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JUL 24 1998
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

CASE NO. 92,628

v.

JOSE LISBOA,

Respondent.

REPLY BRIEF OF PETITIONER
FLORIDA DEPARTMENT OF REVENUE

On Discretionary Review of a Certified Question
from the District Court of Appeal
Third District of Florida

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PRELIMINARY STATEMENT

The Department hereby adopts the designations and abbreviations used in its Initial Brief. This reply brief has two parts. The first responds to Lisboa's Answer Brief; the second, to the Amicus Brief filed by the Florida Immigrant Advocacy Center ("FIAC").

SUMMARY OF THE ARGUMENT

This Court's decision in Juarrero v. McNayr, 157 So. 2d 79 (Fla. 1963), is still controlling law. In Juarrero, this Court set the standard by which one can determine an individual's capacity to form a good faith intent to permanently reside in Florida. Under constitutional and statutory provisions not challenged by Lisboa, homestead exemption is limited to persons who can, in good faith, legally and factually form the intent to remain in Florida permanently. Under federal and Florida law, Lisboa cannot in good faith, legally and factually, form the intent to remain in Florida permanently. He was properly denied homestead exemption.

Lisboa's Answer Brief offers no fact or law which would sustain the decision below. He merely disagrees with the public policy of requiring permanency of residence to obtain homestead exemption, as it applies to asylum applicants.

Amicus for Lisboa, FIAC, does not have standing to inject a new issue -- domicile -- not raised by Lisboa. Similarly, FIAC cannot seek relief for all aliens (including illegal aliens), who are not asylum applicants. FIAC analogizes to inapplicable

domicile cases which do not involve homestead exemption.

FIAC must seek its remedy before the Florida Legislature, and not in this Court. The certified question should be answered in the negative, and the Third District's decision reversed.

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 TAX EXEMPTION.

PART ONE: REPLY TO LISBOA'S ANSWER BRIEF

This Court's decision in Juarrero v. McNayr, 157 So. 2d 79 (Fla. 1963), is still controlling law. In Juarrero, this Court set the standard by which one can determine an individual's capacity to form a good faith intent to permanently reside in Florida.

Lisboa relies on the Department of Health and Rehabilitative Services v. Solis, 580 So. 2d 146 (Fla. 1991)(Solis). See, Initial Brief, at 15-16. However, the underlying statutory definition at issue in Solis was repealed by Chapter 96-175, Section 111, Laws of Florida. That repeal was part of a massive welfare reform law designed to place limits on the duration of benefits and to move welfare recipients back into the work force. The welfare reform law, contained in Section 414.095(3), Florida Statutes, (Supp. 1996), expressly addresses the eligibility of aliens to receive benefits. Florida law no longer recognizes "permanently residing

under the color of law," (PRUCOL), as a ground for receiving welfare benefits.[1] Thus, Solis, is no longer viable and is not applicable to the instant case.

Lisboa's argument that the Immigration and Naturalization Service's, (INS), failure to act on a pending asylum application somehow transforms that application into PRUCOL, has no basis in fact or law. The mere fact that Lisboa has an asylum application pending with the INS has nothing to do with his ability to ability to reside in the United States permanently. Under federal law, even the granting of an asylum application does not, of itself, impart permanent residency in the United States. See, Initial Brief, at 7-8. A successful applicant for asylum must still apply for permanent status; that is, one must still meet the requirements of a "lawfully admitted permanent resident" (LAPR), as defined under 8 U.S.C. Section 1101(a)(20).

Lisboa claims greater permanency as "[h]e does not have a temporary visa. He is an applicant for asylum." Answer Brief, at 7. Lisboa entered this country in 1991, on a temporary visa which expired in November 1994. (R1:164) Lisboa waited until late 1993 to apply for asylum. Only INS's delay in acting on his application permitted Lisboa to stay in this country at all. It would appear that Lisboa is trying to parlay inaction on his

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[1]See, Sharon F. Carton, The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits, 14 Nova Law Rev. 1033, 1035 (Spr. 1990)(PRUCOL is the designations of those aliens who are permanently residing in the United States under the color of law; it is **not** a category of **immigration status**, but rather a category for **public benefits eligibility**.)

application by INS into a greater status than he had when he entered this country. Lisboa concedes as much, urging that his color of law status "can continue for at least the period of time INS requires to hear and determine his application." Answer Brief, at 8-9.

