IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

JOSE LISBOA,

Respondent.
_____/

CASE NO. 92,628

INITIAL BRIEF OF PETITIONER FLORIDA DEPARTMENT OF REVENUE

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

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PRELIMINARY STATEMENT

Despite good faith effort, the Petitioners were not able to file a joint brief. The Department concurs with Dade County's brief with one qualification: The Department agrees that "lawfully admitted permanent resident" (LAPR) status would entitle an otherwise qualified immigrant to obtain homestead exemption. However, it is not necessary for this Court to decide whether LAPR status is the exclusive designation which would do so. The legal ability to reside permanently in Florida, not the label used by INS, is crucial. Application for political asylum is not commensurate with such ability.

STATEMENT OF THE CASE AND FACTS

Respondent (Lisboa) is a Brazilian who entered this country in 1991. (R1:14) (R1:140, Plaintiff's Exhibit 1)[1] He applied for political asylum in late 1993, claiming he feared persecution for his homosexuality if he returned to Brazil. (R1:145-147, Plaintiff's Exhibit 1) Apparently, the application is still pending.

Lisboa's passport and visa were attached to the deposition of Juan Gomez, after being identified by him as Plaintiff's Exhibit 3. (R1: 85 [depo. p. 5] at line 11, 161-165) The passport bears issuance and expiration dates of November 20, 1990 and November 19,

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[1]Cites to the record will be in the form (R[vol. #]:[page #]).

1996; respectively. (R1:161) The visa bears an issuance date of November 27, 1990; and is valid for multiple entries until November 27, 1994. (R1:164)

In 1994, Lisboa purchased a condominium in Miami, and resided there. (R1:14-15) He twice applied for homestead exemption, in March and August of 1995. Both applications were denied by the property appraiser. Upon a hearing in March 1996, the Value Adjustment Board for Dade County upheld the latter denial. (R1:15)

Lisboa sued. In the resultant hearing (in Feb., 1997), it was not disputed that he was "PRUCOL"; that is, "permanently residing under color of [federal] law." (R2:274[trans. p. 3, lines 19-23]). Relying on Juarrero v. McNayr, 157 So.2d 79 (Fla. 1963) and two decisions by the Third District, the trial court denied his motion for summary judgment. (R2:264) The parties stipulated to entry of summary final judgment based on that denial. (R2:260-3, 293-4)

Appeal was taken to the Third District. After oral argument, the parties entered a stipulation concerning the "source and definition" of the term PRUCOL (R295-8). The parties agreed that PRUCOL is employed by some state and federal statutes in determining "eligibility for certain public assistance benefits." (R_:295 at par. 2)

The Third District reversed, essentially holding that PRUCOL, as applied to an asylum applicant, was tantamount to a permanent residency as contemplated by §196.012(17) and (18), Florida

Statutes. (slip op., p. 4-5) It declined to follow Juarrero, observing that "immigration policies of the United States have changed considerably." *Id.*, p. 7.

The lower court rejected the argument that permanency of residence as to eligibility for welfare benefits is different from "permanent resident" under Florida law as to eligibility for the homestead tax exemption. *Id.*, p. 8. It then certified this question:

> 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?

Id., p. 9.

The decision below was rendered February 16, 1998. Petitioners filed their notice to invoke this Court's discretionary jurisdiction on March 11.

SUMMARY OF THE ARGUMENT

Lisboa came to this country under a temporary visa and passport. Claiming fear of persecution, he applied for asylum. Due to a backlog of applications in the INS, the application has been pending since late 1993.

Since his asylum application is pending, Lisboa cannot legally be a permanent resident of Florida, regardless of his desire to stay here indefinitely. It matters not that he was--at the time he sought homestead exemption--deemed to be "permanently residing

under color of [federal] law" (PRUCOL), for the limited purpose of receiving some federal welfare benefits. Immigration law treats Lisboa as a temporary resident of the United States.

Despite Lisboa's legal inability to claim permanent residency, the Third District found him eligible for homestead exemption. It equated the quasi-permanency of PRUCOL--now rescinded--with the permanence necessary to claim homestead exemption. In so doing, it interpreted the homestead tax exemption broadly instead of narrowly, and failed to follow controlling precedent established by this Court's decision in Juarrero v. McNayr, 157 So. 2d 79 (Fla. 1963).

