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IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,628

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

Petitioners,

v.

JOSE LISBOA,

Respondent.
_________________________________/

INITIAL BRIEF ON THE MERITS
OF PETITIONERS DADE COUNTY PROPERTY APPRAISER
AND DADE COUNTY TAX COLLECTOR

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

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INTRODUCTION AND STATEMENT OF THE ISSUE

In this Initial Brief on the Merits, Petitioners Dade County Property Appraiser and Dade County Tax Collector will be referred to as "Petitioners." Respondent Jose Lisboa will be referred to as "Lisboa."

For ease of reference, the following will apply for purposes of this Brief. "INS" refers to the United States Immigration and Naturalization Service. "Alien" refers to "any person not a citizen or natural of the United States." 8 U.S.C. Section 1101(a)(3), the Immigration and Naturalization Act. "LAPR" refers to "lawfully admitted for permanent residence," defined in 8 U.S.C. Section 1101(a)(20) as ". . . the status of having been lawfully accorded the privilege of residing permanently in the United States. . . ." "Asylum" refers to the status granted by INS to an alien pursuant to 8 U.S.C. Section 1158. "Qualified Alien" refers to specific categories of aliens who are deemed eligible to apply for certain public benefits. 8 U.S.C. Section 1641(b).

"PRUCOL," which is neither a term denoting any status granted by INS nor any status otherwise defined in the Immigration & Naturalization Act, refers to "permanently residing under color of law" and describes a former criterion for alien eligibility for certain federal and state welfare benefits. The "Gomez Deposition" refers to the deposition of Respondent's expert witness, Juan Carlos Gomez, Esquire.

The Record on Appeal will be referred to as (R[Vol. #]:[page #]). All references to Petitioners' Appendix shall be noted as (App.-[page #]). All emphasis is supplied by counsel for Petitioners unless otherwise indicated.

The issue before this Court is:

> (Certified 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?

STATEMENT OF THE CASE AND OF THE FACTS

Factual Background

Respondent Jose Lisboa is a Brazilian national who last entered the United States on February 1, 1993 pursuant to a non-immigrant visa issued on November 27, 1990. (R.1:164). Lisboa's visa expired on November 27, 1994 (R.1:164); his passport expired on November 19, 1996. (R.1:161). Lisboa has lived in Florida since his February, 1993 entry.

On or about November 28, 1993, Lisboa filed with INS an application for political asylum. (R.1:140-144). Attached to said "Request for Asylum in the United States" is his statement setting forth the reasons for his seeking asylum, to wit: fear of persecution in Brazil because of his homosexuality. (R.1:145-156). To the best of Petitioners' knowledge, Lisboa's asylum application is still pending.

In 1994, Lisboa purchased a condominium in Miami, Florida. This property is his abode. As the parties stipulated before the trial court, Lisboa applied to the Dade County Property Appraiser for homestead exemption for ad valorem tax year 1994. The Property Appraiser denied said application based on his inability to show "permanent residence" as required by Florida law.

Lisboa petitioned the Value Adjustment Board for a review of said denial. A hearing was held on March 14, 1996, before the Value Adjustment Board Special Master. The Special Master recommended that the Property Appraiser's denial be upheld. (R.1:6-11).

Procedural Background

In July, 1996, Lisboa brought suit in circuit court against Petitioners. Specifically, Lisboa sought to enjoin the Property Appraiser from denying his application for homestead exemption based on his immigration status.

Lisboa moved for entry of summary judgment in his favor. A hearing was held on February 3, 1997, at which time the trial judge denied said Motion on the authority of this Court's decision in Juarrero v. McNayr, 157 So.2d 79 (Fla. 1963) and the Third District Court of Appeal's decisions in Alcime v. Bystrom, 451 So.2d 1037 (Fla. 3d DCA 1984) and Liphete v. Steirheim, 455 So.2d 1348 (Fla. 3d DCA 1984). An Order reflecting said ruling and a Summary Final Judgment were entered on February 21, 1997. (R.2:264, 293-294).

