July 9, 1992

DEPARTMENT Or STATE

BOARD OF APPELLATE REVIEW

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

This case is before the Board of Appellate Review on th appeal of B[redacted] R[redacted] G[redacted] from an administrative determination made by the Department of State on October 20, 1970 that he expatriated himself on July 24,1968 under the provisions of section 349(a)(3) of the Immigration and Nationality Act (INA) by entering and serving in the armed forces of Israel without the prior authorization of the Secretary of State or the Secretary of Defense. 1

The appeal was filed on March 19, 1991, 20 years after the Department of State determined that appellant expatriated himself. The passage of so much time raises a threshold issue: whether the Board may exercise jurisdiction to hear and decide the appeal.

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1. In 1968 section 349(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(3), read 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 --
>
> . . .
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense; ...

Subsections (a) and (d) of section 18 of Immigration and Nationality Act Amendments of 1986 (Pub. L. 99-653, Nov. 14, 1986, 100 Stat. 3658) amended subsection (a) and paragraph (3) of section 349 respectively to read 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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> . . .
>
> (3) entering, or serving in, the armed forces of a foreign state if (A) such

For the reasons that follow, we conclude that appellant has failed to demonstrate that his appeal was taken within the limitation on appeal applicable in 1970, that is, within a reasonable time after he received notice of the Department's adverse decision with respect to his nationality. Accordingly, we dismiss the appeal for lack of jurisdiction.

I

Appellant G[redacted] acquired the nationality of the United States by birth at [redacted] There he was educated and [redacted] to Israel, entering as a temporary resident. Not long after reaching Israel, appellant decided to settle there. Accordingly, around the autumn of 1961 he applied for and obtained immigrant status. As an immigrant, the Law of Return applied to him, and since he did not elect to opt out from its provisions, he automatically acquired the citizenship of Israel under section 2(b)(2) of the Nationality Act of 1952. 2

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1. (Cont'd.)

> armed forces are engaged in hostilities against the United States, or (8) such persons serve as a commissioned or non-commissioned officer; ...

With respect to effective date, Section 23(g) of the Immigration Technical Corrections Act of 1988 (Pub. L. 100-525, Oct. 24, 1988, 102 Stat. 2609) provides that the amendments made by section 18, (as well as sections 19 and 20) of the Immigration and Nationality Act Amendments of 1986 "shall apply to actions taken before, on, or after November 14, 1986."

It is the contention of the Department of State that section 349(a)(3) before it was amended should apply in this case.

2. Section 2(b)(2) of the Israeli Nationality Act of 1952, as amended provides:

> 2. (a) Every immigrant under the Law of Return, 1950 shall become an Israel national.
>
> (b) Nationality by return is granted --

Obtaining naturalization in a foreign state is expatriative under section 349(a)(1) of the Immigration and Nationality Act. However, the Department of State has determined that obtaining Israeli nationality by automatic operation of the Law of Return is not expatriative within tne meaning of the Act.

The effective date of appellant's acquisition of Israeli citizenship was not made a matter of record. The certificate of Israeli citizenship issued to him (at his request) on Marcn 21, 1968 does not state the date. However, appellant told a U.S. consular officer that he became an immigrant on December 6, 1967.

Around the time he became an Israeli citizen, appellant informed his local selective service board in New York City of that fact, presumably hoping thereby to receive an exemption. He was, however, classified 1A in 1968, on the grounds, as his board informed him, that he nad submitted no evidence tnat he had "renounced" his U.S. citizenship (that is, presumably, had duly expatriated himself). Since he was a U.S. citizen, despite his dual nationality, he was liable for military service, the board stated.

In the spring of 1968, after acquiring Israeli citizenship, appellant allegedly consulted the United States Embassy about his draft situation. 3 Apparently he noted to an Embassy officer that his selective service board had informed him that he would have to "renounce" his citizenship in order to be excused from military service in the United States. A Vice consul purportedly told him that since he proposed to enter the Israeli army voluntarily in the near future, he would expatriate himself when he entered. Therefore there was no need for him formally to renounce his citizenship. (It seems the Embassy has no record of such an interview.)

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2. (Cont'd.)

