IN THE SUPREME COURT OF FLORIDA
CASE NO. 92,628

DADE COUNTY PROPERTY APPRAISER, DADE COUNTY TAX COLLECTOR, and FLORIDA DEPARTMENT OF REVENUE,

Petitioners,

v.

JOSE LISBOA,

Respondent.

ANSWER BRIEF ON THE MERITS OF RESPONDENT JOSE LISBOA

On Discretionary Review from the District Court of Appeal
Third District of Florida

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STATEMENT OF THE CASE AND FACTS

Respondent Jose Lisboa joins in the Statement of the Case and Facts of Petitioners, Dade County Property Appraiser and Tax Collector, except for the following points and additions.

The Petitioners also characterize the Third District's opinion in terms Respondent does not agree set out the reasoning, and Respondent relies on the opinion itself. (App.1-9).

The INS will complete a "G-845" form at the request of any state agency, expressly "For Purposes Of Determining If Alien Is Permanently Residing Under Color Of Law Only", informing a state agency whether INS is actively pursuing expulsion of an alien. (R.2:295-298).

While it was not referenced in any of the decisions below, nor used in any material manner in their briefs (nor elsewhere in this brief), the Petitioners' briefs raise in their facts, that Mr. Lisboa's pending application for asylum with Immigration is based on fear of persecution in Brazil because of his "homosexuality." Mr. Lisboa's claim for asylum includes a full statement of the persecution on which it is based, including the likelihood he would be murdered, violently physically abused, his past

incident of arrest and detention for persecution, publications in his country of origin and politicians there advocating concentration camps for gay men and advocating that killing of homosexuals is not murder but a kill (as in sport), and not only the failure of police to act to protect from abuse but their actual complicity and assisting in the targeting of gays for abuse. The claim includes information on United States immigration decisional law about the persecution, that upon testimony about Brazilian paramilitary groups dedicated to killing gays, a gay person has good reason to fear for his life if returned to Brazil and may obtain asylum here (R.1:145-156).

SUMMARY OF ARGUMENT

The Court should affirm the Third District based on Department of HRS v. Solis, 580 So.2d 146 (Fla. 1991). Solis answered the ultimate question of whether an alien who has made application for asylum in the United States, is a "permanent" resident. That case was based upon the definitions and usage of "permanent" and "temporary" in 8 U.S.C. 1101 (a).

Comparison of Solis with Juarrero v. McNayr, 157 So.2d 79 (Fla. 1963) demonstrates the factual and legal status difference between an asylum applicant in current times as opposed to holders of a 1960's-type temporary visa. The political asylum applicant's permanent residence is under color of law as Immigration knows of their presence and acquiesced to it, Solis. The Juarrero temporary visa holders had no ability to claim or apply for permanency until immigration law changed, while political asylum applicants today have the right to claim asylum and to expect success. Therefore, home-owning residents who have pending asylum applications with INS are able "intend to establish permanent residence", F.S. 196.015, "in good faith" F.S. 196.031(1), to qualify for the Florida homestead tax exemption.

ARGUMENT

CAN AN ALIEN RESIDING IN THE UNITED STATES PENDING HIS APPLICATION FOR POLITICAL ASYLUM, SATISFY THE RESIDENCY REQUIREMENTS CONTAINED WITHIN ARTICLE VII, SECTION 6 OF THE FLORIDA CONSTITUTION AND SECTION 196.031(1), FLORIDA STATUTES, IN ORDER TO QUALIFY FOR FLORIDA'S HOMESTEAD TAX EXEMPTION?

The statutes implementing homestead tax exemption direct the property appraisers to determine the exemption based on the "good faith" of a person's "intention to establish a permanent residence in this state..." F.S. 196.031(1) and 196.015. By applying for political asylum, a person shows their intent to permanently reside here. The status rises to "color of law" when INS accepts the application and does not act to deport. Alfred v. Florida Dept. of Labor and Employment Security, 487 So.2d 355 (Fla. 3rd DCA 1986). An asylum applicant's status is described as "permanently residing under color of law", abbreviated "PRUCOL"; INS has its definition of permanent, and residence, and as Solis explains "color of law" is a well-defined term. "INS controls immigration. It knew of the presence of Solis and her children in this country. It could have acted on their application for asylum and moved toward deporting them, but it did not. Their presence, therefore, must be construed as being under color of law because INS knew

of it and acquiesced in it." Solis at 149. Once a PRUCOL, the home-owning resident's intent is settled and remains so unless INS at least eliminates the legal claim to asylum by denial of the asylum, and perhaps even until steps are taken to end the residency such as deportation. An alien asylum applicant can qualify for the homestead tax exemption. A comparison of Solis and Juarrero reinforces this conclusion.