Lisboa appealed the trial court's ruling to the Third District Court of Appeal. He argued that his "PRUCOL" status entitled him to the homestead exemption and that the Property Appraiser's denial violated his constitutional right to equal protection of the law. Oral argument took place on August 1, 1997. Subsequent thereto, the parties filed a Supplemental (Post-Oral Argument) Clarification by Stipulation of Parties (R.2:295-298) to clarify that the term "PRUCOL" is not a term or status defined or contained within the Immigration and Naturalization Act.

On February 11, 1998, the Third District opined that there is no constitutional right to a homestead tax

exemption and that the Property Appraiser's consistent denials of such exemptions to PRUCOL aliens do not violate equal protection. However, the Third District did reverse the lower court, holding that Lisboa's immigration status as an asylum applicant constituted permanent residency for purposes of entitlement to the homestead exemption. (App.1-9). The Third District also certified the following question to this 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?

On March 11, 1998, Petitioners filed their Joint Notice to Invoke Discretionary Review. (App.10-11).

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SUMMARY OF ARGUMENT

The Third District ruled that Jose Lisboa, a political asylum applicant, can satisfy Florida's statutory requirement of good faith permanent residence for purposes of entitlement to homestead tax exemption. In so ruling, the lower court failed to follow the clear dictates of this Court's decision in Juarrero v. McNayr, 157 So.2d 79 (Fla. 1963). Juarrero, under circumstances that are for the purposes of the issue before this Court virtually identical, held that an alien who has not been granted the immigration status of a permanent resident cannot, as a matter of law, show the requisite good faith intent to establish a permanent residence in this state.

Lisboa is in the United States with the permission of the federal government while the INS decides his future immigration status. Will he be granted political asylum? If asylum is granted, what will be the conditions? Will he later be able to adjust his status to that of a "lawfully admitted permanent resident" (LAPR)? These decisions as to his future in the United States are not his to make.

By contrast, a person who has been granted the immigration status of a LAPR is entitled to remain in the United States so long as he does not choose to leave, or otherwise place himself in a position where the status could be revoked. A person with LAPR status can make his own decision as to his future in the United States.

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Tax exemption statutes must be strictly construed. Therefore, so long as Florida's homestead exemption laws require good faith permanent residence as a prerequisite to entitlement to homestead exemption, only LAPR status can satisfy the requirement, for the reasons set forth by this Court in Juarrero.

The Third District mistakenly equated Lisboa's permission to reside in the United States during the pendency of his political asylum application with LAPR status. While this Court's analysis in Department of Health and Rehabilitative Services v. Solis, 580 So.2d 146 (Fla. 1991) would result in Lisboa being considered PRUCOL ("permanently residing under color of law"), said designation has no bearing on the permanency of his immigration status. PRUCOL is not an INS designation. PRUCOL is merely a recognition that the federal government is allowing an alien to remain in the United States pending consideration as to his final status. The only significance of being considered PRUCOL is possible eligibility to receive certain public assistance benefits. Moreover, in light of recent changes to federal and state welfare laws, PRUCOL status per se is no longer recognized as such an eligibility criterion.

The Third District's error in equating LAPR status with PRUCOL status was compounded when it analyzed homestead exemption statutes on the basis on case law dealing with a now-repealed public benefits statute. The eligibility

standards are different; the public policies furthered by the statutes are unrelated. Just as changing public policy considerations have led to revisions by the legislative branches of the federal and state governments with respect to public assistance laws, so, too, should it be left to this state's legislature to deal with eligibility for homestead tax exemptions.

Recognizing the "potential impact" of its decision, the Third District certified to this Court the question of whether an applicant for political asylum can satisfy the homestead laws' requirement of good faith permanent residence. This Court's decision in Juarrero mandates that the question be answered in the negative.

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ARGUMENT

AN ALIEN RESIDING IN THE UNITED STATES PENDING HIS APPLICATION FOR POLITICAL ASYLUM CANNOT 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 EXEMPTION.

