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November 2023

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Niz-Chavez v. Garland – The Next Chapter in the Same Story Turning Square Corners and the Evolving Riddle of Proper Immigration Notice

OUTLINE

1) The pre-*Niz-Chavez* charging landscape
   a) DHS for many years failed to state on the NTA the date and the time (and frequently the place) of the removal hearing, in violation of INA § 239(a), 8 U.S.C. §1229(a)(1)(G)(i).[1]
   b) *Pereira v. Sessions*: in the context of cancellation of removal,[2] the Supreme Court said that if the NTA omitted information as to the hearing's time and place, the DHS had not provided a statutorily compliant NTA, and the stop-time rule consequently did not apply.[3]
   c) The BIA and courts confined *Pereira* to its facts, refusing to apply it outside of the context of cancellation of removal, and often even in that context if the immigration court later sent a notice of hearing stating the date and time of proceedings (the "two-step method").
2) *Niz-Chavez v. Garland*[4]
   a) Held that the two-step approach violated § 239(a), so the stop-time rule could not be triggered by a noncompliant NTA even if that information was later supplied by an NOH.
      i) It stated that § 239(a) requires a singular notice containing all the specified information, including the time and place of the hearing.

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[1] "In removal proceedings under section 1229a of this title, written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following: … The time and place at which the proceedings will be held."

[2] A form of relief from removal, which requires an uninterrupted period of residence in the U.S. for a certain number of years prior to the application. 8 U.S.C. § 1229b. Issuance of an NTA under INA § 239(a) interrupts that period. 8 U.S.C. § 1229b(d). This is the "stop-time rule."

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

[4] *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).

ii) Framed the issue as one of fairness: "[T]he law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."[5]

b) Though it also addressed cancellation of removal, it used broader language, so many courts accepted that its reasoning applied outside the context of the stop time rule

3) Case law after *Niz-Chavez*: the case had an effect in many different areas of immigration law

a) Cancellation of removal

i) It is now widely accepted that, to invoke the stop time rule, an NTA must fully comply with INA § 239(a); a later-sent NOH does not cure a noncompliant NTA.

ii) It is also accepted that even a final removal order issued at the conclusion of proceedings begun with a noncompliant NTA does not trigger the stop-time rule.[6]

iii) Procedural hurdles still exist: some courts will not entertain arguments on appeal or in motions to reopen claiming eligibility for cancellation based on a noncompliant NTA, unless the objection was made during removal proceedings before the IJ, or (in some circuits) the noncitizen "can show excusable delay and prejudice" for failing to raise it—and the fact that *Pereira* came down *after* the noncitizen's immigration proceedings concluded does not count as excusable delay.[7]

b) Voluntary departure: Noncitizens are eligible to apply for voluntary departure at the conclusion of their removal case if they have been physically present in the U.S. for the year or more "immediately preceding the date the notice to appear [NTA] was served under section 1229(a) of this title."[8]

i) Before *Niz-Chavez*, the BIA interpreted this period as ending with the issuance of an NOH that "perfected" or cured a noncompliant NTA.[9]

ii) After *Niz-Chavez*, the Board and at least one circuit court found that an NTA must contain the time and place of the removal hearing in order to cut off eligibility.[10]

c) Termination of parole: 8 C.F.R. § 212.5(e)(2)(i) allows a "charging document" to serve as "notice of termination of parole."

i) The BIA has ruled that even a noncompliant NTA ends a noncitizen's parole, because a "charging document" is defined elsewhere in the regulations in a way that does not cross-reference INA § 239(a), and sweeps in charging documents other than NTAs.[11]

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[5] *Id.* at 1486.

[6] *Parada v. Garland*, 48 F.4th 374, 377 (5th Cir. 2022); *Quebrado Cantor v. Garland*, 17 F.4th 869, 873-74 (9th Cir. 2021); *Mu Ing Lin v. AG United States*, 847 F. App'x 136, 136 n.1 (3d Cir. 2021) (unpublished); *Matter of Yun-Xia Chen*, 28 I. & N. Dec. 676, 679 (BIA 2023); *Estrada-Cardona v. Garland*, 44 F.4th 1275, 1283-85 (10th Cir. 2022).

[7] *Chen v. Barr*, 960 F.3d 448, 451-52 (7th Cir. 2020); *see also Mejia-Padilla v. Garland*, 2 F.4th 1026, 1031 (7th Cir. 2021).