The certified question must be answered negatively. The Third District's decision must be reversed.

ARGUMENT

ISSUE

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? *[certified question]*

A. The *Juarrero* Decision Is Controlling

An alien residing in the United States pending his application for political asylum cannot satisfy the Florida's permanency requirements, and thus cannot qualify for homestead exemption. To avoid this result under Florida law, the Third District relied on federal immigration policy, and failed to follow Juarrero v. McNayr, 157 So.2d 79 (Fla. 1963). Apparently alluding to the deposition of Juan Gomez (R1:80-165), the court concluded:

> Based on the testimony of the expert witness presented below, it is clear that the immigration policies of the United States have changed considerably since Juarrero was decided.

(slip op., p. 7) No more is said. The pertinent parts of such testimony are not cited or described. No federal statutes, administrative regulations, Congressional proceedings, or national studies are cited. Nevertheless, the court relied on these undescribed policy changes to conclude Juarrero's designation, if determined today, would be PRUCOL; and thus tantamount to a "permanent resident" of Florida. *Id.*

As will be detailed below, as of mid 1996 new federal immigration statutes effectively rescinded PRUCOL as a category of immigrants eligible for welfare. Thus, while "immigration policies of the United States " have indeed changed over the years, such change favors denial of state tax exemptions to asylum applicants. Otherwise, immigration policies, such as promptness of INS action of asylum applications, have no bearing on whether an alien can legally intend to be a permanent resident of Florida. What matters is an asylum applicant's legal inability to remain in this country--that is, the legal inability to convert an indefinite "visit" into a permanent home.

Factually, this case is indistinguishable from Juarrero. Lisboa entered this country on a visa which expired in four years, despite allowing unlimited re-entries. His passport expired in six years. Neither document indicated he was being allowed to immigrate permanently to the U.S. Lisboa applied for asylum about two years after his arrival. His application was pending when he applied for homestead exemption, and apparently still is.

By comparison, the Juarrero's sought "refuge" here to escape the political hostility of the Cuban government. They held nonimmigrant visas which allowed unlimited admissions, but expired after a few years, in 1963. About a month after their arrival, they obtained permission from immigration authorities to stay here indefinitely. Nevertheless, they were not given permanent visas.

See 157 So.2d at 80. Their temporary visas did not give them authority to remain in the U.S. permanently; but only indefinitely, as long as their need for asylum remained. *Id.* Under these facts, this Court held them ineligible for homestead exemption, as they did "not have the ability to convert a temporary residence into a permanent home." *Id.* at 81.

Similarly, Lisboa does not have the ability to convert his temporary residence into a permanent home. First, his visa and passport have long since expired. He would have to return to Brazil but for the pendency of his asylum application. Second, he has applied for asylum, not necessarily permanent residency. Like the Juarrero's, the "uncertainty of this need [for asylum] requires an indefinite stay." *Id.* at 80. Nevertheless, as the Juarrero holding makes clear, Lisboa cannot bootstrap his need for an indefinite stay into a legally permanent residency.

Even if he were granted asylum, Lisboa would not have the right to remain here forever. His residency here would be permitted only so long as his need for asylum remained.[2] *See* 8 U.S.C. §1158(c)(2) ("Asylum granted under subsection (b) of this section does not convey a right to remain permanently in the United

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[2]Under 8 U.S.C. §1225(b) an alien may seek asylum under fear of persecution. Such fear must be shown to be "credible" as defined by 8 U.S.C. §1225(b)(1)(B)(v), which cross-references the asylum provisions of §1158 ("For purposes of this subparagraph, the term "credible fear of persecution" means ... the alien could establish eligibility for asylum under section 1158 of this title." [e.s.]).

States[.]"). Consequently, the grant of asylum, however indefinite in duration, is not the same as permission to reside here permanently. If the grant of asylum does not confer permanent U.S. residency, Florida certainly is not required to extend the homestead tax exemption to an alien who has merely applied for asylum.

To avoid following Juarrero, the Third District made a factual assumption absolutely contradicted by the record:

> [I]t is clear that the immigration policies of the United States have changed considerably since *Juarrero* was decided. Most significant is the fact that Mr. Juarrero's visa today would not be of a temporary nature. Indeed, like Mr. Lisboa, Juarrero's status would be that of one "permanently residing under color of law.'' Consequently, we do not find that our decision today is in conflict with *Juarrero*. [e.s.]

