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.

REPLY 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

In this Reply Brief on the Merits, Petitioners Miami-Dade County Property Appraiser and Miami-Dade County Tax Collector will be referred to alternatively as "Petitioners" or "Property Appraiser." Respondent Jose Lisboa will be referred to as "Lisboa." Amicus Florida Immigrant Advocacy Center, Inc. will be referred to as "FIAC."

For ease of reference, the following will apply for purpose of this Reply 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. "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.

All emphasis is supplied by counsel for Petitioners unless otherwise indicated.

Petitioners herein agree with Petitioner Florida Department of Revenue that FIAC lacks standing to seek the

relief sought in its Amicus Curiae Brief. Petitioners adopt the Department of Revenue's argument with respect to standing.

SUMMARY OF REPLY

Ad valorem tax exemption laws are uniquely a creation of a state's legislative process. They are construed narrowly and strictly by the state's courts, and deference is paid such constructions by federal courts, which recognize the sanctity of a state's fiscal policies.

Lisboa and FIAC, as well as the Third District below, are wrong in their attempts to achieve a result--the granting of homestead exemptions for political asylum applicants--by analogizing the homestead exemption laws to statutes and cases in other contexts. Tax exemption "good faith" requirements are considered threshold issues for consideration, and are determinative as a matter of substantive law.

The "good faith permanent residence" required by the homestead exemption statutes is more than the mere "domicile" that courts have found sufficient for aliens without LAPR status to obtain divorces, preferential tuition rates, public assistance, etc. Likewise, PRUCOL status is not the same as being a "lawfully admitted permanent resident," just as it is not the same as being a "good faith permanent resident."

As held by this Court in Juarrero v. McNayr, 157 So.2d 79 (Fla. 1963), unless the taxpayer has the legal ability to decide for himself his future in this country, he cannot make the requisite showing of "good faith permanent residence." The Juarrero test is particularly appropriate given the presumption

of foreign residence contained in Section 196.012(18), Florida Statutes. This presumption can be overcome only by a showing of change; the taxpayer's intent that there be such change is not sufficient.

Under the current statutory framework, only LAPR status is sufficient to show "good faith permanent residence." The Juarrero holding, which is consistent with the necessity of showing LAPR status, ensures consistent application of the homestead exemption laws. If the result of construing the homestead exemption laws as they are written is felt to be undesirable, the remedy must be found in Florida's legislature.

This Court's decision in Juarrero mandates that the Third District's certified question of whether an applicant for political asylum can satisfy the homestead exemption law's requirement of good faith permanent residence be answered in the negative.

ARGUMENT

LISBOA IS A POLITICAL ASYLUM APPLICANT WHO DOES NOT HAVE THE LEGAL ABILITY TO DETERMINE FOR HIMSELF HIS FUTURE STATUS; THEREFORE, PURSUANT TO JUARRERO, HE CANNOT MAKE THE SHOWING OF GOOD FAITH PERMANENT RESIDENCE REQUIRED BY FLORIDA'S HOMESTEAD EXEMPTION LAWS

This Court, in Juarrero v. McNayr, 157 So.2d 79, 81 (Fla. 1963), succinctly and accurately described the dilemma faced by a person either awaiting final action on his immigration status or otherwise present in the United States on a basis considered temporary:

> . . . he does not have the legal ability to determine for himself his future status[1] and does not have the ability legally to convert a temporary residence into a permanent home.

In the absence of such "legal ability to determine for himself his future status," this Court went on to hold that

> He cannot 'legally,' 'rightfully' or in 'good faith' make or declare an intention which he has no assurance he can fulfill. . . . 157 So.2d at 81.

Lisboa wrongly argues that distinctions between Juarrero's and his situations can be based on durational considerations, i.e., what "permanent" versus "temporary" signify in terms of the length of time a person can be in this country without achieving LAPR status. Too many extraneous factors cloud a durational focus. For instance, of what significance is the fact that the INS backlog in processing political asylum applications has resulted in Lisboa's uncertain status?

Rather, the clear point of Juarrero, as applicable to Lisboa, is that a person cannot have the "legal ability to determine for himself his future status" as long as there has been no finality to the INS decision-making process. The granting of LAPR status does bring closure to the process and allows the immigrant to then hold his fate in his own hands.