> (2) to a person coming to Israel as an immigrant after the establishment of the State--with effect from the day of his immigration; ...

3. Appellant executed an affidavit on September 29, 1970, at the U.S. Embassy, which reads as follows:

> In the spring of 1968, after I had become an Israeli citizen, I came to the American Embassy in Tel Aviv and spoke with a Vice Consul about my request to renounce my American citizenship.

Appellant entered the Israeli Defense Forces on July 24, 1968, as he put it, "of my own free will, knowing fully well that I was losing my American citizenship..." (Affidavit of September 29, 1970. Note 3 supra.) Thereafter, for about two years, he remained classified 1A; his local board took no action against him beyond noting in its records that he had failed to report for induction.

In 1970, apellant informed his draft ooard that he was serving in the Israeli armed forces. To this information, tne board replied in the summer of 1370 tnat such service would not justify an exemption. However, if he were still in the Israeli forces whenever he might oe called to perform military service in the U.S. Army, he might request a deferrment which would oe favorably considered.

It was around this time (late September 1970) that appellant went to the United States Embassy with tne intent, as a consular officer later put it, to renounce his U.S. citizensnip in tne belief that this would solve his problem with the selective service system. During an interview with the consular officer, appellant recounted the advice he allegedly had been given by the Embassy in 1968. He also executed an affidavit on September 29, 1970 (note 3, supra) which recited that fact: "I did this /entered the Israeli Defence Forces7 with the intention to transfer my United States allegiance to-that of the State of Israel and therefore do not hold any allegiance to the U.S.A."

The consular officer accordingly concluded that appellant lost his United States citizenship on July 24, 1968 under Section 349(a)(3) of the INA of 1952, In compliance with the statute, the officer concerned on October 6, 1970 executed a certificate of loss of nationality (CLN) in appellant's

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3. (Cont'd,)

> However, he informed me that instead of going through such procedure, I should wait until I went into the Israeli Army and would then lose my U.S. citizenship as a result of this action.
> ,On July 24, 1968 I went into the Israel Defence Forces of my own free will, knowing fully well that I was losing my American citizenship by joining the Israeli Army as was explained to me by the Vice-Consul. I did this with the intention to transfer my United States allegiance to that of the State of Israel and therefore do not hold any allegiance to the U.S.A.

name, 4 certifying that: appellant acquired United States nationality by virtue of his birth in the United States; "entered the Israeli Army on July 24, 1968 and is currently serving;" and thereby expatriated himself under the provisions of section 349(a)(3) of the INA.

The Department approved the CLN on October 20, 1970, approval constituting an administrative determination of loss of citizenship from which an appeal may be taken to the Board of Appellate Review. On October 28, 1970, the United States Embassy forwarded a copy of the approved CLN to appellant along with a statement which advised him of the right of appeal and conveyed information pertinent to making an appeal.

On November 19, 1970 appellant's local board classified him 4C, exempt from training and service on grounds of alienage. He completed his service in the Israeli military on August 21, 1971. According to his discharge papers, his rank at time of discharge was Private.

By letter, dated March 19, 1991, appellant noted an appeal to the Board from the Department's October 20, 1970 holding of loss of his citizenship. 5

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4. 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.

5. After entering the appeal, and informed by the Board of the Department's new (1990) evidentiary standard to adjudicate loss of nationality cases (applied retroactively as well as prospectively), appellant applied for review. The Board held the appeal in abeyance pending the outcome of the Department's

Appellant contends tnat he did not intend to relinquish nis United States citizenship. While serving in the Israeli Defense Forces, he had received notice from his local draft Board that his number had oeen reached in the lottery. After going to the United States Embassy "with my problem and pursuant to advice given me, I was given no alternative but to relinquish my American citizenship." (Presumably, appellant means that he had no alternative to signing an affidavit attesting he voluntarily entered the Israeli Defense Forces with the intention of relinquishing his United States citizenship.) Since his fatner was very ill in the United States (he presumably wished to be able to visit him with impunity from prosecution for draft evasion), he decided to sign the affidavit. He ascribes his action to "youthful immaturity, poor judgment and mostly bad advice given me in the very difficult time and position I found myself in."