(slip op., p. 7-8)

Thus, the court attached greatest significance to its assumption that Juarrero's visa would not be temporary if issued today, and that the Juarrero's would be PRUCOL. That assumption is directly contradicted by the record, and by federal law (*see* n. 5 herein). Lisboa's passport and visa were attached to the deposition of Juan Gomez as Plaintiff's Exhibit 3. (R1:161-165) The passport bears issuance and expiration dates of November 20, 1990 and November 19, 1996; respectively. (R1:161) The visa bears an issuance date of November 27, 1990; and is valid for multiple entries only until November 27, 1994. (R1:164) Thus, it is

undisputed that Lisboa's passport and visa were of limited duration; as were the visas in Juarrero and Alcime (discussed below). That Lisboa's visa was temporary implies the Juarrero's passports and visas, if issued today, would be also.

Alternatively, the court below misapprehended a significant factual difference between the Juarrero's and Lisboa--the fact that the Juarrero's were Cuban. As Cubans, the Juarrero's would have special status today.[3] As a Brazilian, Lisboa would not enjoy the special status.

The decision below also cannot be squared with Alcime v. Bystrom, 451 So.2d 1037 (Fla. 3d DCA 1984), the Third District's own precedent twenty-one years more recent than Juarrero. There, an alien who had resided in the United States for over twenty years; resided in Florida for ten years; and been employed in local government for over six years was held ineligible for homestead exemption because he was without a permanent visa. Alcime relied on Juarrero and Matter of Cooke, 412 So.2d 340 (Fla.1982) (foreign citizen visiting Florida as tourist who did not hold permanent visa cannot be a permanent resident of this state and thus cannot place

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[3]*See* 8 U.S.C. §1641(b)(7) (declaring "an alien who is a Cuban or Haitian entrant" as a "qualified alien" for purposes of welfare eligibility); and §501(e) of the Refugee Education Assistance Act of 1980 [8 U.S.C. §1522] (defining "Cuban and Haitian entrant" to include individuals, among others, granted "any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti"; and to include such nationals who have asylum applications pending).

residence owned in state beyond reach of creditors under homestead exemption from forced sale). These cases answer the only question which need be answered here: an applicant for asylum cannot be a permanent resident.

Cooke has greater significance than might be realized at first blush. It effectively affirmed the continuing vitality of Juarrero, as it also placed controlling importance on the lack of a permanent visa. Cooke, however, is 19 years more recent. Therefore, the law established by Juarrero is not so dated as the opinion below would imply.

To avoid the controlling authority of Juarrero, the court below made an assumption--that visas in Juarrero would not be temporary today--directly contradicted by the record, and attached "most" significance to that assumption. Since the assumption is clearly erroneous, the court's logic--and its conclusion--must fail. Juarrero is controlling. Lisboa is not legally eligible for the homestead exemption privilege.

B. Equating PRUCOL With "Permanent Resident" Reaches An Erroneous Result

The court below began its analysis by quoting §§196.012(17) & (18), Florida Statutes; and concluded it "had no doubt Lisboa fully qualifies for the exemption." (slip op., p. 5) These statutes provide:

> (17) "Permanent resident" means a person who has established a permanent residence as defined in subsection (18).
>
> (18) "Permanent residence" means that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning. A person may have only one permanent residence at a time; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred. [e.s.]

The court omitted the underlined portion of subsection (18), even though it has been part of the law since at least 1993. Lisboa was, without dispute, a permanent resident of Brazil until he came here. Permanency of residence in that country must be presumed until "a change has occurred." The most reasonable reading of the underlined language is that the "change" which must be shown by residents of foreign countries is a change of legal status, to something which would allow permanent residence in the United States. Otherwise, every immigrant could claim homestead exemption when, as here, the factual desire to be a permanent resident of Florida is not disputed. The underlined language would be nullified.

