

February 20, 1990

## DEPARTMENT OF STATE

## BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J ■■■ D ■■■ N ■■■

The Department of State made a determination on April 4, 1977 that J ■■■ D ■■■ N ■■■ expatriated himself on June 24, 1976 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/ In 1989 ■■■ entered an appeal from that determination.

The threshold issue presented is whether the Board may exercise jurisdiction over the appeal. For the reasons given below, we conclude that the appeal is time-barred and accordingly dismiss it 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 of loss of his United States nationality.

## I

Appellant, J ■■■ D ■■■ N ■■■, became a United States citizen by virtue of his birth of a United States citizen father (a United States Foreign Service Officer) at ■■■ ■■■. The United States Legation in Beirut executed a report of appellant's birth as a U.S. citizen on December 20, 1949, and issued him a passport in 1950 at which time he was taken to the United States by his parents. Appellant lived in the United States for about a year and a half. In July 1951 his mother took him to England, as he put it, "to effect a separation which ultimately resulted in divorce proceedings being executed in 1954."

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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 —

(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 ...

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Appellant was educated in the United Kingdom, and received a masters degree in science in 1975 from the University of Cardiff. At that time, appellant states,

...I was strongly advised by my University tutor that I should be better able to gain employment by adopting British citizenship - particularly if I was to pursue a research orientated career. Such work would be, for a person with my qualifications, found in the Ministry of Agriculture and Fisheries for which British Nationality/Commonwealth nationality was a pre-requisite.

Such exhortations were strongly endorsed by my mother who disliked my adherence to identifying myself as American as I did to my friends and colleagues and by refusing to vote in British elections.

After completing my M.Sc, in the absence of advice to the contrary and having been presented with the arguments of having no tangible links to America, as well as the pressing need to find employment in competition with other poor graduates for limited vacancies, I yielded to the emotional pressures of pursuing the adoption of British nationality.

Appellant applied for naturalization. On June 24, 1976 he was granted a certificate of naturalization pursuant to section 10 of the British Nationality Act of 1948. The record does not indicate that appellant made an oath of allegiance, but the Board notes that section 10 of the British Nationality Act of 1948 prescribed that applicants for naturalization make the following oath of allegiance:

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 on July 16, 1976 that appellant had acquired the nationality of the United Kingdom and Colonies. Six months later the Embassy sent appellant a Uniform Loss of Nationality letter, dated December 8, 1976, advising him that by obtaining naturalization in a foreign state he might have expatriated himself. The Embassy

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asked appellant to complete and return a short form which elicited information about himself and asked him to state whether he obtained British citizenship voluntarily with the intention of relinquishing United States citizenship. He was offered an opportunity to discuss his case with a consular officer, and advised that if he did not respond to the Embassy's letter within 60 days, it would be assumed that he did not wish to submit evidence for consideration in the making of a decision regarding his loss of nationality.

Appellant did not reply to the Embassy's letter within the time allowed. A consular officer therefore executed a certificate of loss of nationality in appellant's name on June 24, 1976 in compliance with the provisions of section 358 of the Immigration and Nationality Act. <sup>2/</sup> The certificate recited that appellant acquired United States nationality by virtue of his birth abroad to a United States citizen parent; obtained naturalization in the United Kingdom; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Embassy sent the certificate to the Department on January 31, 1977 under cover of a memorandum which reported simply that:

There is transmitted herewith Certificate of Loss of Nationality executed in the name of J [REDACTED] D [REDACTED] N [REDACTED]. It will be seen that there was no response from Mr. N [REDACTED] to the Uniform Loss of

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<sup>2/</sup> 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.

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Nationality Letter of December 8, 1976, the envelope was returned marked "not called for".

Therefore the above CLN has been prepared showing loss of nationality on June 24, 1976 under Section 349(a)(1) of the INA of 1952.

