Supreme Court: *Pereira v. Sessions*: Should the Notice to Appear Contain the Time and Location for A Hearing To Trigger the "Stop-Time" Rule?

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The Legal Question

On June 21, 2018, the Supreme Court issued a decision in Pereira v. Sessions. The issue in the case is, "Does a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' as required by [8 U.S.C.] §1229(a)(1)(G)(i), trigger the stop time rule? The notice to appear (NTA) refers to the charging document drawn by the government and served on the individual in connection with removal ("deportation") hearings. The NTA includes important information like the date and location of the hearing and the immigration charges the government alleges the non-citizen has violated. Once the NTA is filed with the immigration court, removal proceedings have commenced.

Cancellation of removal is an important remedy available for non-permanent residents who can show physical presence in the United States for a continuous period of ten years, good moral character, and have not been convicted of any crimes that would disqualify them from this relief. In addition, applicants must show removal would cause exceptional and extremely unusual hardship to a U.S. citizen or an LPR child, spouse, or parent. The "stop time" rule refers to the government's power to stop the clock on continuous physical presence when the applicant is served an NTA.

What is the litigation history?

This case came to the Supreme Court from the First Circuit. The petitioner arrived in the United States in June 2000 as a non-immigrant visitor. While he was authorized to stay until December 21, 2000, he subsequently overstayed his visa. In May 2006, the Department of Homeland Security (DHS) served him with a notice to appear. The NTA did not specify the date and time of his initial removal hearing but instead ordered him to appear before an immigration court in Boston "on a date to be set at a time to be set."

After more than one year, the court mailed Pereira a second NTA scheduling the removal hearing for October 31, 2007 at 9:30a.m. Notwithstanding the second NTA, Pereira never arrived to his hearing, because the NTA was sent to his street address instead of the post office box he had provided to DHS. The NTA was therefore returned as undeliverable. When Pereira failed to appear at the hearing, the Immigration Judge (IJ) ordered him removed *in absentia*.

In March 2013, Pereira was arrested for a motor vehicle violation and detained by DHS. He moved to reopen the removal proceedings based on his sworn statement that he had never received the 2007 NTA indicating the date and time of the hearing. After an immigration judge allowed the motion, Pereira conceded removability but sought cancellation of removal under 8 U.S.C. § 1229b(b)(1).

Pereira argued that he had continued to accrue time for the purpose of § 1229b(b)(1) until he received an NTA that occurred after his case was reopened in 2013. He contended that the original NTA did not interrupt his accrual of the necessary ten years of continuous presence, because it lacked the date and time certain for his initial hearing, and the stop-time rule did not stop the clock until he received a notice with the specific date and time of a hearing on his reopened removal proceedings in 2013.

The IJ denied petitioner's application for cancellation of removal finding that Pereira could not establish the ten years of continuous physical presence. The BIA affirmed relying on its precedential decision in *In re Camarillo*, 25 I. & N. Dec. 644 (2011). In *Camarillo*, the BIA found that the language of the stop-time rule was ambiguous and that the statute's reference to "a notice to appear under § 1229(a)" could be read as "simply definitional" and not with a requirement to include the specific details required for a notice to appear. The First Circuit denied Pereira's petition for review of the BIA's decision. The court's reasoning was twofold. First, the court rejected petitioner's argument that Section 1229b(d)(1)'s reference to "a notice to appear under § 1229(a)" unambiguously requires that a notice to appear containing all of the information listed in Section 1229(a)(1), including the specific date and time of the removal hearing, be served on the alien before it can trigger the stop-time rule. Second, the court concluded that the BIA's reasoning was a permissible interpretation of the statute and the stop-time rule under the *Chevron* deference doctrine. In making this conclusion, the First Circuit joined five other circuits that have granted *Chevron* deference to the BIA's interpretation in *Camarillo*.

The Third Circuit's reasoning in *Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016) differs from the First Circuit's holding in *Pereira* (and other circuits). In the Third Circuit case *Orozco-Velazquez*, the respondent arrived in the United States without having been admitted or paroled in late 1998 or early 1999. However, it was not until May 9, 2008, that he received an NTA, which did not specify a date to appear before the Immigration Judge and merely stated that respondent should appear in Elizabeth, New Jersey. On April 12, 2010, over ten years after his entry into the country, Orozco-Velasquez received an NTA specifying the time of his hearing.

Orozco-Velasquez applied for cancellation of removal arguing that his 2010 NTA superseded the 2008 NTA because the statute unambiguously requiring the NTA include all of the information specified in § 1229(a)(1), including the date and time of the initial removal hearing.

On appeal, the Third Circuit held that the BIA's holding in *Camarillo* was not worthy of *Chevron* deference because the statute is unambiguous about the information necessary to be included in

the NTA in order to trigger the "stop-time" rule. Such a conclusion was critical for Orozco-Velasquez because to be eligible for cancellation, *Orozco-Velasquez* needed to obtain 10-years of continuous physical presence.

The Third Circuit found that the NTA, under 8 U.S.C. § 1229(a)(1), necessarily requires specification of the "time and place at which the proceedings shall be held." The Court found that the word "shall" in the statute is a requirement, and in the absence of another conflicting canon of statutory construction such a requirement is mandatory.

The Third Circuit emphasized that the NTA is not "enigmatic," finding that the NTA's purpose is to provide *notice* to the noncitizen. The Third Circuit noted that here, just a few months before the "stop-time" rule would apply, Orozco-Velasquez was given an NTA which was devoid "fundamental, statutorily required information and misinforming him of the proceedings' location." By the Board's logic, the Third Circuit concluded that the agency might treat an NTA containing no information as a trigger for the stop-time rule, a result which the Third Circuit finds to be "counter-textual."

At the Supreme Court

The Supreme Court released a decision on June 21, 2018. Writing for an 8-justice majority, Justice Sotomayor said, "If the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify the time or place of the removal proceedings, does it trigger the stop-time rule? The answer is as obvious as it seems: No. A notice that does not inform a noncitizen 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." The majority rejected attempts by the government and the dissent to "inject ambiguity into the statute."

Justice Kennedy joined fully with the court, but wrote a concurring opinion to express his concern with the way *Chevron* had been applied by the circuit courts that deferred to the BIA's interpretation in *Camarillo*, saying, "The type of reflexive deference exhibited in some of these cases is troubling."

In his dissent, Justice Alito accused the majority of ignoring *Chevron* deference "in favor of [an interpretation] that it regards as the best reading of the statute." In arguing that the statute is ambiguous, Justice Alito pointed out how all but one Court of Appeals to consider the question reached the opposite conclusion.

What this means: The stop-time rule will not be applied to noncitizens who are served NTAs that do not include, at a bare minimum, the time and place of the hearing. Until a noncitizen is served an NTA that includes such information, the noncitizen will be able to continue to accrue continuous physical presence for "cancellation of removal" purposes. The decision could also have implications for a broader set of noncitizens who are served NTAs without a specified time and location.