Lisboa's desire to permanently reside in Florida is irrelevant, because one cannot -- as long as one's asylum application is pending -- legally be a permanent resident of the United States. That absolute legal barrier cannot be overcome by one's reliance on now non-existent PRUCOL status. Because Lisboa cannot legally be a permanent resident of the this country, he cannot legally form the good faith intent to be a permanent Florida resident, and cannot be eligible for homestead exemption.

PART TWO: REPLY TO FIAC's AMICUS BRIEF

As amicus, FIAC does not have standing to raise the issues in the Amicus Brief. FIAC's argument is easy to summarize: neither federal nor Florida law precludes an asylum applicant from establishing domicile in Florida. Therefore, an immigrant establishing domicile has simultaneously established the intent to reside here permanently, and is eligible to claim homestead exemption. Upon such argument, FIAC requests this Court hold that "aliens can establish domicile" and that "aliens, including illegal aliens, can establish domicile." [e.s.] Amicus Brief, at 14 and 19).

Lisboa is an asylum applicant. Whether Lisboa can legally form the good faith intent to be a permanent Florida resident and thus obtain homestead exemption is before this Court. Whether other classifications of immigrants -- such as refugees and illegal aliens -- can legally form the good faith intent to be a permanent Florida resident and thus obtain homestead exemption **is not** before this Court. This is not a class action in which Lisboa is the representative. He would lack standing to request relief on behalf of others who are dissimilar and not before the Court.

Since Lisboa lacks standing to seek relief as to immigrants other than himself (an asylum applicant), the FIAC -- as an amicus on his behalf -- also lacks standing to do so. See, Acton v. Ft. Lauderdale Hosp., 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982), aff'd, 440 So. 2d 1282 (Fla. 1983); Keating v. State ex rel. Ausebel, 157 So. 2d 567 (Fla. 1st DCA 1963).

In addition to seeking relief on behalf of aliens unlike Lisboa, FIAC injects a new and unnecessary issue into this case: whether certain immigrants can establish domicile in Florida. "Domicile" is irrelevant to this case.

The Department maintains that federal immigration law bars Lisboa from forming the intent to reside in this country permanently, and, thus, he cannot in good faith claim he is a permanent Florida resident. Absent such permanency, under immigration law, Lisboa is barred by Florida statutory law implementing the homestead exemption contained in Article VII,

Section 6, Florida Constitution. However analogous his facts are to facts establishing domicile for other purposes, Lisboa cannot overcome federal and Florida statutory criteria to eligibility for homestead exemption.

As an advocate group, it is not surprising that FIAC would seek to inject issues into this case that would result in a broad holding, which would be in the interest of FIAC. FIAC does not even limit itself to legal immigrants, but would extend this issue before this Court to illegal aliens. It is without serious debate that illegal aliens cannot legally form the good faith intent to be a permanent Florida resident. In addition to its lack of standing, FIAC injects an unnecessary issue not presented by the parties. This Court should disregard FIAC's entire amicus brief.

I. A. The Florida Law Of Domicile

The opening section of the Amicus Brief sets forth an irrelevant synopsis of Florida law of domicile. While it appears Lisboa desires to reside in Florida permanently, his legal inability to reside in this country permanently bars him from forming the good-faith intent to reside in Florida permanently. INS inaction (or acquiescence) cannot factually, or legally, be the basis for permanence under Florida law for ad valorem tax purposes.

B. "Permanent Residence" Is Not Synonymous With "Domicile" When An Asylum Applicant Seeks Homestead Exemption

FIAC would equate Lisboa's factual desire to establish "permanent residence" in Florida with "domicile" for homestead

exemption purposes. FIAC analogizes to a variety of cases not involving immigrants, such as a voting rights case. Lisboa, who is not a United States citizen, seeks the benefit of a privilege; that is, a partial exemption from real property taxes. Such exemption does not implicate rights under the United States Constitution. Florida does not extend this benefit even to United States citizens who permanently reside in other states. See, e.g., Rubin v. Glaser, 416 A.2d 382 (N.J. 1980), appeal dismissed, 449 U.S. 997 (1980). FIAC's analogy fails.