Like the immigrants in Juarrero, Lisboa "made every requirement for the exemption claimed within [his] power." Juarrero, 157 So.2d at 81. The unalterable circumstance remains: Lisboa resides in the United States only temporarily, while his asylum application is pending. His visa and passport expired some time ago. According to Lisboa's own expert, the large backlog of asylum applications pending before the INS allows Lisboa to stay here and work until a decision is made on his application. (R1:84-86) It is only because of the resultant delay that INS does not either grant the application or deny it and remove Lisboa immediately. (R1:87-89) Moreover, it appears the PRUCOL designation was developed by federal agencies other than INS as a response to this backlog. Since INS cannot catch up in processing applications, immigrants awaiting asylum decisions stay here long enough to seek welfare; and are deemed "permanently residing under the color of law" for such purposes. Again, as Lisboa's expert admitted, PRUCOL "is just a category created in a way under the social service system." (R1:90, deposition. at p. 11, lines 17-18)

Some aliens have remained PRUCOL even while under deportation orders not yet enforced. *See* Gomez deposition at p. 27-8 (R1:106-7). *See also* Dept. of HRS v. Solis, 580 So.2d 146, 148 (Fla. 1991) (discussing Holley v. Lavine, 553 F.2d 845 (2d Cir.1977), *cert. denied*, 435 U.S. 947, 98 S.Ct. 1532, 55 L.Ed.2d 545 (1978); and noting that Holley, an illegal resident, was found to be PRUCOL for

purposes of obtaining benefits). PRUCOL immigrants actually awaiting deportation can hardly be deemed permanent residents of this state. The possibility of having to give homestead exemption to deportees illustrates the reasonableness of requiring more than PRUCOL status to qualify for the exemption.

Under the logic of the opinion below, whether an immigrant can legally intend to be a permanent resident of Florida no longer depends, for example, on the nature and duration of their passport and visa. Instead it depends on the ability of INS to timely process asylum applications. Because of INS's protracted delay, a quasi-permanent designation (PRUCOL)--which was never an immigration status and is no longer a basis for welfare eligibility--has been elevated to the controlling rule of law in Florida. Lisboa cannot be allowed to parlay the backlog of asylum applications and extraordinary delay by INS into permanent Florida residency. By so interpreting §196.012(18), the Third District reached an erroneous result. *See* Woodall v. Travelers Indem. Co., 699 So.2d 1361, 1363 (Fla. 1997) ("A statute should not be interpreted so as to lead to an absurd result.").

C. PRUCOL Has Been Eliminated As A Ground for Welfare Eligibility

The so-called permanency of PRUCOL simply has nothing to do with "permanent resident" as contemplated by Florida's homestead tax exemption laws. Nothing requires this state to recognize PRUCOL as tantamount to permanent residency for purposes of

claiming the exemption. *See* Smart v. Shalala, 9 F.3d 921, 923 (11th Cir. 1993) ("[Immigrant] contends that PRUCOL status is the equivalent of being lawfully admitted for permanent residence. That argument is plainly wrong.").

Even if the analogy to the PRUCOL designation was logical, it is no longer available. Both the U.S. and Florida have eliminated PRUCOL as a basis for receiving welfare benefits.

PRUCOL is not a category or status of immigrant adopted by the INS. Until it was eliminated in 1996, it was a designation afforded some immigrants for purposes of establishing their eligibility for welfare benefits. *See* Smart, 9 F.3d at 923 ("PRUCOL is a criterion for determining whether an alien is eligible for benefits under certain public welfare programs, such as Medicaid and Supplemental Security Income for the Aged, Blind and Disabled"), *citing to* 42 U.S.C. §1382c(a)(1)(B)(i), 20 C.F.R. §416.1618; 42 C.F.R. §435.408(a). *See also* Carton, S., The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits, 14 NovaL.R. 1033, 1035-6 (Sp. 1990) (""PRUCOL ... is not a category of immigration status, but rather a category for public benefits eligibility ... of shifting composition, depending on the specific program in question.").

Lisboa concedes this. At trial, his expert testified:

> [PRUCOL] is just a category created in a way under the social service system.

(R1:90, Gomez depo. at p. 11, lines 17-18) Therefore, the permanency attributed to PRUCOL is not the same as permission, received from the INS, to remain in the U.S. as a "lawfully admitted permanent resident" (LAPR). Since the federal government makes this distinction, Florida can too.

Nevertheless, the Third DCA relied heavily on Solis, to conclude Lisboa was a "permanent" resident and entitled to claim homestead exemption. (slip op., p. 5-6) Solis was premised on adoption of PRUCOL by Florida law. There, the certified question read:

> Whether an alien residing in this country pending her application for political asylum is eligible for AFDC benefits as one "permanently residing in the United States under color of law" within the meaning of section 409.026, Florida Statutes. [e.s.]