The sole evidence submitted by the Embassy in support of a holding of loss of nationality was the memorandum from the Home Office to the Embassy attesting that appellant had obtained naturalization. The Department approved the certificate on April 4, 1977, approval being an administrative determination of loss of nationality from which an appeal may be taken to this Board.

Appellant married a British citizen in 1978. They have three children, all born in the United Kingdom.

The appeal was entered on April 4, 1989.

## II

The initial issue presented is whether the Board may consider and determine this appeal which was entered twelve years after appellant received notice of the Department's administrative determination of loss of nationality. To exercise jurisdiction, the Board must conclude that the appeal was or may be deemed to have been filed within the limitation prescribed by the governing regulations, since 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." <sup>3/</sup> The regulations require that an appeal filed after the prescribed time 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

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<sup>3/</sup> 22 CFR 7.5(b)(1) (1989).

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certificate. 4/ Those regulations, however, were not in force on April 4, 1977, when the Department approved the certificate of loss of nationality that was issued in appellant's case.

The regulations in effect in April 1977 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 believe that the 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.

"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, 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.

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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.

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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 after April 4, 1977 he initiated the appeal as promptly as he reasonably could. 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.

The Department sent a copy of the approved certificate of loss of nationality to the Embassy on April 4, 1977 to forward to appellant in compliance with the provisions of section 358 of the Immigration and Nationality Act. (Note 2 supra.) Appellant concedes that he received the certificate, presumably not long after the Department sent it to the Embassy. On the reverse of the certificate there was set out the following information about making an appeal to this Board:

#### APPEAL PROCEDURES

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.

Unless you have new or additional evidence to submit, or you believe that the holding of loss of nationality was contrary to the law or to the facts in your case it is unlikely that an appeal will be successful.

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.

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In his appeal appellant set forth as follows the reasons why he did not appeal sooner:

On receipt of my certificate of loss of nationality I queried whether it was possible to reverse the decision but was advised that this was not possible. (I had no personal contact with officials from either the American or British embassies at this time.) Also I received no encouragement from either home or work to support the pursuit of re-adoption of my former nationality.

I therefore came to the conclusion, with great regret, that I had irrevocably lost my American citizenship due to a combination of naivety on my behalf and yielding to the advice of my mother.. ..

Thus although I was unhappy that I had lost my citizenship, I considered I was not able to pursue do [sic] anything about it as I had no contact with any of my American relatives, and no new information to give to the Secretary of State.

Between July 1977 and November 1982 I had no cause to enquire of the U.S. Embassy any details of my former citizenship, although it was [sic] it was in Nov. '82 that I managed to get in touch with my Dad for the first time.

However, the issue of my nationality was not raised until I enquired of staff in the U.S. Embassy in London in January 1988 about the issuing of an emergency visa due to the critical medical condition my father developed.

It was then for the FIRST time I learnt from the duty officer (present in the Embassy on January 30th 1988) about the possibility of holding dual nationality - and within a fortnight of my return from the States I began making enquiries in earnest as to how I could regain my U.S. citizenship.

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This has necessitated long correspondence [sic] and several trips to consult with the staff at the London Embassy between February 1988 and April 1989.

Hence the matter of the long delay in submitting an appeal against the Department's decision is due entirely to the lack of information I had.

Neither American or British Consular services had thought to inform me about the change in the interpretation of the law, so whilst I recognise my own failings in the lack of comprehension I expressed I do feel that some advice from them would have been appropriate.

We do not find persuasive appellant's reasons for not moving sooner to seek review of the Department's determination.