Under Section 196.012(18), Florida Statutes (1997), 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 a change has occurred." Lisboa was a permanent resident of Brazil, a fact established by the temporary nature of his visa and passport, when he entered this country and eventually applied for asylum. Legally, he is still -- for homestead exemption purposes -- a permanent resident of that country. He will continue to be so until INS acts favorably upon his asylum application. FIAC's attempt to equate domicile and permanent residence simply ignores the mandate of Section 196.012(18), Florida Statutes (1997).

II. A. Domicile As A Mixed Question Of Federal And State Law and B. Asylum Applicant's Intent To Reside In Florida Permanently

FIAC urges that Lisboa's intent to establish domicile is not

precluded under federal immigration law. There are two errors in this argument. First, it equates Lisboa's factual desire to remain in Florida with his legal ability to do so; despite the fact his presence in this country results from mere pendency of his asylum application, which has not been acted upon by the INS. Second, it assumes, by erroneous analogy to Elkins v. Moreno, 435 U.S. 647 (1978), that federal immigration law creates the legal ability to establish domicile by asylum applicants such as Lisboa.

The first error has been discussed above. The second error stems from FIAC's apparent misunderstanding of federal statutory law. As noted in the Initial Brief, at 7-8, even the grant of asylum does not confer permanent admission to the United States. See, 8 U.S.C. Section 1158(c)(2)("Asylum granted under subsection (b) of this section does not convey a right to remain permanently in the United States[.]"). Consequently, the grant of asylum, however indefinite in duration, is not the same as permission to reside here permanently. If the actual grant of asylum does not confer permanent United States residency, mere pendency of an application cannot impart the legal ability to reside permanently in any particular state.

Elkins held that federal immigration law did not bar the children of certain non-immigrant aliens (i.e., officers or employees of international organizations) from claiming domicile in a particular state. Id., 435 U.S. at 663-668. Elkins has nothing to do with whether an asylum applicant -- whose visa and passport

expired years ago, and who would thus be an illegal immigrant but for the pendency of an asylum application -- can establish domicile.

As illustrated by the Elkins decision, which eventually deferred to Maryland law, nothing in federal immigration law requires Florida to treat Lisboa's pending application as tantamount to the ability to reside in this state permanently. Pursuant to Section 196.012(18), Florida Statutes, the Florida Legislature has defined the phrase "permanent residence" as follows:

> "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.

Lisboa cannot satisfy this definition and therefore is not eligible for homestead exemption.

Federal law declares that a grant of asylum does not confer the right to remain here permanently. Furthermore, the pendency of an asylum application does not confer such right. If Lisboa cannot legally remain in this country permanently, he cannot -- as a matter of federal law -- establish good faith intent to reside permanently in any particular state.

Throughout the last part of its brief, FIAC alludes to the laws of other states. At no time does FIAC quote other state law

substantively similar to Section 196.012(18), Florida Statutes, or show such law was at issue in cases from other states. However, the fact that other states might extend homestead exemption to an applicant for political asylum is irrelevant to the issue of whether Florida law extends its homestead exemption to such applicants. Florida law does not extend its homestead exemption to such applicants.

C. **Florida Law of Domicile Is Not Dispositive**

In part II. C. of its Amicus Brief, FIAC overlooks the fact that Florida law of domicile is irrelevant in this tax exemption case. "Domicile" is a broader body of law than residency for purposes of homestead exemption. An immigrant's legal ability to form good-faith intent for homestead exemption purposes is controlled by the law specific to immigration and homestead exemption.

Juarrero v. McNayr, 157 So. 2d 79 (Fla. 1963) and Alcime v. Bystrom, 451 So. 2d 1037 (Fla. 3d DCA 1984), do not support FIAC's reliance on domicile case law. Neither of these decisions was concerned with domicile, despite the fact that Juarrero had been in this country several years, and had obviously purchased a home. The Alcime facts were much different. Alcime was a six-year government employee who had resided in Florida for ten years, and resided in this country for twenty years. See Initial Brief at 9. Even though he had resided in this country for over twenty years and in Florida for ten years; and was employed in local government

for over six years, the Third District (through strict construction of the statute and reliance on Juarrero) held that Alcime was ineligible for homestead exemption.