I. Florida's Homestead Exemption Laws Cannot Be Construed By Analogy To Laws In Other Contexts.

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[1] A political asylum applicant, such as Lisboa, is in a particularly uncertain position. As noted in 11 U.S.C. Section 1158, even a person already granted asylum does not, as a matter of federal law, possess any ". . . right to remain permanently in the United States."

A. "Good Faith" requirements in ad valorem tax laws are to be narrowly construed.

FIAC asserts that nothing in federal statutory law or state common law prohibits Lisboa from forming the necessary intent to establish Florida as his residence. What FIAC neglects to analyze, though, is whether the homestead exemption laws themselves mandate the conclusion that Lisboa cannot show good faith permanent residence.[2]

This Court in Forsythe v. Longboat Key Beach Erosion Control District, 604 So.2d 452, 455 (Fla. 1992), noted the principle of statutory construction that " . . . all parts of a statute must be read together in order to achieve a consistent whole." To that end, the pertinent sections of the following homestead exemption laws must be analyzed in pari materia:

> Section 196.031(1), Florida Statutes
>
> Every person who, on January 1, has the legal title or beneficial title in equity to real property in this sate and who resides thereon and in good faith makes the same his or her permanent residence . . . is entitled to an exemption. . . .
>
> Section 196.012, Florida Statutes
>
> (17) "Permanent resident" means person who has established a permanent residence as defined in subsection (18)

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[2] The unique position of a state's tax laws has been specially recognized by Congress in the passage of the Tax Injunction Act, 28 U.S.C. Section 1341, which prohibits taxpayers from using federal courts to litigate state tax matters, in recognition of the state's need to administer its own fiscal policies. Rosewall v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464, reh'g denied, 451 U.S. 1011, 101 S.Ct. 2349, 68 L.Ed.2d 864 (1981). See also State v. Gay, 46 So.2d 165 (Fla. 1950).

> (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.

With respect to "permanent residence" for homestead exemption purposes, subjective intent is not enough. The statute itself contains a presumption of foreign residence absent the showing of a change. Since an application for political asylum does not in and of itself evidence any decision by INS, the mere fact of the application does not overcome the presumption.

Moreover, the homestead exemption laws go one step further in requiring that the permanent residence be "in good faith." Section 196.031(1), Florida Statutes. The "good faith" requirement in ad valorem statutes has a significance of its own.

"Good faith," for ad valorem tax purposes, is not evidenced merely by the intent of the taxpayer. Juarrero clearly illustrates this point, as does Robbins v. Yusem, 559 So.2d 1185 (Fla. 3d DCA), rev. denied, 569 So.2d 1282 (Fla. 1990). Property Appraiser cites Yusem not because the facts are in any way similar, but because the decision illustrates that determinations of "good faith" compliance with ad valorem tax statutes are threshold determinations, made before other

statutory factors are considered.[3] See also Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274, 285 (1972), where the United States Supreme Court, in striking a durational residence requirement with respect to voting privileges, stated, "[w]e emphasize again the difference between bona fide residence requirements and durational residence requirements."

The narrow, strict construction of tax exemption statutes is grounded in public policy. This Court's Justice Overton, specially concurring in Redford v. Department of Revenue, 478 So.2d 808, 812 (Fla. 1985), said it best when he made the following point:

> Because a given amount of tax revenue is needed to operate the government, it should be recognized that one person's tax exemption will become another person's tax. (emphasized in the original)

See also the discussion in Property Appraiser's Initial Brief of Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corporation, 355 So.2d 1202 (Fla. 1978) and Schooley v. Judd,

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[3] Yusem dealt with entitlement to agricultural classification of land, which is akin to a tax exemption. St. Petersburg Kennel Club, Inc. v. Smith, 662 So.2d 1270 (Fla. 2d DCA 1995). Section 193.461(3), Florida Statutes, requires a determination as to whether commercial agricultural use is "bona fide." The court held that, where actual agricultural use in fact existed, there was no entitlement to the classification where the use violated local zoning laws. The "bona fide" determination superceded consideration of the other use factors listed in Section 193.461. Likewise, here, the Section 196.031(1) "bona fide" determination with respect to permanent residence supercedes the consideration of other residency factors listed in Section 196.015.

