Recent Developments in Removal Defense: The Years in Review

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After a few years of getting used to 2-year continuances, administrative closures, terminations, and practicing in an atmosphere of occasional reasonableness emanating from the Department of Justice and the Department of Homeland Security, Jeffrey Beauregard Sessions was sworn in as the Attorney General on February 9, 2017. Immigration attorneys everywhere did not rejoice.

Since the installment of Sessions, the DOJ has attempted to shift removal defense practice and procedure further away from the already minimal due process protections afforded to non-citizen respondents. DHS has been very happy to oblige the efforts of the DOJ, doing all it can to achieve the same. Sessions' resignation on November 7, 2018, unfortunately, did not leave us much better off. William Barr became the Attorney General on February 14, 2019, and continued to pursue policies aimed at "streamlining" removal proceedings. Thankfully, many of these efforts have been legally inartful enough to warrant rather swift rebuke from the federal courts. Through it all, removal defense attorneys persist.

The current administration as a whole has tried to hamstring the ability of respondents to exercise simple due process rights in removal proceedings. It has attempted to discredit not only immigrants as a class, but their attorneys as well. The administration's tactics have had some short-term victories, but has run up against an obstacle that it vastly underestimated: the resolve of the immigration bar.

The focus of this article will be on just five developments in removal defense. Please note, however, there are a lot more, and removal practice these days requires an almost daily review of the latest administrative and federal court developments.

1. *Pereira v. Sessions*

In an 8 to 1 decision that makes perfect sense to no one but immigration lawyers, the Supreme Court held that "a notice to appear that does not inform a non citizen of when and where to appear for removal proceedings is not a notice to appear under section 1229(a) and therefore does not trigger the stop-time rule." *Pereira v. Sessions*, ___ U.S. ___, 1380 S. Ct. 2105 (2015). The issue before the Court was whether a NTA lacking the date and time of the first hearing was sufficient to trigger the stop-time rule for purposes of cancellation of removal, and the Court was very explicit in stating that the plain language of §1229(a)(1)(G)(i) is unambiguous: to be a NTA under the Immigration and Nationality Act, it must specify the date and time of the removal hearing such that the respondent knows when and where to appear.

The Court sliced through various government arguments to the contrary. The Court was

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unimpressed that the government felt it would be an administrative nightmare to comply with the law, pointing out that this is the 21st century. The Court rejected the argument that the regulations at 8 CFR §1003.18(b), which exclude the date and time requirement, excuses any failure to include the date and time and reminded the government of one the basic principles of administrative law: that a regulation cannot contradict a statute. The Court was unpersuaded by prior administrative and federal court decisions finding that the two-step notification process – the DHS's NTA and the Executive Office for Immigration Review's hearing notice – was sufficient to meet the requirement of §1229(a)(1).

Removal attorneys jumped at the chance to apply the central holding of *Pereira* to other provisions of the INA in which a properly executed NTA as defined in §1229(a)(1) is required, including the very establishment of the court's jurisdiction under 8 CFR §1003.14. DHS attorneys continued to urge each of the Supreme Court-rejected arguments against further application of Pereira in any circumstance other than the stop-time rule. With unnatural speed, the Board of Immigration Appeals adopted DHS's reasoning in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), a decision that limits the application of *Pereira* exclusively to the stop-time rule. Subsequently, the Fifth Circuit declined to expressly rule on *Bermudez-Cota,* but agreed with the BIA's reasoning that a defective NTA can be cured by service of notice of hearing and characterized the *Pereira* issue as a "claims-processing" issue, not jurisdictional, which must be timely raised or will be deemed waived. *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019)

Specific to the stop-time rule, the Board issued a decision in *Matter of Mendoza-Hernandez*, 27 I&N Dec. 520 (BIA 2019) (en banc), which essentially ignores the key provisions of *Pereira* to hold that a deficient NTA that does not include the time and place of an initial removal hearing is perfected by the subsequent service of a notice of hearing specifying that missing information. Unfortunately, the Fifth Circuit adopted *Mendoza-Hernandez*'s holding that "(1) the information statutorily required to be contained in an NTA may be supplied in more than one document, and (2) an NTA is perfected, and the stop-time rule is triggered, when the alien receives all required information, whether in one document or more". *Yanez-Pena v. Barr*, 952 F.3d 239 (5th Cir. 2020). *Yanez-Pena* filed a petition for certiorari on April 10, 2020 (No. 19-1208).