Both Solis and Juarrero focus on the terminology of INS to describe its durational implications. The key terms are "temporary" and "permanent".

Solis relies heavily on the Immigration and Nationality Act's definition of "permanent". The decision examined exactly the same immigration status as Mr. Lisboa's ("an alien residing in this country pending her application for political asylum"). The inquiry was the same: to determine the meaning of this status as to the length of time a person may remain in this country, specifically "permanent" versus "temporary" residents. The Solis method of inquiry is what the lower court used: how immigration addresses and defines duration, will be descriptive of what the immigration status means in terms of how long a person may be in this country. The definition of "permanent" has not been changed by Congress since its quotation in that case: "The term 'permanent' means a relationship

of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." 8 U.S.C. Section 1101 (a) (31).

The asylum applicant fits within the statutory definition of "permanent", rather than statutory use of the word "temporary", said Solis. The term "temporary" still is used in conjunction with students, tourists, business visitors, and specific workers as the Immigration and Nationality Act did when Solis described it. 8 U.S.C. Section 1101 (a) (15) (B), (F), and (H). Since Congress did not make relevant changes in the definitions and usage of permanent and temporary that were the crux of Solis, the same question was given the same answer by the lower court here. There is nothing different about immigration to favor the Appellants.

The Third District correctly stated its opinion has no conflict with Juarrero. The case is distinguishable in many respects. The case dealt with Cuban refugees who held "nothing more than a *temporary* visa" (emphasis in original). Juarrero's rationale contains the following descriptive language of the immigration status involved in that case. The "Cuban refugees" had temporary visas, from the U.S. Embassy in Cuba, then they obtained permission to stay indefinitely and to depart voluntarily. They did not have

"permanent" visas, and the "visas are not authority under existing circumstances for them to remain here permanently, that is to say, beyond their immediate need for political asylum." The "uncertainty of this need" for refuge "requires an indefinite stay although the visas are temporary in character." The decision was an alien "temporarily absent from his homeland because of political persecution, and residing in this country for an indefinite stay by warrant of a temporary visa" could not make Florida in good faith his permanent home.

The immigration status of Mr. Lisboa is different. He does not have a temporary visa. He is an applicant for political asylum. The INS then in its discretion, by its deliberate inaction, has refused to use its enforcement powers to deport. Alfred. He is residing under color of the law, with the right to a hearing before his residency can be ended. Solis v. Department of Health and Rehabilitative Services, 546 So.2d 1073 (3rd DCA 1989).

The distinction from Juarrero is that the temporary visa holders had absolutely no ability to claim a right to be permanent in the U.S., no right to present their claim, and their presence was without color of law, and INS had not been presented with a colorable claim (presumably because there was no colorable claim then recognizable that Cuban refugees were allowed

to make), and INS had not deliberately withheld taking action on such a claim.

The Juarrero Court identified the consequence of the temporary visa status. The alien did not have the "ability legally to convert a temporary residence into a permanent one." Mr. Lisboa by contrast, does have permanent residence already by INS definition, and if successful he will convert his status through processing and hearing on his pending application, into a grant of asylum and eventually may seek citizenship. Juarrero said the temporary visa holder "cannot legally intend to do that which by law and the temporary nature of their visas they are prohibited from doing", but Mr. Lisboa is not prohibited from being processed and succeeding in his application.

A key point made in Juarrero is the discussion of who is permanent, and the use of the word "certainty". It states, a "permanent" visa holder has the "freedom and right with certainty to make and declare a bona fide intention of permanent residence", Juarrero at 81. The "certainty" involves freedom and right to make and declare intent. It is not the certainty of having established asylum. It is merely the legal ability to claim asylum. Mr. Lisboa certainly has the freedom and right to pursue his asylum application, intending all the while to be permanent. Juarrero's "nothing more than a

temporary" visa is exceeded by Mr. Lisboa's the application for asylum, and the attendant color of law status. Mr. Lisboa has the assurance that he can continue for at least the period of time INS requires to hear and determine his application. The Juarrero refugees could not even claim they could have better status, until at least the later-adopted Cuban Adjustment Act in 1966. There was no such thing as an asylum applicant from Cuba at that time.