Article VII, Section 6, Florida Constitution, which establishes Florida's ad valorem homestead exemption, is implemented within Chapter 196, Florida Statutes. The terms of the exemption privilege are set forth in Section 196.031(1), Florida Statutes, in pertinent part as follows:

> (1) 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. . . .

As the Third District below correctly noted, no person has a constitutional right to a homestead exemption. Rather, as held in Horne v. Markham, 288 So.2d 196, 199 (Fla. 1973), a taxpayer can only establish his right to the exemption "'in the manner prescribed by law.'" Article VII, Section 6(a), Florida Constitution.

I. Florida's Homestead Exemption Laws Require that Permanent Residence Be Established In Good Faith.

Section 196.015, Florida Statutes, lists individual factors that may be considered by a property appraiser in determining whether a "permanent residence" has been established. These factors are insignificant, however, unless the dispositive threshold criterion of good faith exists.

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To that end, Sections 196.012(17) and (18), Florida Statutes, which define "permanent resident" and "permanent residence" must be read in pari materia with the "good faith" requirement of Section 196.031(1), Florida Statutes. These sections 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.[1]

These exemption statutes must be strictly construed. The court in Schooley v. Judd, 149 So.2d 587, 589 (Fla. 2d DCA 1963) cautioned that even though a "liberal and beneficent spirit" motivated the passage of the homestead exemption,

> . . . the rule is well established in Florida and elsewhere that where the benefits of an exemption from taxation are claimed, then the constitution or statute in question must be construed strictly against the one attempting to bring himself within the terms of the exemption. This does not mean that where an exemption is claimed in good faith the provision of the law under which the claimant attempts to bring

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1 The Third District's opinion omitted reference to the second, and very relevant, sentence in Section 196.012(18), Florida Statutes.

> himself is to be subjected to a strained and unnatural construction as to defeat the plain and evident intendments thereof; but it does mean that the person claiming the exemption has the burden of proving that he is within the usual and obvious meaning of the constitutional and statutory provision which establishes the exemption. 149 So.2d at 590 (citation omitted).

The rule of strict construction of tax exemption statutes is grounded in public policy. This Court emphasized in Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corporation, 355 So.2d 1202, 1205 (Fla. 1978), that increased exemptions place " . . . a greater portion of the tax burden upon other classes of property." Such a result flies in the face of "[t]he fundamental principles of our democratic system [which] mandate that every taxpayer contribute his fair share to the tax revenues." Id. at 1204.

Not only did the Third District below ignore the well-established principles of statutory construction of tax exemption statutes, the Court expressly -- and erroneously -- dismissed them as irrelevant. This Court must reaffirm these principles to ensure consistent and fair application of the homestead exemption laws.

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A. The test for whether an alien in good faith can make Florida his permanent residence for homestead exemption purposes is set forth in this Court's Juarrero v. McNayr decision; the Third District erred in not following Juarrero.

But for Lisboa's pending application for political asylum, he has no authority to remain in the United States. His visa has expired; he has no ability to seek permanent resident status from INS without his application for political asylum first being granted. Because he has no control over whether, or how long, or under what conditions he will be allowed to remain in this country, he cannot legally form the intent necessary to establish permanent residence as required by Florida's homestead exemption laws.

The Court, in Juarrero v. McNayr, 157 So.2d 79 (Fla. 1963) decided that political refugees who have not been accorded permanent status by INS cannot establish good faith, permanent residence in Florida for purposes of entitlement to the homestead tax exemption. The immigration nomenclature has changed since 1963, but it is clear (especially if one substitutes the phrase "application for political asylum" for the phrase "temporary visa") that the taxpayer in Juarrero was in the same position as Lisboa.[2]

The Juarrero taxpayer sought refuge in Florida from a politically hostile government. The United States

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[2] It could be argued that the Juarrero family was in a better position, for immigration purposes, than Lisboa. The Juarreros did have visas. Lisboa's visa has expired.

government granted the Juarrero family permission to stay in this country indefinitely, albeit pursuant to a visa described as "temporary." The Court framed the issue before it 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?

