Supreme Court Preview: *Pereira v. Sessions*: Should the Notice to Appear Contain Complete Information in Order to Trigger the Stop-Time Rule?

I. Background:

On April 23, 2018, the Supreme Court of the United States will hear arguments in *Pereira v. Sessions*. The issue in the case is "Whether, to trigger the stop-time rule by serving a 'notice to appear,' the government must 'specify' the items listed in the definition of a 'notice to appear,' including '[t]he time and place at which the proceedings will be held.'" 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?

In the First Circuit case *Pereira v. Sessions*, 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 his post office box. 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

At the Supreme Court, Pereira argues that deference is inappropriate: "Because the statute's text is unambiguous, and because, in any event, the BIA's interpretation is not a reasonable one, this Court should reject the BIA's interpretation of the stop-time rule and hold that only service of a "notice to appear" that satisfies § 1229(a)'s definition of that term constitutes a "notice to appear under section 1229(a)" for purposes of the stop-time rule." By contrast, the government argues that the statute is ambiguous and that BIA's interpretation the stop-time rule in the immigration statute is reasonable and therefore entitled to *Chevron* deference.

Key groups and individuals have filed amicus (friend-of-the-court) briefs in connection with this case, among them the American Immigration Lawyers Association, National Immigrant Justice and a former Board of Immigration Appeals Chairman and immigration judge. The National Immigrant Justice Center argues that "The First Circuit and the BIA erred by relying on "administrative context"—in short, that the government has promulgated a regulation authorizing "notices to appear" that do not contain hearing dates and times, which the government believes is more convenient. "[C]heapness alone cannot save an arbitrary agency policy." *Judulang*, 565 U.S. at 64." A brief filed by the American Immigration Lawyers Association states in part, "Each of the BIA's justifications is entirely arbitrary and meritless on its own terms—but as this brief highlight, the BIA's approach also ignores the history of the statutory sections at issue, and the 1996 Act's relevant legislative history."

How the Supreme Court will rule remains to be seen. For more information about the case, visit: http://www.scotusblog.com/case-files/cases/pereira-v-sessions/