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CERTIFICATION OF QUESTIONS OF STATE LAW: A NEW TREND IN SECOND CIRCUIT IMMIGRATION CASES?

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In both February and May of this year, the U.S. Court of Appeals for the Second Circuit did something that it appears not to have done in an immigration case in more than fifteen years, and that is rare for other courts to do in such cases as well. In *Nguyen v. Holder*, on February 14, 2014, and *Efstathiadis v. Holder*, on May 20, 2014, the Second Circuit chose to certify questions of state law about which it was uncertain to the highest court of the relevant state – New York in *Nguyen*, and Connecticut in *Efstathiadis* -- rather than seeking to answer those questions itself. This is at least a notable coincidence given the historical rarity of such certification in immigration cases, and merits watching to see if it is the beginning of a broader trend.

The issue in *Nguyen* involved the validity, under New York law, of a marriage between an uncle and his half-niece. The petitioner, Huyen V. Nguyen, had been admitted to the United States in 2000 as a conditional permanent resident based on her marriage to Vu Truong, a U.S. citizen. Her joint I-751 petition to remove those conditions, filed in 2002, was ultimately denied by U.S. Citizenship and Immigration Services (USCIS) in 2007 because she was the half-niece of her husband—that is, her grandmother was also her husband's mother. USCIS concluded that this marriage was incestuous and void, and an Immigration Judge (IJ) reached a similar conclusion in removal proceedings, holding that a New York statute which voids a marriage between "an uncle and a niece" also applies to a marriage between a half-uncle and a half-niece. On appeal, the Board of Immigration Appeals (BIA) affirmed the IJ's conclusion that "a marriage between

a niece and a half-uncle is invalid under New York law." *Nguyen*, slip op. at 4.

The Second Circuit, however, was not sure that the BIA and IJ were correct. The relevant New York statute, N.Y. Domestic Relations Law §5, voids as incestuous a marriage between

1. An ancestor and a descendant;
2. A brother and sister of either the whole or the half blood;
3. An uncle and niece or an aunt and a nephew.

N.Y. Dom. Rel. Law §5, *quoted in Nguyen*, slip op. at 6. Subsection 2 of the statute, regarding siblings, specifically includes relationships "of either the whole or the half blood", but subsection 3 does not. As the Second Circuit noted, "two cases from New York's intermediate appellate courts," that is,*Audley v. Audley,* 187 N.Y.S. 652 (N.Y. App. Div. 1921), and In re *May's Estate,* 117 N.Y.S.2d 345 (N.Y. App. Div. 1952), *aff'd*, 305 N.Y. 486 (1953), "hold that marriages between half-nieces and half-uncles are void for incest notwithstanding the omission of the 'whole or the half blood' language from subsection (3) of the statute." *Nguyen*, slip op at 6. However, this holding is drawn into question by dicta in *In re Simms' Estate,* 26 N.Y.2d 163 (1970), a decision of the New York Court of Appeals, New York's highest court. As the Second Circuit explained:

In *Simms*, the Court of Appeals did not decide the question of statutory interpretation that is before us here, see id. at 167, but it nevertheless cast doubt upon the analysis given by the Appellate Division in *Audley*. The*Simms* opinion observed that the omission of the phrase "whole or half blood" from the applicable statutory language was troublesome given the inclusion of that language in the statute's immediately preceding interdiction of marriages between brothers and sisters, and further noted that "it seems reasonable to think that if the Legislature intended to prohibit marriages between uncles, nieces, aunts and nephews whose parents were related to the contracting party only by the half blood, it would have used similar language." *Id*. at 166. The Court of Appeals further opined that

> *f the Legislature had intended that its interdiction on this type of marriage should extend down to the rather more remote relationship of half blood between uncle and niece, it could have made suitable provision. Its failure to do so in the light of its explicit language*

> *relating to brothers and sisters suggests it may not have intended to carry the interdiction this far.*
>
> *Id. While the Court of Appeals's analysis in Simms can fairly be called dicta, it nonetheless gives us pause in considering the continued vitality of Audley's interpretation of subsection (3).*

Nguyen, slip op. at 8-9. If, as *Simms* suggested, marriages between a half-uncle and a half-niece are actually permitted under New York law, then Huyen Nguyen's marriage would have been valid and the removal proceedings against her would need to be terminated.