157 So.2d at 80.

Despite the recognition that the taxpayer had "made every requirement for the exemption claimed within [his] power," Id. at 81, the Juarrero Court held that the requisite "good faith" showing of permanent residence could not be made. The Court stated that the entitlement to exemption does not exist

> . . . in the case of a citizen and former resident of a foreign country who is here under the authority of nothing more than a temporary visa, because such person has no assurance that he can continue to reside in good faith for any fixed period of time in this country. Consequently, we hold he cannot "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. In other words, he does not have the legal ability to determine for himself his future status and does not have the ability legally to convert a temporary residence into a permanent home.

Id. at 81.

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The Third District has followed Juarrero in Alcime v. Bystrom, 451 So.2d 1037 (Fla. 3d DCA 1984). In Alcime, the court held that the requisite good faith could not be shown by the taxpayer, an alien without a permanent visa,

> [n]otwithstanding the fact that [he] has resided in the United States for over twenty years, has resided in the State of Florida for ten years, and has been employed in local government for over six years. . . ."

451 So.2d at 1037. See also, Liphete v. Steirheim, 455 So.2d 1348 (Fla. 3d DCA 1984), affirmed on the authority of Alcime, and Matter of Cooke, 412 So.2d 340 (Fla. 1982), where this Court adopted the Juarrero rationale in denying a bankrupt Canadian citizen living in the United States, but only possessing a tourist visa, the ability to declare his home as homestead for purposes of Florida's constitutional protection from forced sale. The Cooke Court stated, with respect to its analysis of Article X, Section 4, Florida Constitution:

> . . . we state that Cooke may not place the residence owned by him in this state beyond the reach of creditors under the Florida homestead exemption because, at the time he petitioned for bankruptcy, he could not legally formulate the requisite intent to make that residence his family's permanent place of residence.

412 So.2d at 343.

The Third District in Lisboa wrongly and superficially distinguished the Juarrero case from its decision by focusing on the nomenclature attributed at the time of the

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respective decisions to each taxpayer's status, to wit: Juarrero had a "temporary visa"; Lisboa is a political asylum applicant. In making this distinction, the lower court overlooked the reality that Lisboa is -- and Juarrero was -- in the same position with respect to their immigration status. Neither could be deemed an alien with permanent status accorded by INS.

At the time that Juarrero and Lisboa applied for their homestead exemptions, each still lived in the United States without " . . . assurance that he can continue to reside in good faith for any fixed period of time in the country." Juarrero at 81. Therefore, Lisboa cannot meet the Juarrero homestead exemption test of good faith permanent residence in that INS' determination as to his final status is pending.

B. The Third District erred in equating good faith permanent residence for homestead exemption purposes with simple eligibility for public assistance benefits.

The Juarrero test requires an alien to show that he has been recognized by the INS as a "lawfully admitted permanent resident" (LAPR). LAPR is a specific INS status, defined in 8 U.S.C. § 1101(20) as follows:

> (20) The 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.

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It has long been recognized that this official status carries important privileges:

> He may remain in the United States indefinitely; he is free to work in this country; he may return to his country after a temporary absence abroad; and he has the privilege of establishing a permanent residence in the United States.

Saxbe v. Bustos, 419 U.S. 65, 72, 95 S.Ct. 272, 277, 42 L.Ed.2d 231 (1974).

Significantly, even if Lisboa's application for political asylum were granted, his status still would not rise to that of LAPR. See 8 U.S.C. Section 108(c)(2), entitled Termination of Asylum, which reads, "Asylum granted under subsection (b) of this Section does not convey a right to remain permanently in the United States. . . ." As noted in Joudah v. Ohio Dept. of Human Services, 641 N.E.2d 288, 289 (Ohio App. 9 Dist. 1994), the INS has taken the position that "'[a]fter asylum is granted, they wait one year before adjusting [their status] to lawful permanent residence.'"

The necessity that LAPR status be granted conforms to the homestead law definition of "permanent residence," found in Section 196.012(18), Florida Statutes. This section, cited again in pertinent part, reads:

> . . . 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.