149 So.2d 587 (Fla. 2d), rev'd on other grounds, Judd v. Schooley, 158 So.2d 514 (Fla. 1963).[4]

B. "Domicile" and "Bona Fide Permanent Residence" are not the same for ad valorem tax purposes.

Property Appraiser strongly disagrees with FIAC's argument that a showing of "domicile" is sufficient to satisfy the homestead exemption laws' "good faith permanent residence" requirement. In support of its argument, FIAC relies on the United States Supreme Court's decision in Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 1338(1978). While the Court held that nothing in federal law precluded aliens holding nonimmigrant visas from possessing the legal ability to change domicile, it also noted that state law would be dispositive as to the issue of whether domicile requirements for in-state college tuition could be met.

Analysis of Florida law proves FIAC's reliance on Elkins to be misplaced. This Court has noted the difference between mere "domicile" and the more narrowly defined "residence." As noted in Brown v. Brown, 123 So.2d 382, 383 (Fla. 1960),

> Perhaps the clearest way to point out this technical distinction is by the proof required to establish each item. The domicile involves the intent of an individual. The residence is a matter of objective fact.

The Brown Court recognized the fluid nature of the concept of domicile when it cited Minick v. Minick, 111 Fla. 469, 149 So. 483, 487 (Fla. 1933):

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[4] Property Appraiser inadvertently omitted the full citation to Schooley v. Judd, in his Initial Brief.

> 'Perhaps the interpretation of no words used in legal phraseology has given the courts of this country more labor and difficulty, and has resulted in a greater variety of judicial opinion, than the interpretation of the words 'domicile' and 'residence.' Undoubtedly, much of the apparent variety and inconsistency in the decisions is due to the fact that the words 'residence' and 'residence,' and 'nonresident,' as well as the word 'domicile,' are evidently used in a different sense in some statutes from that in which they are used in other statutes relating to different subjects.'

See also Melian v. Immigration and Naturalization Service, 987 F.2d 1521, 1524-25 (11th Cir. 1993), where the court discussed the divergence in the case law across the nation as to whether the Immigration and Naturalization Act's reference to "lawful domicile" is ". . . simply a synonym for 'permanent residence.'"

Significantly, Florida courts, in dealing with domicile issues have specifically distinguished Juarrero from their holdings. This Court in Judd v. Schooley, 158 So.2d 514 (Fla. 1963), discussed whether a married woman who had established a residence separate from her husband could receive a homestead exemption. In ruling that the exemption could be granted, this Court was careful to point out

> We have not overlooked our recent opinion in Juarrero et ux. V. McNayr et al., Fla., 157 So.2d 79. There we simply held that an alien living in Florida under a temporary visa could not obtain the benefits of homestead exemption because it was legally impossible for him to claim the property as his "permanent home." The distinction is that in the instant case we have held that it is legally possible for a married woman, in good faith, to claim a permanent home in Florida property even

> though her husband is legally domiciled elsewhere. Whether "good faith" is proven is a matter to be decided in each case. Here the only question was whether proof of necessity was an essential element of proof of "good faith."

See also Perez v. Perez, 164 So.2d 561 (Fla. 3d DCA 1964), where the court, in allowing a Cuban refugee to be considered domiciled in Florida for purposes of obtaining a divorce, found the case before it distinguishable from Juarrero.

Therefore, it is neither helpful nor instructive for FIAC to analogize case law from other jurisdictions and in other contexts to Florida's homestead exemption laws which so carefully define " permanent residence," especially where it concerns a person from a "foreign state."

II. PRUCOL Status Is Not The Same As Bona Fide Permanent Residence.

Lisboa's contention to the contrary, this Court's holding in Department of Health and Rehabilitative Services v. Solis, 580 So.2d 146 (Fla. 1991), did not answer the question of who is a permanent resident for homestead exemption purposes. All Solis did was establish who can be considered PRUCOL for purposes of public assistance.

Not even the statute in effect at the time of the Solis decision equated permanent resident status with PRUCOL status.[5] The Solis Court was not deciding whether "lawfully

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[5] The former Section 409.026(1), Florida Statutes, extended certain welfare benefits to individuals ". . . 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 permanently residing in the United States under color of law."

admitted for permanent residence" was the same as "otherwise permanently residing . . . under color of law." Rather, the Solis Court was deciding whether to interpret the PRUCOL language liberally or narrowly. It is well-established that LAPR and PRUCOL do not connote the same status. Smart v. Shalala, 9 F.3d 921 (11th Cir. 1993).