Id., 580 So.2d at 147. Had Florida law not separately adopted PRUCOL as a welfare recipient category, an alien such as Solis would not have been eligible for AFDC. *See id.* at 150 ("Therefore, we agree with the district court that Solis and her family fit within the PRUCOL language of subsection 409.026(1), and we approve that court's decision". [e.s.]).[4] In contrast, there is no PRUCOL

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[4]At the time, §409.026(1), Florida Statutes, provided:

> The department shall determine the benefits each applicant or recipient of assistance is entitled to receive under this chapter, provided that each such applicant or recipient is a resident of this state and is a citizen of the United States or is an alien lawfully admitted for permanent residence or otherwise

terminology in the homestead provisions of Florida's Constitution or the statutory implementing language.

Section 409.026 was repealed in 1996. *See* §111, ch. 96-175, Laws of Fla. (1996). That repeal was part of a massive welfare reform law designed to place limits on the duration of benefits and move welfare recipients back into the workforce. The new law expressly addressed the eligibility of aliens to receive benefits:

> (3) Eligibility for noncitizens.--A qualified noncitizen is an individual who is lawfully present in the United States as a refugee or <u>who is granted asylum</u> under ss. 207 and 208 of the Immigration and Nationality Act, an alien whose deportation is withheld under s. 243(h) of the Immigration and Nationality Act, or an alien who has been admitted as a permanent resident and meets specific criteria under federal law. .... [e.s.]

§414.095(3), Florida Statutes (Supp. 1996). Florida law no longer recognizes PRUCOL as a ground for receiving welfare. With its lynchpin repealed, <u>Solis</u> is no longer good law, and cannot be persuasive by analogy.

Equally important, U.S. immigration law forbids welfare benefits to asylum applicants generally. In 1996, Congress set forth a new policy concerning welfare and immigration. *See* Pub.L. 104-193, Title IV, §400 (effective Aug. 22, 1996); *codified* as 8 U.S.C. §1601. That policy stressed self-sufficiency; that aliens

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> <u>permanently residing in the United States under color of law</u>. [e.s.]

not depend on public resources; and that there is a "compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." Congress also enacted broad prohibitions against extending federal welfare benefits to persons who were not "qualified aliens." *See id.*, at 8 U.S.C. §§1611, 1612, 1613.

Specifically, 8 U.S.C. §1611(a) declares, with exceptions not applicable to Lisboa, an alien who is not "qualified alien" is not eligible for any federal public benefit. *See also*, §1612 (qualified aliens not eligible for certain federal programs), §1613 (qualified aliens entering U.S. after Aug. 22, 1996 not eligible for means-tested public benefits for 5 years).

A "qualified alien" is defined in 8 U.S.C. §1641(b). That definition includes seven categories of aliens, none of which declare an alien "permanently residing under the color of law" to be qualified for federal welfare benefits. To the contrary, §1641(b)(2) requires an alien to have been granted asylum to be considered "qualified." None of the other categories include asylum applicants generally.

The 1996 law eliminated PRUCOL as a ground for welfare eligibility. Whatever permanence attributed to that designation cannot, by analogy, be elevated into permanent residence for purposes of claiming homestead exemption. Moreover, the 1996 laws--obviously effective before the Third DCA's decision but well after

Lisboa sought homestead exemption in 1995--must be applied by this Court. Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986) ("An appellate court is generally required to apply the law in effect at the time of its decision.").

D. An Immigrant Must Be More Than PRUCOL To Receive Homestead Exemption

To obtain homestead exemption, an immigrant must be able to show the good-faith intent to reside in Florida permanently. This is more than showing eligibility for federal welfare benefits under the old or new immigration laws. As said above, PRUCOL--if it were still available--is not enough.

Requiring the legal ability to remain in the U.S. permanently is not arbitrary.[5] A good example is provided by the definition of LAPR:

> [t]he term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

8 U.S.C. §1101(a)(20). This is the status which Lisboa lacks. The crucial difference between this status and PRUCOL is that PRUCOL does not confer any privileges relating to residence or travel.

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[5]Requiring the legal ability to remain in the U.S. permanently is also consistent with Department of Revenue Rule 12D-7.007(3), Fla. Admin. Code (providing that a "person in this country under a temporary visa cannot meet the requirement of permanent residence or home and, therefore, cannot claim homestead exemption.").

