Niz-Chavez v. Garland: Turning Square Corners and The Evolving Riddle of Proper Immigration Notice(C)[1]

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I. INTRODUCTION

In 2018, the Supreme Court issued an opinion in *Pereira v. Sessions*[2] that upset over two decades of established agency practice. The Court's holding threatened to require the agency to reopen many thousands or even millions of immigration proceedings and potentially permit a significant number of noncitizens to remain in or return to the United States.

At its root, *Pereira* concerned how the Department of Homeland Security must fill out a form. The form in question, called "notice to appear" (NTA), is issued by the Department of Homeland Security (DHS) to a noncitizen whom the agency wishes to remove from the United States. It informs the noncitizen that she needs to attend a hearing before an Immigration Judge to defend her right to remain in the United States. In other words, it gives her *notice* that she is *to appear*. *Pereira* held that the Immigration and Naturalization Act requires DHS to fill in three blanks on the form: the *place*, the *date* and the *time* at which a noncitizen must appear before an Immigration Judge—information that's necessary for the noncitizen to attend her first hearing.

The matter arose because the agency had a decades-long practice of marking the date and the time (and sometimes the place) as "TBD" (i.e., to be determined) and then, at some unspecified later time, mailing the noncitizen a separate notice which provided the missing information. Mr. Pereira argued that a notice to appear missing this critical information failed to comply with the statute's requirements. And the Supreme Court in *Pereira* agreed that without that essential information, the DHS had *not* provided the noncitizen with a statutorily compliant notice to appear.

Immigration courts and federal courts reacted swiftly and divergently, but eventually they severely limited *Pereira*'s holding so that it would have minimal practical effects, thus staving off the flood of motions from the many noncitizens who, like Mr. Pereira, had received putative notices to appear lacking information concerning *when* and sometimes *where* to appear.

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[2] *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

Before considering how and why these courts so markedly and so vastly constrained the application of *Pereira*, it is important to understand an essential aspect of Mr. Pereira's case: Mr. Pereira had asked the Immigration Judge to grant him a form of relief from removal available to certain noncitizens: *cancellation of removal*. To be eligible for this form of relief under the statute, the noncitizen must have physically resided in the U.S. for at least 10 years, among other requirements. Mr. Pereira had been here for 13 years.

However, he was told that he was not eligible because he had not physically resided in the U.S. for at least ten years *before the notice to appear was issued to him.* This is referred to as the *stop-time rule*, because issuance of a notice to appear stops the clock on the accrual of physical presence for purposes of eligibility. Mr. Pereira countered that because the notice he was issued did not comply with the statute, it had not triggered the stop-time rule. The Court agreed, broadly interpreting what constitutes a valid NTA. Because the Court's conclusion focused on the stop time rule and eligibility for cancellation of removal, however, most courts refused to apply the decision outside of that context.

Furthermore, about half the courts considering how to apply *Pereira* found that any defect caused by a failure to include the *when* and the *where* is "cured" by the subsequent issuance of a notice of hearing (NOH) including the date and time of the removal proceedings (a matter not reached by *Pereira*). The reasoning underlying this conclusion varied among the courts, but the result was the same. Such a holding permitted a few more noncitizens to apply for cancellation of removal — those who hit the ten-year mark *after* the deficient notice to appear was issued but *before* the curing notice of hearing was issued. For most noncitizens, however, this entirely undermined *Pereira*'s import, even for the purpose of eligibility for cancellation of removal.

Not so fast replied the Court in 2021. In *Niz-Chavez v. Garland*, the Court held that the so-called two-step approach (the NTA followed by a NOH) relied on an impermissible reading of the statute.[3] The Court affirmed *Pereira*'s holding that a notice to appear that lacks the place and the time information is not a notice to appear, and

[3] *Niz-Chavez v. Garland*, 539 U.S. ___ (2021). Slip op. avail. at https://www.supremecourt.gov/opinions/20pdf/19-863_6jgm.pdf

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