Immigration Court: BIA

Case: *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022) **Date:** August 4, 2022

Adjudicated by: Mullane, Mann, Grant **Opinion:** Mullane **Dissent:** Grant

Tags: Defective NTA, mandatory claim processing rule, jurisdiction, termination, timely objection, EOIR, removal proceedings, pleadings, prejudice, harmless error

Questions Presented:

1. Is INA 239(a)(1)(G)(i) a mandatory claim processing rule, or a jurisdictional requirement?
2. When is an objection to an INA 239(a)(1)(G)(i) violation timely?
3. If INA 239(a)(1)(G)(i) is a mandatory claim processing rule, does Respondent need to show prejudice?
4. What is the proper remedy for an INA 239(a)(1)(G)(i) violation?

Holdings:

1. "We conclude that the time and place requirement in INA 239(a)(1)(G)(i) is a claim-processing rule, not a jurisdictional requirement." 608
2. "[W]e will generally consider an objection to a noncompliant notice to appear to be timely if it is raised prior to the closing of pleadings before the Immigration Judge." 610-11
3. A respondent who has mad a timely objection to a noncompliant NTA is not generally required to show he or she was prejudiced by missing time or place information. 611
4. An IJ may allow the DHS to remedy a noncompliant NTA without ordering the termination of removal proceedings. 605, 615

Rationale: A violation of a mandatory claims-processing rule, if raised in a timely and proper way, means that the court must provide a remedy.

Facts: (605-606) Native and citizen of Portugal admitted as LPR. Served NTA on March 1, 2021 with date & time "to be set."

Procedural History:

- **March 1, 2021:** NTA personally served on Respondent, no time or date
- **March 12, 2021:** Boston Imm Court mailed hearing notice with time & date
- **March 18 & etc.:** three MCHs, no pleadings taken, Respondent is pro se
- **April 15, 2021:** Respondent appeared with counsel, continuance granted. Subsequently filed written pleadings objecting to the noncompliant NTA.
- **May 6, 2021:** MCH – IJ found Respondent removable; granted time for written brief.
- **May 25, 2021:** Respondent submitted brief titled "Motion to Quash Service of Process for the Respondent's NTA and Dismiss Removal Proceedings" because of defective NTA
- **June 2021:** IJ denied Respondent's motion to terminate & ordered him removed.
- **BIA 2022:** Remanded to IJ

Appeals to Statute & Precedent:

