Third Circuit Court

Case: *Guadalupe v. Attorney General of the U.S.*, No. 19-2239 (3d Cir. Feb. 2020)

Judges: Restrepo, Roth, Fisher **Date:** February 26, 2020

Tags: Immigration, deportation, NTA, hearing notice, *Pereira*, cancellation of removal, continuous physical residence, stop-time rule

Gravamen/Question(s) at issue: "In removal proceedings, does *Pereira v. Sessions* prohibit DHS from curing a defective NTA, which has triggered the stop-time rule with a subsequent Notice of Hearing which contains the missing information?" *Guadalupe v. Attorney General of the U.S.*, No. 19-2239, *6 (3d Cir. Feb. 2020).

Is the 3d Circuit's holding in *Orozco-Velasquez* (namely, that a deficient NTA may be cured by a subsequent Hearing Notice) abrogated by *Pereira*?

Holdings: Yes, *Orozco-Velasquez* has been abrogated by *Pereira*.
Therefore, an NTA that is missing date, time, and/or place cannot be "cured" by a subsequent Hearing Notice with that information.
Neither the deficient NTA nor the subsequent Hearing Notice stop the time on a respondent's continuous physical presence.
Case vacated and remanded.

Rationale: SCOTUS was clear in *Pereira* that a deficient NTA is not an NTA. Per the statute, a valid NTA—and *only* a valid NTA—is sufficient to stop the time on a respondent's continuous physical presence.

Facts: Ecuadorian citizen entered U.S. as EWI in 1998. He married a USC in 2003, divorced her in 2006. She signed an affidavit saying that he married her for immigration status. His conditional resident status was terminated by USCIS in 2007 and he was placed in removal proceedings. He received an NTA with no date or time. Four days later he received a hearing notice with that information. He attended the hearing with his attorney. Respondent was ordered departed, but he stuck around. In June 2018, *Pereira* was decided, and respondent moved to reopen his case because he had now been in the U.S. for over 10 years and could apply for cancellation of removal.

Prior Appeals & Trial Court Input:

- **2007:** Placed in removal proceedings, defective NTA, hearing notice, hearing
- **2008:** ICH, ordered removed
- **2018:** Motion to reopen denied by BIA
- **2019:** Appeals to 3d Circuit

Appeals to Statute & Precedent:

- **8 U.S.C. § 1229b(b)(1):** 10 years continuous residence can ask for discretionary cancellation of removal.
- ***Pereira v. Sessions*, 138 S. Ct. 2105 (U.S. 2018):** Defective NTA is not an NTA for purposes of stop-time rule for continuous physical residence in the U.S.
- ***Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016):** NTA missing date/time/place may be cured by subsequent Hearing Notice with that information. *Abrogated by Pereira.*
- ***Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018):** NTA can be "cured" by a subsequent hearing notice filling in the missing information.
- ***Garcia-Romo v. Barr*, 940 F.3d 192 (6th Cir. 2019):** DHS may cure defective NTA with hearing notice.
- ***Matter of Mendoza-Hernandez*, 27 I&N Dec. 520 (BIA 2019):** DHS may cure defective NTA with hearing notice.

Discussion:

- **Jurisdiction:** Can't usually review BIA's exercise of discretion in a cancellation of removal case, but there's an exception if the BIA based their decision on a false legal premise.
- "The language is clear. *Pereira* holds that an NTA shall contain all the information set out in section 1229(a)(1). An NTA which omits the time and date of the hearing is defective. To file an effective NTA, the government cannot, in maybe four days or maybe four months, file a second—and possibly third—Notice with the missing information." *Guadalupe v. Attorney General of the U.S.*, No. 19-2239, *7 (3d Cir. Feb. 2020).
- "Moreover, it seems to us to be no great imposition on the government to require it to communicate all that information to the noncitizen in one document." *Guadalupe v. Attorney General of the U.S.*, No. 19-2239, *8 (3d Cir. Feb. 2020).
- BIA: *Chevron* deference applies, bcz *Mendoza-Hernandez*!
    - 3d Cir.: "We conclude, however, that *Chevron* deference is inapplicable here because we are not merely interpreting the stop-time rule. Rather, we are deciding as a matter of law whether the Supreme Court's decision in *Pereira* forecloses our interpretation of the statute in *Orozco-Velasquez*." *Guadalupe v. Attorney General of the U.S.*, No. 19-2239, 8-9 (3d Cir. Feb. 2020).
- "Nor do we agree with the government that the BIA's error was harmless. . . The government rests its theory of harmlessness on the fact that Guadalupe appeared for his hearing. But the correct inquiry is whether the BIA's legal error affected the outcome of Guadalupe's motion to reopen. It has. The BIA's misreading of the stop-time rule was its sole reason for rejecting Guadalupe's motion to reopen. The BIA found Guadalupe ineligible for cancellation of removal based on an incorrect legal premise. The error was not harmless." *Guadalupe v. Attorney General of the U.S.*, No. 19-2239, *12 (3d Cir. Feb. 2020).