Rather than attempting to predict how the New York Court of Appeals would decide this outcome-determinative issue of New York law, the Second Circuit decided to certify the question to the New York Court of Appeals, allowing that court to provide the answer. As the Second Circuit explained, there are criteria established in case law for such certification:

> *Before exercising our discretion to certify the question before us to the New York Court of Appeals, we must satisfy ourselves that the question meets the following criteria: 1) it must be determinative of this petition; 2) it must not have been squarely addressed by the New York Court of Appeals and the decisions of other New York courts must leave us unable to predict how the Court of Appeals would rule; and 3) the question must be important to the state and its resolution must require value-laden judgments or public policy choices.*

Nguyen, slip op. at 10. The Second Circuit determined in *Nguyen* that these criteria were met. The New York State Court of Appeals appears to agree, as it has already accepted the certification in Nguyen and included it on its list of certified questions pending before that court, by an order reported at 22 N.Y.3d 1150 (2014). Once the New York Court of Appeals answers the certified question, the *Nguyen* case will return to the Second Circuit for a final ruling.

In *Efstathiadis,* decided three months after *Nguyen*, the issue was not one of state family law, as in *Nguyen,* but one of state criminal law. Petitioner Charalambos Efstathiadis was a lawful permanent resident of the United States, having immigrated to the US in 1967. In 2005, he pled guilty to four counts of sexual assault in the fourth degree under Connecticut General Statute (CGS) §53a-73a(a)(2), which criminalizes subjecting "another person to sexual contact

without such other person's consent." Under the related definitional provision at CGS §53a-65(3), "sexual contact" is defined as contact "with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person." *Efstathiadis*, slip op. at 3. Mr. Efstathiadis was placed in removal proceedings and ultimately found deportable under INA §237(a)(2)(A)(ii), 8 U.S.C. §1227(a)(2)(A)(ii), on the basis that each of his convictions was for a crime involving moral turpitude (CIMT), and that they did not arise out of a single scheme of criminal misconduct.

In attempting to determine whether a conviction for sexual assault in the fourth degree under CGS §53a-73a(a)(2) was indeed a CIMT so as to support Mr. Efstathiadis's removal, the Second Circuit found itself stymied by uncertainty regarding the *mens rea,* that is, "the degree of mental culpability with which a defendant committed the acts underlying a conviction," that was required under the Connecticut statute with regard to the element of lack of consent of the victim. *Efstathiadis*, slip op. at 11. Based on the text of the statute, some case law applying the statute as written, and the model jury instructions, it appeared that there might be no *mens rea* requirement at all—that with respect to lack of consent, the crime might be a strict-liability offense, where it was not necessary for the government to prove any particular mental state of the defendant. However, the decision of the Connecticut Supreme Court in *State v. Smith*, 554 A.2d 713 (Conn. 1989), addressing a different provision of law relating to sexual assault in the first rather than fourth degree, could potentially be read to imply that a reasonable mistake of fact as to consent was a valid defense, meaning that some culpable *mens rea* would effectively be required for a conviction.

The question of what if any *mens rea* or "evil intent" was required for a conviction was potentially key to the determination whether the crime was a CIMT, since a CIMT has been variously described as requiring "a vicious motive or corrupt mind," or "n evil or malicious intent," and Second Circuit case law has indicated that "corrupt scienter is the touchstone of moral turpitude" and that "it is in the intent that moral turpitude inheres." *Michel v. I.N.S.*, 206 F.3d 253, 263 (2d Cir. 2000) (internal quotation marks omitted),*quoted in Efstathiadis*, slip op. at 14. Moreover, as the Second Circuit pointed out, while the statute at issue in *Efstathiadis* does at least have some *mens rea* requirement insofar as the sexual contact must be committed "for the purpose of sexual gratification of the

actor or for the purpose of degrading or humiliating ," this is not necessarily dispositive, because "the intent to receive sexual gratification, standing alone, is not evil." *Efstathiadis,* slip op. at 14. Thus, the *mens rea*requirement, or lack thereof, with respect to the lack of consent element was significant. But the Second Circuit could not definitively determine whether such a *mens rea* requirement existed, and if so, what it was.