- **INA 239(a)(1)(G)(i):** NTA shall include date, time, and place of removal proceeding.
- ***Pereira v. Sessions*, 138 S. Ct. 2015, 2114 (2018):** a NOT "that fails to designate the specific time or place of the noncitizen's removal proceedings . . . does not trigger the stop-time rule [INA §240A(d)(1)]."
- ***Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1480 (2021):** to trigger the stop-time rule, the NTA "must be a single document specifying the time and place of the hearing, and a noncompliant [NTA] missing time or place information cannot be cured by a subsequent notice of hearing specifying this information." *Fernandes* at 607.
- ***Matter of Arambula-Bravo*, 28 I&N Dec. 388 (BIA 2021):** even an NTA that lacks time or place "is sufficient to vest an Immigration Court with subject matter jurisdiction." *Fernandes* at 607.
- ***Chavez-Chilel v. A.G.*, 20 F.4th 138, 142-44 (3d Cir. 2021):** Neither *Pereira* nor *Niz-Chavez* affects an Immigration Court's jurisdiction.
  - ***U.S. v. Catillo-Martinez*, 16 F.4th 906, 914 n.3 (1st Cir. 2021)**
  - ***Chery v. Garland*, 16 F.4th 980, 986-87 (2d Cir. 2021)**
  - ***Ramos Rafael v. Garland*, 15 F.4th 797, 800-01 (6th Cir. 2021)**
  - ***Tino v. Garland*, 13 F. 4th 708, 709 n.2 (8th Cir. 2021) (per curiam)**
  - ***Maniar v. Garland*, 998 F.3d 235, 242 & n.2 (5th Cir. 2021)**
- ***Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011):** "claim-processing rules seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at specific times." (& "Claim-processing rules do not implicate the jurisdiction of the tribunal." *Fernandes* at 608)
- ***Fort Bend Cnty. V. Davis*, 139 S. Ct. 1843, 1849 (2019):** enforcement of claim-processing rule is mandatory if properly raised.
- ***Manrique v. U.S.*, 137 S. Ct. 1266, 1272 (2017):** mandatory claim-processing rules are subject to waiver or forfeiture unless properly and timely raised by affected party. "[M]andatory claim-processing rules, although subject to forfeiture, are not subject to harmless-error analysis." *Manrique* at 1274.
- ***Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019), *abrogated on other grounds by Niz-Chavez*, 141 S. Ct. at 1485.** NTA is not statutorily connected to jurisdiction (692). Objection to a defective NTA must be timely (693). Timely probably means when respondent concedes removability (pleadings) (693 n.6).
- ***Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. 745, 753-54 (BIA 2020):** Termination not warranted because there was no apparent prejudice to defective NTAs. Distinguishable here because in *Rosales* BIA was considering a claim-processing rule in the regulations.
- ***Matter of Nchifor*, 28 I&N Dec. 585 (BIA 2022):** claim-processing rules; termination is not warranted for defective NTA.
- ***Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 465-66 (A.G. 2018):** termination of proceedings by IJ should be limited
- ***Matter of J-A-B- I-J-V-A-*, 27 I&N Dec. 168, 169 (BIA 2017):** Once NTA is filed with immigration court, IJ may only terminate proceedings in limited circumstances.

- ***B.R. v. Garland*, 26 F.4th 827, 840 (9th Cir. 2022):** "holding that Immigration Judges have the authority to allow DHS to cure improper service of a notice to appear on a minor without requiring termination," *Fernandes* at 615.
- ***Matter of W-A-F-C-*, 26 I&N Dec. 880, 882 (BIA 2016):** IJ may grant continuances to allow DHS to properly serve NTA on a minor.
- ***Matter of E-S-I*, 26 I&N Dec. 136, 145 (BIA 2013):** continuance granted to serve NTA on person with mental deficiencies
- ***Matter of Hernandez*, 21 I&N Dec. 224, 228 (BIA 1996):** IJ could take action short of termination where an order to show cause was not properly served.
- ***But see: Arreola-Ochoa v. Garland*, 34 F.4th 603, 608 (7th Cir. 2022):** this Circuit DOES say that a respondent is entitled to termination or dismissal for a defective NTA: "the proceeding must be dismissed for failure to comply with a mandatory claims-processing rule." (BIA says it's bound by this in the 7th Circuit, but nowhere else. 616 n.9.)

Respondent's Arguments:

- "The respondent argues that, under *Pereira* and *Niz-Chavez*, an Immigration Court is only vested with jurisdiction upon the service of a single document containing all of the information required by section 239(a)(1) of the INA, 8 U.S.C. § 1229(a(1)." 607 (i.e., no jurisdiction here)
- Also argues that it's a mandatory claim-processing rule, his objection was timely, he's not required to show prejudice, and dismissal or termination is the only remedy for the violation (since the NTA is a "case-initiating document," 615). 608

Discussion:

- **Jurisdictional:** "We adhere to our view in *Matter of Arambula-Bravo* and the view of the courts of appeals that have addressed the issue that section 239(a)(1) is not a jurisdictional provision." 601
  - "Congress has not made the Immigration Courts' jurisdiction dependent upon the content of the notice to appear." 608

- **Mandatory:** "Although not jurisdictional, a claim-processing rule may be mandatory in the sense that the rule must be enforced if it is properly raised." 608
  - Also mandatory if it uses the word "shall." 608-609