On pages 11-13 of its Amicus Brief, FIAC urges Juarrero is not controlling, as it is "visa category case" not applicable to an asylum applicant. Juarrero is controlling in the instant case. In Juarrero, this Court established a test that can easily be administered at the local level to determine if an applicant can, in good faith, legally and factually form he intent to remain in Florida permanently:

> [W]e 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., 157 So.2d at 81. An applicant meeting this test would qualify for homestead exemption.

FIAC next relies on Perez v. Perez, 164 So. 2d 561 (Fla. 3d DCA 1964), and Nicolas v. Nicolas, 444 So. 2d 1118 (Fla. 3d CA 1984). Both decisions held that a Cuban refugee (Perez) who had lived in Florida for 10 years, and an alien (Nicolas) who had lived in Florida 6 months, both established domicile for purposes of maintaining divorce proceedings. Predictably, FIAC does not acknowledge the most significant difference from this case. The ability to bring divorce proceedings involves a different statutory scheme established by the Florida Legislature.

In Perez, the divorce statute equated "residence" and "domicile." Id., 164 So. 2d, at 562. Notably, the Third District expressly distinguished the then-recent Juarrero decision, correctly recognizing that Florida's Constitution then required a "permanent home" to claim exemption.[2] Perez, 164 So. 2d at 564 (emphasis in the original). Similarly, Nicolas involved a different (statutory) criterion -- 6 months residency in Florida -- and also equated residence and domicile for purposes of a divorce action. Nichols, 444 So. 2d, at 1119-1120.

FIAC then takes the position that the distinction between domicile for purposes of divorce, and permanent residence for purposes of homestead exemption is "not persuasive." Amicus Brief, at 16. FIAC relies heavily on this Court's interchangeable use residence and permanent home in Judd v. Schooley, 158 So. 2d 514 (Fla. 1963).

The problem with FIAC's reliance is that the Judd decision did not involve immigrants, and that this Court expressly stated:

> [Juarrero] 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."

Judd, 158 So. 2d, at 517. Unfortunately, because of Lisboa's

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[2]Article X, Section 7, Florida Constitution (1885), extended the homestead exemption to persons residing on real property which they, in good faith, made their "permanent home." Present-day Article VII, Section 6, Florida Constitution (1968), does not have an express good-faith requirement, but still requires a homestead exemption claimant to maintain "permanent residence" on the property. [e.s.]

immigration status it is not legally possible for him, in good faith, to claim a permanent home in Florida, thereby qualifying him for the homestead exemption.

CONCLUSION

The certified question must be answered negatively, and the Third District's opinion reversed with directions to affirm the Summary Final Judgment entered by the trial court in favor of the Property Appraiser.

Respectfully submitted,

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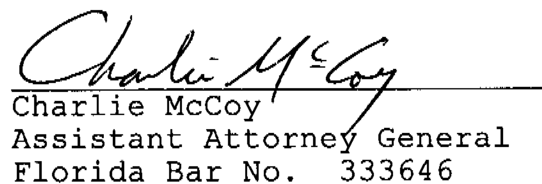

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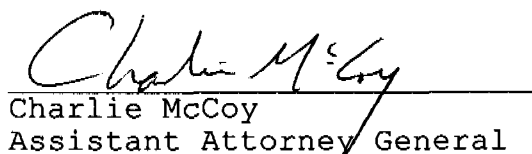
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **BRION BLACKWELDER**, counsel for Lisboa, Nova Southeastern Civil Law Clinic, 3305 College Avenue, Fort Lauderdale, Florida 33314; **MELINDA THORNTON**, Assistant County Attorney, Stephen P. Clark Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128-1993; and **VINCENT A. TOME**, Counsel for amicus curiae, Florida Immigrant Advocacy Center, 3000 Biscayne Boulevard, Suite 400, Miami, Florida 33137; this 24th day of July, 1998.



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