The only reasonable, consistent way to overcome the presumption of foreign residence in the homestead law is to

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show that INS has affirmatively changed the alien's status to that of a LAPR. See, also Rule 12D-7.007(3), Fla. Administrative Code, in which the Department of Revenue implements Section 196.012(18), Florida Statutes, by stating that "[a] person in the country under a temporary visa cannot meet the requirement of permanent residence or home and, therefore, cannot claim homestead exemption." Again, INS nomenclature has changed, but the significance remains the same -- nothing short of INS status as a LAPR meets Florida's statutory intention with respect to an alien's entitlement to homestead exemption.

The Third District below, however, in reliance on this Court's decision in Department of Health & Rehabilitative Service v. Solis, 580 So.2d 146 (Fla. 1991), a public assistance case construing a now-repealed AFDC statute, found it sufficient that Lisboa is considered to be "permanently residing under color of law" ("PRUCOL"). Being considered PRUCOL entitled him to certain benefits under welfare statutes in effect at the time he applied for homestead exemption. The court mistakenly assumed, though, that PRUCOL was Lisboa's "immigration status," and that " . . . INS defines a PRUCOL's status as permanent. . . ." Lisboa at 705.

PRUCOL is not an immigration status. As noted in the parties' Supplemental (Post-Oral Argument) Clarification by Stipulation of the Parties (R.2:295), "The [Immigration and Naturalization] Act does not describe or expressly define

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the term "'PRUCOL.'" See also Carlon, S., The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits, 14 Nova.L.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.").[3] Even Lisboa's expert witness, in the Gomez Deposition, acknowledged that, " . . .[PRUCOL] is just a category created in a way under the social service system." (R.:90). The court in Berger v. Heckler, 771 F.2d 1556, 1571 (2d Cir. 1985) discussed that the phrase "permanently residing in the United States under color of law," as it is used in certain benefits statutes,

> . . . is designed to be adaptable and to be interpreted over time in accordance with experience, developments in the law, and the like. In this sense the phrase is organic and fluid, rather than prescriptive or formulaic.

LAPR and PRUCOL do not connote the same status, the Third District's analysis notwithstanding. The federal Eleventh Circuit Court of Appeals, in Smart v. Shalala, 9 F.3d 921, 923 (11th Cir. 1993), expressly rejected as "plainly wrong" a PRUCOL alien's argument that " . . .

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3 As discussed in the above-referenced article, the types of programs which in the past extended benefits eligibility to PRUCOL aliens include Aid to Families with Dependent Children (AFDC), unemployment insurance compensation, Supplemental Security Income (SSI) and Medicaid. Medicare and Food Stamp programs traditionally have not included PRUCOL aliens in their eligibility criteria.

PRUCOL status is the equivalent of being lawfully admitted for permanent residence."

The fallacy of equating PRUCOL recognition with LAPR status is best illustrated by the Solis ruling. In Solis, this Court adopted a liberal interpretation of when an alien can be considered PRUCOL. This liberal interpretation is set forth in Holley v. Lavine, 553 F.2d 845 (2d Cir. 1997), cert. denied, 435 U.S. 947, 98 S.Ct. 1532, 55 L.Ed.2d 545 (1978), which held that an alien could reside "under color of law" even where the only official INS "action" was its "discretionary refusal to enforce its power to deport. . . ." Solis at 148. See also Cruz v. Commissioner of Public Welfare, 478 N.E.2d 1262 (Mass. 1985), which, in discussing the Holley case, makes it clear that INS acquiescence, even in the face of unlawful presence, is tantamount to residence "under color of law" for purposes of those benefit programs encompassing PRUCOL status.