For example, under 8 U.S.C. §1101(a)(13)(C), an alien lawfully admitted for permanent residence (LAPR) generally does not have to seek formal re-admission into this country after traveling abroad. In effect, an alien who is LAPR can travel and work much like a U.S. citizen. *See* Saxbe v. Bustos, 419 U.S. 65, 72, 95 S.Ct. 272, 277-8, 42 L.Ed.2d 231 (1974) (immigrant who is LAPR may remain in the U.S. indefinitely and work in this country; return to this country after a temporary absence abroad; and establish a permanent residence in the United States).

Once an immigrant can travel and work much the same as a U.S. citizen, and may establish a permanent residence here, that person is practically indistinguishable from any other Florida resident. It is entirely reasonable to require aliens to obtain some of the day-to-day privileges enjoyed by U.S. citizens--regardless of INS nomenclature--before treating them as permanent residents for tax purposes.

Florida administers the homestead exemption uniformly, without regard to U.S. citizenship. It does not extend the homestead tax exemption to U.S. citizens who permanently reside in other states. Owners of the classic Florida "second home" or "winter home" are not eligible for the exemption. *See* §196.012(18), Florida Statutes (declaring, within definition of "permanent residence," that a person may have only one permanent residence at a time). Nothing in federal law prohibits this practice, or the practice of denying

homestead exemption to asylum applicants. By requiring permanency of residence in this state, Florida law compelled denial of the exemption to Lisboa.

CONCLUSION

The certified question must be answered negatively, and the Third District's opinion reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **BRION BLACKWELDER**, counsel for Lisboa, Nova Southeastern Civil Law Clinic, 3305 College Avenue, Fort Lauderdale, Florida 33314; and **MELINDA THORNTON**, Assistant County Attorney, Stephen P. Clark Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128-1993; this 19th day of May, 1998.

CHARLIE MCCOY
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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1998

JOSE LISBOA,

Appellant,

vs.

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

Appellees.

CASE NO. 97-874

LOWER TRIBUNAL NO. 95-15132

Opinion filed February 11, 1998.

An Appeal from the Circuit Court for Dade County, Bernard S. Shapiro, Judge.

Sherene Persad and Pierce Rivera, Certified Legal Interns, and Brion Blackwelder, for appellant.

Robert Ginsburg and Melinda S. Thornton, for appellees.

Before FLETCHER, SHEVIN and SORONDO, JJ.

SORONDO, J.

Jose Lisboa, an applicant for political asylum, appeals the denial of his homestead tax exemption. He argues that he should be considered a permanent resident for purposes of exemption from ad valorem taxation.

Lisboa is a legal immigrant whose political asylum application is pending with the Immigration and Naturalization Service (INS). His immigration status is known as "permanently residing under the color of law" (PRUCOL). He has lived in Miami, Florida since he arrived in the United States and owns a condominium. On March 3, 1995, Lisboa applied for the homestead tax exemption. He was denied because, according to the Dade County Property Appraiser (Appraiser), he did not satisfy the permanent residence requirement necessary to qualify for homestead exemption.

The homestead tax exemption is granted by the Florida Constitution to any person who in "good faith" makes Florida their permanent state of residence. The Appraiser regards a PRUCOL as a temporary resident and therefore ineligible for the homestead exemption. However, the Appraiser considers an alien with the "lawfully admitted permanent resident" status (LAPR) to be permanent for purposes of the exemption.

PRUCOLs and LAPRs are similar in that they are both legal aliens, reside with the knowledge and permission of INS, for an indefinite period of time, and without intentions of returning to their own country. A difference between them is that a PRUCOL may not travel freely outside the United States, and it is harder for the INS to revoke a LAPR's status. The INS defines a PRUCOL's status as permanent and as a relationship of continuing nature, as opposed to temporary, even though their status may eventually be dissolved. A PRUCOL has the right to live and work in the United States while their application is pending.

In July of 1996, Lisboa filed suit against the Appraiser, requesting eligibility for the homestead tax exemption and to enjoin the Appraiser from denying exemptions based on his immigration status. Lisboa sought summary judgment, claiming that he was a permanent resident and is entitled to homestead tax exemption. The Appraiser argued that an alien must be classified as a LAPR in order to be entitled to the homestead tax exemption. The trial court denied the motion for summary judgment. Both sides stipulated that on the basis of the court's denial of summary judgment for Lisboa, no issues remained to be decided. A stipulated Summary Final Judgment in favor of the Appraiser was entered and Lisboa appeals.