In *Efstathiadis* as in *Nguyen*, the Second Circuit therefore decided to certify the question that was puzzling it to the highest court of the relevant state. In addition to being potentially dispositive, the Second Circuit said, the question of the *mens rea* requirement with regard to lack of consent in a sexual assault case had significant policy implications, since "hether or not Connecticut imposes strict liability for intentional sexual touching without consent implicates important policy concerns," *Efstathiadis*, slip op. at 21. The Second Circuit therefore certified the following two questions to the Connecticut Supreme Court:

1. Is C.G.S. § 53a-73a(a)(2) a strict liability offense with respect to the lack of consent element?
2. If C.G.S. § 53a-73a(a)(2) is not a strict liability offense with respect to the lack of consent element, what level of mens rea vis-à-vis that element is required to support a conviction?

Id. at 22. It does not appear that the Connecticut Supreme Court has yet decided whether to accept or reject the certification in *Efstathiadis*.

The certification of two questions of state law in immigration cases by the Second Circuit in a single year (a year that is not yet half over) is noteworthy, given the historical rarity of such certifications. Before 2014, the last time the Second Circuit appears to have sought to certify a question of state law in an immigration case was in 1998. In *Yesil v. Reno* and *Mojica v. Reno*, two of the consolidated cases addressed in *Henderson v. INS,* 157 F.3d 106 (2d Cir. 1998), the Second Circuit attempted to certify a question relating to the existence of jurisdiction over a non-New-York District Director of the then-Immigration and Naturalization Service under the New York "long arm" statute. The New York Court of Appeals respectfully declined the certified questions, *Yesil v. Reno*, 705 N.E.2d 655 (N.Y. 1998), and the appeals were subsequently withdrawn after the parties settled, as explained in *Yesil v. Reno,* 175 F.3d 287 (2d Cir. 1999).

Yesil and *Mojica* appear to be the only immigration cases, before this year, in which the Second Circuit attempted certification of questions of state law. Historically, the Second Circuit has more commonly utilized certification of questions of state law in other legal settings, but not in the immigration context. Nor is the technique especially common among other courts in the immigration context, although it is not entirely unheard of.

In 2011, the U.S. District Court for the Middle District of Tennessee, in the case of *Renteria-Villegas v. Metropolitan Government of Nashville and Davidson County*, certified to the Supreme Court of Tennessee an issue relating to the powers of the Metropolitan Government of Nashville and Davidson County under state law. That lawsuit was filed by a U.S. citizen who had twice allegedly been subjected to an investigation of his immigration status following his arrest, pursuant to an October 2009 Memorandum of Agreement between Immigration and Customs Enforcement (ICE) and the Metropolitan Government which he believed to be illegal. The Supreme Court of Tennessee accepted the certified question, and ruled in an October 4, 2012, decision that the agreement was not illegal as a matter of state law.

Earlier, the U.S. District Court for the District of Nebraska had attempted to certify a somewhat similar question regarding the powers of a local government body in the *Keller v. City* of Fremont litigation, regarding a local anti-immigrant ordinance somewhat similar to that struck down by the Third Circuit in *Lozano v. City of Hazleton*. However, in November 2010 the Supreme Court of Nebraska declined the certified question in *Keller*, just as the Court of Appeals of New York had done years earlier in *Yesil* and*Mojica*. The Court of Appeals for the Eighth Circuit ultimately upheld that Fremont ordinance as a matter of federal law, and the U.S. Supreme Court recently denied certiorari in the case, allowing the Eighth Circuit's decision to stand.

Going back further into U.S. legal history, there is also the Supreme Court's 1978 decision in *Elkins v. Moreno*, 435 U.S. 647, which certified to the Maryland Court of Appeals the question whether Maryland state law prevented G-4 nonimmigrants from acquiring domicile in that state. But overall, certification of questions of state law has been fairly rare in the immigration context, not only in the Second Circuit but elsewhere, at least until this year.

It is possible that the reappearance of certification in two unrelated Second Circuit immigration cases this year is merely a coincidence, but the possible trend merits further observation. Certification can be, in many areas of the law, a valuable tool for determining the proper answer to a question of state law rather than leaving that question to speculation by a federal court. If the increased use of certification in immigration cases is indeed a trend in the Second Circuit, it is a potentially promising one for some immigrants whose cases may turn on questions of state law, and for their attorneys.