The AFDC statute in effect at the time of the Solis decision, Section 409.026(1), Florida Statutes, expansively extended benefits not only to " . . . aliens lawfully admitted for permanent residence . . ." but also to aliens " . . . otherwise permanently residing within the United States under color of law."[4]

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[4] Section 409.026, Florida Statutes, was repealed in 1996. Section 111, ch. 96-175, Laws of Florida (1996). This repeal resulted from a massive reform of welfare laws, originating in Congress, which, for the first time restricted alien eligibility to certain federal and state *(Footnote continued)*

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By contrast, Florida's homestead exemption laws have traditionally restricted eligibility to those showing good faith permanent residence. The more restrictive nature of tax exemption eligibility is consistent with the public policy discussed in Cedars of minimizing the burden placed on those members of the tax-paying community who do not receive exemptions.

It is not possible to reconcile this Court's Juarrero discussion of the good faith permanent residence requirement with the Third District's finding that PRUCOL aliens -- which group could include persons who could be deported but are allowed to remain by virtue of mere INS acquiescence -- are the permanent residents to which Florida intends to extend homestead exemption benefits. The "permanency" attributed to PRUCOL status is not the true permanency attributed to INS' decision to adjust an alien's status to that of a LAPR.

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benefits as part of federal immigration policy. See 8 U.S.C. Section 1601. As a result of this action, benefits are restricted to aliens defined as "qualified aliens" pursuant to 8 U.S.C. Section 1641(6). Asylum applicants (contrasted with asylees whose applications have been granted) are not considered "qualified aliens." Likewise, Florida's new welfare law provides in Section 414.095(3), Florida Statutes (Supp. 1996) a "noncitizen" qualified and eligible for benefits is " . . . an individual who is lawfully present in the United States as a refugee or who is granted asylum under ss. 207 and 208 of the Immigration and Naturalization Act, an alien whose deportation is withheld under s. 243(h) of the Immigration and Naturalization Act, or an alien who has been admitted as a permanent resident and meets specific criteria under federal law. PRUCOL recognition is no longer a ground in Florida for welfare benefits eligibility.

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II. THIS COURT, AND THE PROPERTY APPRAISERS IN THIS STATE, MUST APPLY FLORIDA'S HOMESTEAD EXEMPTION LAWS AS THEY ARE WRITTEN.

The Third District in Lisboa erroneously declined to follow the requirement that it strictly construe the applicable homestead exemption laws ". . . for two reasons." 705 So.2d at 708. The first reason was the Court's mistaken reliance on the reasoning in Solis. The second reason was the Court's perception that it seemed "unjust" to extend government assistance more liberally than tax exemption benefits.

There is nothing inherently unfair in restricting eligibility for relief from ad valorem taxation on a portion of a home's assessed value. In fact, as noted above, this Court in Cedars discussed the need for viewing tax exemptions narrowly. However, to the extent that public policy considerations may at any point dictate a need to more liberally grant tax relief, it is for the legislative branch of government to effectuate same.

United States Supreme Court Justice Benjamin Cardozo, in referring to the duty to exercise judicial restraint, wrote:

> We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it. Anderson v. Wilson, 289 U.S. 22, 27, 53 S.Ct. 417, 420, 77 L.Ed. 1004 (1933).

Florida courts echo Justice Cardozo's sentiments. See State v. Swope, 30 So.2d 748 (Fla. 1947) (courts do not

function to legislate), and In re Estate of Horner, 188 So.2d 386 (Fla. 3d DCA 1966) (court must accept statute as written).

Robbins v. Summit Apts., Ltd., 586 So.2d 1068 (Fla. 3d DCA), review denied, 592 So.2d 682 (Fla. 1991), exemplifies the role of a court when faced with tax legislation which mandates a particular result. In Summit Apts., the district court was asked to find that the fair market value of a rent-controlled, HUD-regulated apartment complex should reflect the restrictions which limited the income derived from the property. The court rejected the argument, holding that Section 193.011, Florida Statutes, as previously interpreted, requires utilization of all statutory criteria in determining the valuation of income producing policy. The court pointed out that ". . . even if a policy reason exists for reducing the valuation on HUD-regulated properties, this Court is required to follow the controlling decisions of the Florida Supreme Court." 586 So.2d at 1070.

Florida's homestead exemption laws require proof of permanent residence in "good faith" and, with respect to an alien, presume permanent residence in a foreign country unless a showing is made that a change in status has occurred. The Juarrero decision correctly construed these laws. The Third District in Lisboa erred in not reaching the result mandated by Juarrero.