[8] INA § 240B(b)(1)(A), 8 U.S.C. § 1229c(b).

[9] *Matter of Viera-Garcia and Ordonez-Viera*, 28 I. & N. Dec. 223 (BIA 2021).

[10] *Matter of M-F-O-*, 28 I. & N. Dec. 408, 416-17 (BIA 2021); *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1185 (9th Cir. 2021). The Fifth Circuit has also remanded a case for reconsideration in the light of *Niz-Chavez*. *Gregorio-Osorio v. Garland*, 27 F.4th 372, 375 (5th Cir. 2022).

[11] *Matter of Arambula-Bravo*, 28 I. & N. Dec. 388, 392-93 (BIA 2021).

(1) But it did acknowledge that *Pereira* could apply outside of the stop time rule, in a break with earlier precedent.[12]
(2) It also accepted that "notice of the time and place of an initial removal hearing" is "essential to the NTA's function in commencing removal proceedings,"[13] which steps away from past circuit court precedent that drew a sharp line between the NTA's function of notice and of initiating a removal proceeding—a line that courts have used to reject jurisdictional arguments based on noncompliant NTAs.[14]

d) Jurisdiction: the regulations say jurisdiction arises when the DHS files "a charging document" with the court.[15] A "charging document" is "the written instrument which initiates a proceeding before an Immigration Judge"—which, for removal proceedings, means an NTA.[16] Since "[f]ailing to specify integral information like the time and place of removal proceedings unquestionably would 'deprive [the notice to appear] of its essential character,'"[17] noncitizens have argued that noncompliant NTAs could not vest immigration courts with jurisdiction over the removal case.
   i) Response to *Pereira*:
      (1) Courts dismissed *Pereira* as only applicable to the stop-time rule.[18]
      (2) The BIA and some courts further concluded that a defect in an NTA due to the lack of the date, time, and place information could be cured by an NOH, in the so-called "two-step process."[19]
      (3) Many courts also held that since only the regulations discuss jurisdiction, only their provisions controlled; and since they state that the NTA must only include

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[12] *Id*. at 394; *compare Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443 (BIA 2018); *Matter of Viera-Garcia and Ordonez-Viera*, 28 I. & N. Dec. 223, 225 (BIA 2021); *Matter of Pena-Mejia*, 27 I. & N. Dec. 546, 549 (BIA 2019) (all refusing to apply *Pereira* outside the context of cancellation of removal).

[13] *Arambula-Bravo*, 28 I. & N. Dec. at 395.

[14] *See, e.g.*, *United States v. Cortez*, 930 F.3d 350, 366 (4th Cir. 2019) ("According to Cortez, a regulatory definition for a 'notice to appear' that does not incorporate § 1229(a)'s date and time requirement conflicts with the INA and is therefore void. But there is no conflict because, as we have explained, the regulations in question and § 1229(a) speak to different issues—filings in the immigration court to initiate proceedings, on the one hand, and notice to noncitizens of removal hearings, on the other—and the INA 'says nothing about' how a case is to be docketed with the immigration court.") (quoting *Karingithi v. Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019) and citing *Banegas Gomez v. Barr*, 922 F.3d 101, 110 (2d Cir. 2019)).

[15] 8 C.F.R. § 1003.14(a).

[16] 8 U.S.C. § 1229; 8 C.F.R. §§ 1003.13, 208.2(c), 246.1, 246.5.

[17] *Pereira*, 138 S. Ct. at 2115-17 (alteration in the original).

[18] *See, e.g.*, *Bermudez-Cota*, 27 I. & N. Dec. at 443; *Pierre-Paul v. Barr*, 930 F.3d 684, 689 (5th Cir. 2019), *abrogated in part on other grounds by Niz-Chavez*, 141 S. Ct. at 1479-80; *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314 (6th Cir. 2018); *Karingithi*, 913 F.3d at 1161.

[19] *See, e.g.*, *Bermudez-Cota*, 27 I. & N. Dec. at 445-47; *Pierre-Paul*, 930 F.3d at 690-91; *Banegas Gomez*, 922 F.3d at 112; *Garcia-Romo v. Barr*, 940 F.3d 192, 201 (6th Cir. 2019).

Title search: OUTLINE Matter of Fernandes: Non-Compliant and Knotty NTAs

First appeared as part of the conference materials for the
47th Annual Conference on Immigration and Nationality Law session
"*Matter of Fernandes*: Non-Compliant and Knotty NTAs"