II

We face initially the issue of whether the Board has jurisdiction to consider and determine this appeal. 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 UU.S. 265 (1961). Therefore, 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.

Under the regulations now in force, the time limit on appeal from an administrative determination of loss of nationality by the State Department; is one year after approval by the Department of the certificate of loss of nationality or

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5. (Cont'd.)

review. On June 13, 1991, the Department affirmed its original decision in his case.

Appellant filed a proper appeal, and the Department filed a brief. .The Board sent appellant a copy of the Department's brief late in November 1991, in care of the U.S. Embassy, advising him that he might, within *30* days of receipt, file a reply. By mid-January 1992, the expiration of the 30-day period, he had not filed a reply. Accordingly, the Board informed him that if he wished to reply, he should do so no later than February 24, 1992 and explain why he did not or could not reply within the time allowed. To date appellant has not responded.

a certificate of expatriation." 6 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. 7 These regulations were not, however, in effect in 1970 when the Department determined that this appellant expatriated himself. In 1970, the rule on limitation on appeal was "within a reasonable time" after the affected party received notice of the Department's holding of loss of citizenship. 8 Believing it unfair to apply the current regulation as to the time limit on appeal retrospectively, we will apply the Department's regulations on time limitation which were in effect in 1970.

Under the limitation applicable here, a person who contends that the Department's determination of loss of nationality is contrary to law or fact must file a request for review within a reasonable time after receipt of notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be time-barred and the Board would lack jurisdiction to consider it. In brief, the reasonable time provision presents a jurisdictional issue.

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

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6. Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b) (1991).

7. 22 CFR 7.5(a) (1991).

8. Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60, provided:

> 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.

delay, whether the delay is injurious to another party's interest, and the interests in repose, stability and finality of the prior decision. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981); Lairsey v. Advance Abrasives Co., 542 F.2d 928, 940-31 (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. In loss of nationality proceedings, the time limitation begins to run when the citizenship claimant has notice of the Department's holding of loss of nationality in his or her case.

Appellant maintains that despite its tardiness his appeal should be allowed. He had made numerous inquiries about how he might recover his citizenship but received no encouragement. Every time he applied to the United States Embassy at Tel Aviv for a visa to visit the United States, "I was categorically told that there was nothing that could be done." He continued: "This was the case as well during my three year stay in Canada /1979-1982/ as an educational advisor to the Jewish Community. I requested a review but was told there was nothing to be done once the year limit of appeal had passed." He had hoped to be allowed to request a review of his case; he knew nothing about the possibility of any kind of review until the Board informed him of it in the spring of 1991. "Nor was I informed that I might approach the Board of Appellate Review due to the circumstances of my case.'

The Department on October 20, 1970 approved the CLN that was issued in this case, A copy thereof was mailed to appellant by the Embassy at Tel Aviv on October 28, 1970. Enclosed in its transmittal letter was a statement that spelled out his right to take an appeal to this Board and how to pursue one. Since appellant does not contend that he never received the CLN and its accompanying appeals information, he must be deemed to have been on notice that he had expatriated himself and how he might, if he believed the Department had erred, contest the Department's decision.

We are unable to accept his mere assertions that he sought advice on a number of occasions from consular officers or employees about what relief might be available to him. For he has submitted no evidence to support his allegations that United States authorities in Israel or Canada told him he had no recourse. Even if a consular officer or employee had given him such advice, he always had the opportunity to address an inquiry to this Board, as the appeals information sent him in October 1970 advised him he might do.

It is plain no unforseen circumstances intervened to prevent appellant from moving sooner than he did to try to recover his citizenship. He was on notice from the outset of

its loss and how he might seek review of the Department's decision. That he did not move until after the lapse of over 20 years is no one's fault but his.

We conclude that appellant has failed to show good cause why he could not have taken an appeal long before he did so.

III

Upon consideration of the foregoing, we conclude that the appeal was not taken within a reasonable time after appellant received notice of the Department's administrative holding of loss of nationality. The appeal is therefor time-barred, and, as a consequence, the Board lacks jurisdiction to consider the case. The appeal is hereby dismissed as untimely.

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

Alan G. James, Chairman

Gerald A. Rosen, Member

George Taft, Member