Review of Juarrero was made in Rodriguez v. Steirheim, 465 F.Supp. 1191 (S.D. Fla. 1979). The federal court found it lacked subject matter jurisdiction over the state homestead exemption claim of aliens residing under color of law, but it also explained exactly the significance of changes since Juarrero. The court said "It now appears that there is no disability under Federal law preventing Cuban refugees from forming an intent to permanently reside which would satisfy the requirements of the Florida homestead tax exemption." And, "Further, Florida's controlling precedent as set forth in Juarrero is now of uncertain effect in light of changed circumstances and changes in the applicable federal law." Rodriguez at 1194.

An historical perspective of immigration policies since Juarrero reinforce the distinction. Castro took control of the government in Cuba on January 1, 1959. Juarrero was decided in 1963, when the prospect of a

public benefits. Public Law 104-193, See 42 U.S.C. Section 608 (e) and 8 U.S.C. Sections 1601 et seq. Congress also adopted the Immigration Reform and Immigrant Responsibility Act of 1996.

Yet Congress in all the changes, did not alter the underlying definition of who is "permanent". The changes prohibited only the entitlements the changes specify, like TANF, food stamps, or SSI benefits, not other matters. Congress did not include state homestead tax provisions in its prohibitions when it adopted PRWORA or the other reforms. Simply put, the new prohibitions on eligibility for certain public benefits are not based on an examination of permanency of residence. The prohibitions are based on Congress' goals of reducing government expenditures, and stemming the entry of immigrants who are not self-reliant and self-sufficient, as PRWORA states. Congress determined only that asylum applicants, among others, are not allowed public benefits from those certain programs identified in the new law. To say Congress eliminated welfare and SSI benefits for certain resident aliens (These "are not Constitutional rights...they are purely statutory entitlements." Ostroff v. HRS, 554 F.Supp 347 (M.D. Fla. 1983)) is irrelevant to deciding the intent of an asylum applicant to establish permanent residence. There has been no change applicable to the Solis analysis or concept of when a resident alien is permanent.

PRUCOL status is verifiable by a state agency, under a form it can send to INS, for the express purpose of determining if a person is PRUCOL. INS is equipped to help a state identify if an immigrant is "PRUCOL", as seen in the form G-845S (Defendant's Exhibit 2 at page 2, to Deposition of the expert witness, Juan Gomez, see deposition at page 26 line 15). By using this form, a state agency may obtain from INS confirmation of an alien's status, for the explicit purpose only of determining if the alien is "Permanently Residing Under Color of Law". By answering the form, INS states if it actively pursues the expulsion of an alien in this category or not at this time. Asylum applicants are PRUCOL unless and until such action is taken against then. If the Dade County Property Appraiser wishes to check on a homestead owner's statements, it can inquire to INS on a this form.

When the Property Appraiser receives an application for the homestead tax exemption, the Appraiser is to decide if the applicant "in good faith makes (Florida) his or her permanent residence." F.S. 196.031(1) "Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner... shall be exempt...upon establishment of the right thereto in the manner prescribed by law." Fla. Constit. Art. VII Sec 6. The manner is prescribed in F.S. 196.015:

> Intention to establish a permanent residence in this state is a factual determination to be made, in the first instance, by the

property appraiser. Although any one factor is not conclusive of the establishment or nonestablishment of permanent residence, the following are relevant factors that may be considered by the property appraiser in making his or her determination as to the intent of a person claiming a homestead exemption to establish a permanent residence in this state:

(1) Formal declarations of the applicant.

(2) Informal statements of the applicant.

(3) The place of employment of the applicant.

(4) The previous permanent residency by the applicant in a state other than Florida or in another country and the date non-Florida residency was terminated.

(5) The place where the applicant is registered to vote.

(6) The place of issuance of a driver's license to the applicant.

(7) The place of issuance of a license tag on any motor vehicle owned by the applicant.

(8) The address as listed on federal income tax returns filed by the applicant.

(9) The previous filing of Florida intangible tax returns by the applicant.

The manner prescribed by statute for the Property Appraiser to determine the eligibility does not even reference immigration status. The most similar provision is F.S. 196.015 (4), which only asks the country of the previous permanent residency, and when it was terminated. For Appellee, the country was Brazil, and the termination was when he applied for political asylum. Those facts should satisfy the provision. An alien residing in the United States pending his application for political asylum, can satisfy the residency requirements contained within Article VII, Section

6 of the Florida Constitution and Section 196.031(1), Florida Statutes, in order to qualify for Florida's homestead tax exemption.