Lisboa first argues that Florida's homestead tax exemption is a constitutional right and that the Appraiser's denial of his application for the exemption amounts to a denial of that right. We do not agree. In Horne v. Markham, 288 So. 2d 196 (Fla. 1973), the Florida Supreme Court stated:

> Appellant's contention that he has an absolute right to a homestead exemption is without merit. . . . Article VII, Section 6, of the Constitution of the State of Florida, . . . *does not establish an absolute right to a homestead exemption*. Rather, it clearly provides that taxpayers who otherwise qualify shall be granted an exemption only *"upon establishment of right thereto in the manner prescribed by law"*.

Id. at 199. We further find no merit to his claim that the Appraiser's decision has violated his equal protection right under the federal constitution. A preliminary step in an equal protection

analysis is the determination that others, similarly situated, were subject to disparate treatment. Johnson v. Smith, 696 F.2d 1334 (11th Cir. 1983); Battaglia v. Adams, 164 So. 2d 195 (Fla. 1964); Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Asso., Inc., 225 So. 2d 557 (Fla. 3d DCA 1969). Lisboa has not made such a claim in this case. Indeed, the record is clear that the Appraiser has taken the position that all immigrants with a PRUCOL status are ineligible for the exemption.

The central question presented in this case is whether, as a matter of Florida law, an applicant for political asylum whose application is pending as of the relevant taxing date, is a "permanent resident" for purposes of Florida's homestead exemption from ad valorem taxation. Based upon our review of Florida law, as well as the expert testimony presented below on the current status of United States immigration law, we answer this question in the affirmative.

For purposes of our analysis we begin with a discussion of the relevant state and federal statutes. The ad valorem exemption of the Florida Constitution is implemented within Chapter 196, Florida Statutes. The exemption privilege itself is set forth in section 196.031(1), Florida Statutes. In pertinent part it reads:

> Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent residence . . . is entitled to an exemption . . .

Section 196.012(17) and (18), Florida Statutes, define the terms

"permanent resident" and "permanent residence" in pertinent parts, as follows:

> (17) "Permanent resident" means a person who has established a permanent residence as defined in subsection (18).
>
> (18) "Permanent residence" means that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning.

Under this definition, we have no doubt that Lisboa fully qualifies for the exemption. It is clear, however, that the parties felt that United States immigration laws have an impact on the definition of permanent residency where an alien seeks the benefit of exemption from ad valorem taxation. We therefore include in our analysis a review of the applicable federal statute.

For purposes of federal immigration law, the term "permanent" is defined at 8 U.S.C. § 1101(31) as follows:

> 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.

Although different, it is clear that the federal definition of "permanent" is as permissive, if not more so, than the state definition of "permanent resident."

In Department of Health and Rehabilitative Services v. Solis, 580 So. 2d 146 (Fla. 1991), the Florida Supreme Court held that an

alien residing in the United States pending her application for political asylum was eligible for AFDC benefits as one "permanently residing in the United States under color of law" within the meaning of section 409.026, Florida Statutes. In analyzing the word "permanent," the Court distinguished it from the word "temporary" as used in federal statutes. The Court stated:

> Unlike the word "permanent," Congress has not defined the word "temporary." "Temporary" and "temporarily," however, are used in 8 U.S.C. Sec. 1101(a)(15) in reference to students, tourists, business visitors, and specific workers. As stated in the dissent to Sudomir:[1] "The common characteristics of all these temporary relationships is that they exist for a defined purpose with a defined end, and there is never any intention of abandoning the country of origin as home."

Solis at 149 (footnote added). Lisboa is seeking asylum in this country and has no intention of returning to Brazil. As the Supreme Court noted in Solis, "an asylum applicant is present in [this country] with ***no*** defined end or defined purpose as set out by Congress regarding temporary aliens." Id. (emphasis added). As in Solis, "the status of [Lisboa] will not change until [he] chooses to leave this country or INS acts on the application for asylum." Id. Accordingly, like Mrs. Solis, we find that Mr. Lisboa fits more appropriately within the definition of "permanent."