By his own admission, he received timely notice that he had the right to appeal the Department's adverse decision in his case. He was informed how to file an appeal and how to obtain more information about appeals if he required it. We must therefore assume that if at that time he wished to recover his citizenship, he would have acted promptly to avail himself of the opportunity to obtain relief from this Board, whether or not he had been encouraged by family and colleagues to pursue the matter. Since he did not act on the information he possessed, one can but presume that he did not find it important or convenient at that time to try to recover his citizenship. Whose fault was it but his own that he "had no personal contact" with British or American officials in 1977, or that from 1977 to 1982 he had no cause to inquire of the United States Embassy about his citizenship? Nor do we think that the phraseology of the appeal information on the reverse of the certificate of loss of nationality should have deterred him from acting. Perhaps he did not think he had any new information to present, but if he truly believed that the Department was wrong to decide that he expatriated himself, he should have communicated with the Board to inquire what he might do to challenge the Department's decision. In short, the record shows nothing standing in appellant's way to make timely use of the information he had been given about making an appeal.

Appellant also submits that his appeal should be deemed timely because as soon as he learned that there had been a change in the interpretation of the law (in conversation with a

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consular duty officer at the Embassy in January 1988), he acted to initiate this appeal.

There is no evidence in the record of appellant's conversation with the consular duty officer in January 1988, and he has not explained what he understood to be "the change in interpretation of the law." The Board is unaware of any recent change in the interpretation of the Immigration and Nationality Act. However, we note that in 1986 the Act was amended to codify long-standing constitutional decisions of the Supreme Court regarding criteria to determine loss of nationality. The Immigration and Nationality Act Amendments of 1986 (Pub. L. 99-653, Nov. 14, 1986, 100 Stat. 3658), among other things, amended section 349(a) of the Act by prescribing that performance of a statutory expatriative act would result in loss of citizenship only if done voluntarily with the intention of relinquishing citizenship.

Possibly appellant means that the 1986 amendments provided him with grounds to appeal which he did not have before then. If that is his contention, he is, of course, wrong. If he had acted on the appeal information given him in 1977, he would have learned then that he might present an appeal based on allegations that he obtained British nationality involuntarily or that he lacked the requisite intent to relinquish citizenship. It has long been settled that only voluntary acts may result in loss of citizenship. And since 1967 when the Supreme Court decided Afroyim v. Rusk, 387 U.S. 253 (1967), anyone who has been held to have expatriated himself might, in loss of nationality proceedings, raise the issue of intent to relinquish citizenship. 6/

In sum, appellant's explanation of the substantial delay in taking the appeal is plainly insufficient to excuse it. Furthermore, on its face, appellant's delay of twelve years in

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6/ In Afroyim, the Court held that Congress has no power to take away an American citizen's citizenship without his assent. After the Afroyim decision, the Attorney General in 1969 issued an interpretation of the case in which he indicated inter alia, that performing an expatriative act cannot result in loss of citizenship unless the citizen intended to relinquish citizenship. In all loss of nationality proceedings, the citizen might raise the issue of his intent, the Attorney General asserted. The Supreme Court agreed with the Attorney General's interpretation of Afroyim when it decided Vance v. Terrazas, 444 U.S. 252 (1980), stating that the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act, but also intended to relinquish his citizenship.

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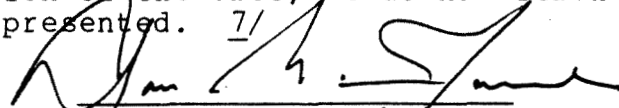
seeking relief from the Department's adverse decision on his citizenship would be prejudicial to the Department, were we to allow the appeal.

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 an inadequately explained delay of twelve years in taking an appeal.

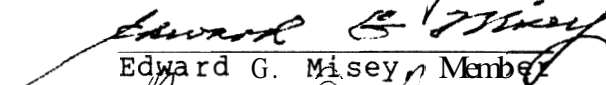
### III

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. <sup>7/</sup>



Alan G. James, Chairman



Edward G. Misesy, Member



Gerald A. Rosen, Member

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7/ In its brief the Department, while arguing that the appeal is 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 at the time he performed the expatriative act, "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, we take note that the fact that the Board has decided that it lacked jurisdiction over the appeal would not in itself bar the Department from taking such action as it considered appropriate to correct 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).