The tension between *Bermudez-Cota* and *Pereira* continues to play out before EOIR as the issue makes its way to federal court, and most likely back to the Supreme Court. As we await definitive circuit law on the matter, the following considerations in removal defense are raised:

- <u>The stop-time rule</u>: *Pereira* is inarguably all about the stop-time rule. While *Mendoza-Hernandez* and *Yanez-Pena* are binding in the Fifth Circuit, practitioners should continue to argue they are wrongly decided until the Supreme Court weighs in.
- <u>Motions to terminate:</u> Every removal practitioner knows that NTAs almost never contain the correct date and time of the removal hearing. Early challenges to immigration court jurisdiction based on the core holding of *Pereira* were met with some success before *Bermudez-Cota*, as many immigration judges granted motions to terminate based on lack of jurisdiction. The longevity of *Bermudez-Cota* is not guaranteed, and thus practitioners should continue to raise the issue of jurisdiction as it arises, even if only to preserve the argument for the appellate record. Because a matter of subject matter jurisdiction can

never be waived, however, practitioners should not be afraid to raise the issue at every level in the appellate process, should *Bermudez-Cota* eventually be overturned. In addition, depending on your situation, practitioners should object to defective NTAs as claims-processing violations under *Pierre-Paul*.

- Motions to reopen: Pereira-based arguments may support new eligibility for relief for cancellation of removal or jurisdiction-based grounds to reopen and terminate a removal case. Practitioners filing motions to reopen in these matters must be aware of compliance with the time limitations in filing motions to reopen, discussed in more detail below.
- Fake dates and times: It has been widely and credibly reported that DHS has tried to circumvent challenges to NTAs by issuing them with incorrect dates and times. Some NTAs have had obviously incorrect dates and times (twelve midnight on a Sunday, for example), while other respondents discovered the fraud when they showed up by the hundreds at immigration courts across the country, only to be told that EOIR had no scheduled hearing for them that day. Given the Supreme Court's concern that respondents be properly advised of their first hearing on the NTA, practitioners should bring the matter of a fake date and time to the court's attention and challenge the validity of any NTA with a fake date and time.
- Bermudez-Cota and fifth circuit so far: While a circuit court decision directly challenging *Bermudez-Cota* has not yet been issued, there have been a handful of district court decisions that either reject or ignore the decision in the context of criminal re-entry cases. Practitioners should be aware of these cases and use them in support of an aggressive attack on *Bermudez- Cota*.

2. The death of administrative closure and continuances?

In the eyes of the Attorney General, the immigration court and the BIA are simply not deporting people fast enough. Sessions aggressively took up the issue of expediency in a hat trick of BIA cases that he certified to himself.

The ability of immigration courts and the BIA to "administratively close" cases, taking the matter off the docket and effectively suspending action on the matter until either party moves to re- calendar, was the first target of Sessions' ire. The use of administrative closure had previously been expanded by *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), recognizing the inherent authority of the immigration judge or the BIA to administratively close a case. In May 2018, the AG issued *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), decreeing that absent any specific authority to administratively close a case by settlement agreement or regulation, neither the immigration courts nor the BIA have authority to administratively close a case and explicitly overruled prior administrative decisions to the contrary. The AG also directed EOIR to begin re-calendaring cases that were not the product of regulation or judicially approved settlement.

Practitioners should be aware of the possibility that long-closed cases will be back to haunt them. The already stretched resources of the immigration courts will of course be impacted, but of greater concern is the issue of notice to respondents in this re-calendaring effort. As a change of address is not possible when a case is closed, there is no guarantee that a re-calendared hearing

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