CONCLUSION AND REQUEST FOR RELIEF

Florida's homestead exemption laws reasonably require that all property owners -- citizens and aliens alike -- establish good faith permanent residence before receiving homestead tax exemption. Only aliens who have been lawfully admitted by INS for permanent residence can establish, as a matter of law, such good faith permanent residence. Applicants for political asylum cannot show such lawful admittance. The Third District erred in holding otherwise.

For the reasons discussed herein, Petitioners request that this Court:

1. answer the Third District's certified question in the negative and

2. reverse the decision of the Third District.

Respectfully submitted,

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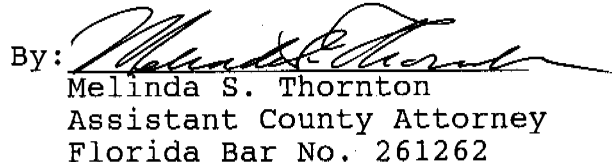
By: 

Melinda S. Thornton
Assistant County Attorney
Florida Bar No. 261262

Counsel for Dade County Property Appraiser & Tax Collector

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioners was this 15 day of May, 1998, mailed to: Brion Blackwelder, Counsel for Respondent Jose Lisboa, Nova Southeastern Civil Law Clinic, 3305 College Avenue, Fort Lauderdale, Florida 33314, and to Joseph C. Mellichamp, III, Senior Assistant Attorney General, Counsel for Department of Revenue, Office of the Attorney General, The Capitol, Room LL04, Tallahassee, Florida 32399-1050.

Assistant County Attorney

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TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF

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Dade County Attorney

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1998

JOSE LISBOA, **

Appellant, **

vs. ** CASE NO. 97-874

DADE COUNTY PROPERTY APPRAISER, DADE COUNTY TAX COLLECTOR, and FLORIDA DEPARTMENT OF REVENUE, ** LOWER TRIBUNAL NO. 95-15132

Appellees. ** ** **

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 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.

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

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 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

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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).

is reversed. This case is remanded with instructions to enter a final summary judgment in favor of Lisboa.

DISTRICT COURT OF APPEAL
THIRD DISTRICT

CASE NO. 97-00874

JOSE LISBOA,

Appellant/Respondent,

LOWER TRIBUNAL
CASE NO. 96-15132

vs.

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

Appellees/Petitioners.
_______________________________/

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APPEAL-THIRD DISTRICT

JOINT NOTICE TO INVOKE DISCRETIONARY REVIEW

Appellees/Petitioners, the Dade County Property Appraiser, the Dade County Tax Collector and the Florida Department of Revenue, by and through undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv) and Florida Rules of Appellate Procedure 9.030(a)(2)(A)(v), hereby invoke the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court, rendered in the above-styled appeal on February 11, 1998, and for grounds would state:

1. This Court's decision in the instant appeal expressly and directly conflicts on the same question of law with the Florida Supreme Court decision in Juarrero v. NcNayr, 157 So.2d 79 (Fla. 1963).

2. Further, this Court has certified the following question as being 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?

Slip opinion, at page 9.

3. A true and correct copy of the Court's decision in the above-styled appeal is attached.

Respectfully submitted,

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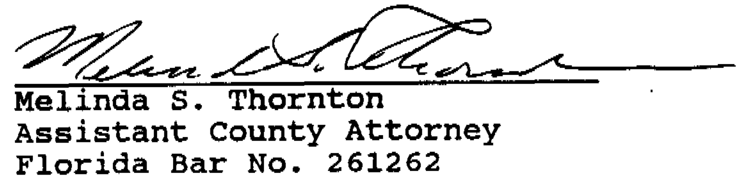

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Brion Blackwelder, Esquire, Counsel for Appellant/Respondent Jose Lisboa, Nova Southeastern Law Clinic, 3305 College Avenue, Ft. Lauderdale, Florida 33314, this 11 day of March, 1998.

Assistant County Attorney