses of time cloud a person's recollection of events and also make it difficult for the trier of fact to determine the case, particularly where the record is incomplete or lost or obscured by the passage of time.

Appellant, in our view, permitted a substantial period of time to elapse before entering his appeal. He has not offered a legally sufficient reason to justify the delay. Whatever the meaning of the term "within a reasonable time" may be, we do not believe that the term contemplates a delay of almost eleven years in taking an appeal. 7/ To allow the appeal would also result in prejudice to the Department. It would be difficult, if not impossible, for the Department after the passage of so many years to address appellant's recent claims. In the circumstances of this case, we believe that the unexcused delay of eleven years in taking an appeal was unreasonable and that the interest in finality and repose of administrative decisions requires that the appeal be dismissed as untimely.

III

On consideration of the foregoing, we are unable to conclude that the appeal was taken within a reasonable time after appellant; had notice of the Department's administrative holding of loss of nationality. We find that the appeal is

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7/ Even if we were able to accept appellant's (implausible) contention that he did not realize in 1978 that he had forfeited his citizenship, he surely knew in 1982, as his mother has deposed. From that date he had the requisite knowledge which should have put him upon inquiry about possible recourse from the Department's adverse decision in his case. Nontheless, he failed to act. Thus, even if the delay were to be reckoned as from 1982 rather than 1978, it still must be regarded as unreasonable.

ime-barred, and, as a consequence, tne Board lacks arisdiction to consider it. The appeal is hereby dismissed.

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

Alan G. Hames, Chai

Edward G. Misey, Member

George Taft, Member