- **Timely:** Claim-processing rules are "subject to waiver and forfeiture, unless properly and timely raised by the affected party." 609
  - Statute doesn't say when an objection is/isn't "timely"
  - "Generally, requiring respondents to raise an objection before the closing of pleadings would not force respondents (especially unrepresented respondents0 to raise an objection at the initial appearance before an Immigration Judge and would allow them adequate opportunity to obtain counsel." 610
  - Objection can be oral or written – 611

- "Where pleadings are made in writing, the written pleading must include any objection to the absence of time or place information, or the objection will be deemed waived." 611

- **Prejudice:** "When Congress intends to require a showing of prejudice after a party objects to the violation of a claim-processing rule, it generally does so explicitly." 611
  - "considering that claim-processing rules are intended to promote the orderly progress of litigation, we are hesitant to read a prejudice requirement into section 239(a)(1) where none exists." 611

- **Appropriate Remedy:**
  - "The precise contours of permissible remedies are not before us at this time." 616
  - Since jurisdiction still vests in the Immigration Court, "it follows that an Immigration Judge may exercise judgment and discretion to enforce that rule as he or she deems appropriate to promote the rule's underlying purpose." 613
  - "While an Immigration Judge may not overlook or ignore a violation of section 239(a)(1) if the issue is timely raised, it does not necessarily follow that an Immigration Judge has no discretion in determining how to enforce that rule or remedy its violation." 614
    - If termination is mandatory, that means section 239(a)(1) is essentially a jurisdictional requirement after all. 614
  - "Nor does this statutory text explicitly preclude an Immigration Judge from allowing DHS to remedy missing time or place information." 614
  - SCOTUS on claim-processing rules seems to allow for remediation of defect in a document without dismissing proceedings (illustration: habeas petitions missing constitutional violation)
  - "While an Immigration Judge cannot simply ignore or overlook DHS' failure to include the required time or place information on a notice to appear if the issue is timely raised, the Immigration Judge also cannot simply treat the notice to appear as never having been served or filed." 615
  - FRCP allow for amendment of case-initiating documents (like complaints)
    - "In addition, not allowing a complaint or information to be amended would cause a case to be dismissed and waste judicial and administrative resources." 615
  - BIA and other Circuit Courts have allowed DHS to remedy defective NTA w/o termination.
  - "We similarly conclude that the omission of time or place information in a notice to appear 'can be cured and is not fatal,' and thus the Immigration Judge in this case may allow DHS to remedy the defect in the notice to appear without ordering the termination of removal proceedings. *Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020)." 616

Commentary:

- Briefed by Jeffrey B. Rubin of Rubin & Pomerleau, Boston

- "The respondent has not shown that the lack of date and time information in the notice to appear violated his right to due process. **To establish a due process violation, the respondent must show that**

a procedural error led to fundamental unfairness and actual prejudice. *See Toribio-Chavez v. Holder*, 611 F.3d 57, 65 (1st Cir. 2010); *Lopez-Reyes v. Gonzales*, 496 F.3d 20, 23 (1st Cir. 2007)." 613 n.8

Dissent: Grant

- "The majority rejects the respondent's contention that the only remedy is termination of proceedings without prejudice to DHS' ability to serve and file a fully-compliant notice to appear. However, it is difficult to see what other 'remedy' can be found—the respondent will insist on that course of action, and he has a valid point: neither an Immigration Judge nor DHS has authority to 'pencil in' a hearing date after the fact on an already-served notice to appear." 618
    - Ought to let DHS issue a new NTA right there.
    - It's a **non-mandatory** claims-processing rule—look to the implementing regulations (8 C.F.R. § 1003.18(b)) to provide the means for enforcing the statute and addressing a noncompliant NTA. (more flexible enforcement)

- Grant sees the issue here as "an **instantiation of fundamental due process**—the right to know when and where one's hearing shall take place." 619
    - But if it's due process, then respondent has to show prejudice to his case: a higher bar!