The Appraiser first argues that this court is compelled to affirm the lower court's ruling by the Florida Supreme Court's

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[1]Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985).

decision in Juarrero v. McNayr, 157 So. 2d 79 (Fla. 1963), and our own decision in Alcime v. Bystrom, 451 So. 2d 1037 (Fla. 3d DCA 1984). A review of those decisions is necessary.

In Juarrero, the Court articulated the controlling question in the case as follows:

> Can 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, make Florida in good faith his permanent home?

Id. at 80. In that case the alien was a Cuban refugee who had applied for political asylum. As in this case, Juarrero had applied for and been denied the homestead ad valorem tax exemption provided by the Florida Constitution. The Court held that because Juarrero was in this country on a "temporary" visa he could not "legally, rightfully or in good faith make or declare an intention which he has no assurance he can fulfill or carry out because of the temporary nature of the visa." Id. at 81. Based on the testimony of the expert witness presented below, it is clear that the immigration policies of the United States have changed considerably since Juarrero was decided. Most significant is the fact that Mr. Juarrero's visa today would not be of a temporary nature. Indeed, like Mr. Lisboa, Juarrero's status would be that of one "permanently residing under color of law." Consequently, we do not find that our decision today is in conflict with Juarrero. Likewise, in Alcime, we held that because Mr. Alcime was an alien

without a permanent visa he was ineligible for a homestead exemption from ad valorem taxes. As has been discussed above, in the present case Mr. Lisboa has a "permanent" status. The fact that his status can be "dissolved eventually at the instance either of the United States or of the individual" does not detract from its permanency. 8 U.S.C. § 1101(31).

The Appraiser further argues that the cases relied upon by Lisboa all deal with eligibility for a variety of social service programs which require the recipient to be permanently residing in the United States under color of law.[2] This reasoning, the argument goes, should not be applied to homestead exemption benefits, which, like all tax exemptions, should be strictly construed. We disagree with this argument for two reasons. First, we believe the reasoning of Solis, as set forth above, requires this result. Second, it seems unjust to us that an alien who by misfortune finds himself or herself in need of government assistance, should be designated a "permanent resident" and thereby eligible for social service benefits, while another alien who is self-supporting and a tax-paying resident of this country should be deemed to be less than "permanent" for tax-exemption benefits.

Because of the potential impact of this decision, we certify

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[2]See Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947 (1978); see also Department of Health and Rehabilitative Services v. Solis, 580 So. 2d 146, 148 n.3 (Fla. 1991)(cases cited therein).

the following question to the Florida Supreme Court as one of great public importance:

> 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 final summary judgment entered on behalf of the Appraiser is reversed. This case is remanded with instructions to enter a final summary judgment in favor of Lisboa.

IN THE CIRCUIT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT, MIAMI, FLORIDA

JOSE LISBOA, Appellant v. DADE COUNTY PROPERTY APPRAISER, DADE COUNTY TAX COLLECTOR, and FLORIDA DEPARTMENT OF REVENUE, Appellees.	)	Case No.: 97-00874

SUPPLEMENTAL (POST-ORAL ARGUMENT) CLARIFICATION
BY STIPULATION OF THE PARTIES

The parties, through their undersigned counsel and in order to assist the Court in its deliberations, submit the following stipulation to supplement and clarify an issue raised during oral argument; to wit: the source and definition of the term "PRUCOL":

1. Congress defines the word "permanent" at 8 U.S.C. sec. 1101(1)(31) (1982), the Immigration and Nationality Act:

> 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.

The Act does not describe or expressly define the term "PRUCOL".

2. The term "PRUCOL" refers to "permanently residing under color of law". It is found in state and federal regulations and statutes that consider immigration status for the purpose of determining eligibility for certain public assistance benefits. For example, a regulation which considers and explains PRUCOL status is 20 CFR part 416.1615 (1996) where the Social Security Administration stated:

> We will consider you to be permanently residing in the United States under color of law and you may be eligible for SSI benefits if you are an alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and that agency does not contemplate enforcing your departure....

Similarly by way of example, a state statute, Section 409.026, Fla.Stat. (1987) on food stamps addressed entitlement with respect to "...aliens lawfully admitted for permanent residence or otherwise permanently residing under color of law."

3. The Immigration and Naturalization Service ("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". This is the only involvement of INS with the "PRUCOL" determination. A copy of the form is part of the record, and is attached hereto as Appendix A.

Respectfully submitted this 19 day of August, 1997:

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