The fallacy of adopting Lisboa's (and the Third District's) view of PRUCOL as it relates to permanent residence for homestead exemption purposes is exemplified by a case cited by Lisboa in his Answer Brief, Alfred v. Florida Department of Labor and Employment Security, 487 So.2d 355 (Fla. 3d DCA 1986). The Third District in Alfred followed the liberal view of PRUCOL and found that "excludable" and "deportable" aliens could qualify for state unemployment benefits until such time as INS conducted deportation hearings or otherwise affirmatively changed their status. As analyzed in Alfred and Solis, PRUCOL determinations under statutes authorizing benefits for aliens with such status operate under a presumption that is the opposite of the presumption of foreign residence contained in Section 196.012(18), Florida Statutes (". . . 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 statutory contexts of eligibility for public assistance and for entitlement to tax exemptions are based on unrelated public policies. Therefore, Lisboa is wrong when he asserts that the determination as to an alien's status should

not change from one context to the next ". . . because those who make use of it in a state are in different agencies." See Lisboa Answer Brief, p. 10.

III. Juarrero Correctly Interprets Florida's Homestead Exemption Laws.

A. The Juarrero decision is still good law.

Lisboa and FIAC both point out that the federal district court in Rodriguez v. Steirheim, 465 F. Supp. 1191 (S.D. Fla. 1979), questioned the continued viability of Juarrero in light of the Elkins v. Moreno decision and changes in immigration law. The context of the court's dicta, however, was the granting of the property appraiser's motion to dismiss a class action filed by aliens without LAPR status who claimed that denial of their homestead exemption applications violated federal law. The court recognized that state law, not federal law, would be determinative of the issue.

Subsequent to the Rodriguez opinion, this Court continued to recognize Juarrero as controlling precedent in Matter of Cooke, 412 So.2d 340 (Fla. 1982). The Third District likewise maintained its reliance on Juarrero in Liphete v. Steirheim, 455 So. 2d 1348 (Fla. 3d DCA 1984) and Alcime v. Bystrom, 451 So.2d 1037 (Fla. 3d DCA 1984).

B. Application of the Juarrero test assures consistent application of the homestead exemption laws as they currently exist.

The Juarrero test is applied by asking the following question: Does the alien applying for homestead exemption have the ability legally to determine for himself his future status?

If the alien enjoys LAPR status, the answer is clearly "yes."[6] If the alien is in a temporary classification or is awaiting INS action--of any kind--with respect to his status, the answer is clearly "no."

Florida's homestead exemption laws, with their requirement of "bona fide" residence and their presumption of foreign residence in the absence of a showing of a change, require narrow construction. If public sentiment or policy considerations have changed over the years, the appropriate forum for revision is the Florida legislative. As aptly noted by Iowa's Supreme Court in Wisconsin Evangelical Lutheran Synod v. Regis, 197 N.W.2d 353, 357 (Iowa 1972), a case discussing interpretation of a charitable exemption property tax statute,

> This area of our law involves complex and sensitive questions of public tax policy. It requires the study, review, and fine-tuning of the legislative branch of government rather than the tedious and piecemeal construction of this court.

Implementation of ad valorem tax laws should be based solely within the context in which tax laws have been construed, not confused with considerations of ever-changing immigration and public assistance policies. Until, and unless, revisions are made to the homestead exemption laws, the Juarrero test is the appropriate way to ensure that property

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[6] As the federal Eleventh Circuit in Melian v. Immigration and Naturalization Service, id., wrestled with various interpretations of "domicile" versus "residence," it noted that one situation could clearly be answered: "It is undisputed that an alien who has obtained immigrant status may lawfully intend to remain in this country." 987 F.2d at 1525, ftnt. 7.

appraisers across this state can consistently apply the laws as written.

CONCLUSION

As discussed in the Initial Brief and this Reply Brief, only aliens who have been lawfully admitted by INS for permanent residence can:

(a) establish, as a matter of law, good faith permanent residence as required in Section 196.03(1), Florida Statutes, and

(b) overcome the presumption of foreign residence contained in Section 196.012(18), Florida Statutes.

The Third District erred in holding otherwise. This Court's decision in Juarrero mandates that

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

2. the Third District's decision be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners was this 24 day of July, 1998, mailed to: **Brion Blackwelder, Counsel for Respondent Jose Lisboa**, Nova Southeastern Civil Law Clinic, 3305 College Avenue, Fort Lauderdale, Florida 33314, 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, and to **Vincente A. Tomé, Counsel for Amicus Curiae**, 3000 Biscayne Boulevard, Suite 400, Miami, Florida 33137.

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