

EN BANC

G.R. No. 197930 (*Efrain C. Genuino, et al. vs. Hon. Leila M. De Lima, in her capacity as Secretary of Justice, et al.*); G.R. No. 199034 (*Ma. Gloria Macapagal-Arroyo vs. Hon. Leila M. De Lima, in her capacity as Secretary of Department of Justice, et al.*); and G.R. No. 199046 (*Jose Miguel T. Arroyo vs. Hon. Leila M. De Lima, in her capacity as Secretary, Department of Justice, et al.*)

Promulgated:

April 17, 2018

SEPARATE CONCURRING OPINION

VELASCO, JR., J.:

I concur with the *ponencia* of my esteemed colleague, Justice Andres B. Reyes, Jr.

That the right to travel and to freedom of movement are guaranteed protection by no less than the fundamental law of our land brooks no argument. While these rights are not absolute, the delimitation thereof must rest on specific circumstances that would warrant the intrusion of the State. As mandated by Section 6 of the Bill of Rights, any curtailment of the people's freedom of movement must indispensably be grounded on an intrinsically valid law, and only whenever necessary to protect national security, public safety, or public health, thus:

SEC. 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, **as may be provided by law.** (Emphasis and underscoring supplied)

The Department of Justice (DOJ) Circular No. 41 cannot be the law pertained to in the provision. As pointed out in the *ponencia*, it is but an administrative issuance that requires an enabling law to be valid.<sup>1</sup>

Jurisprudence dictates that the validity of an administrative issuance is hinged on compliance with the following requirements: 1) its promulgation is authorized by the legislature; 2) it is promulgated in accordance with the prescribed procedure; 3) *it is within the scope of the authority given by the legislature*; and 4) it is reasonable.<sup>2</sup> The DOJ, thus, exceeded its jurisdiction

<sup>1</sup> Page 22 of the Decision.

<sup>2</sup> *Hon. Executive Secretary, et. al. v. Southwing Heavy Industries, Inc.*, G.R. No. 164171, February 20, 2006, 482 SCRA 673, 686.

when it assumed to wield the power to issue hold departure orders (HDOs) and watchlist orders (WLOs), and allow department orders which unduly infringe on the people's right to travel absent any *specific* legislation expressly vesting it with authority to do so.

I, therefore, concur that DOJ Circular No. 41 is without basis in law and is, accordingly, unconstitutional.

With the declaration of nullity of DOJ Circular No. 41, our law enforcers are left in a quandary and without prompt recourse for preventing persons strongly suspected of committing criminal activities from evading the reach of our justice system by fleeing to other countries.

Justice Antonio T. Carpio, in his Separate Concurring Opinion, makes mention of Republic Act No. 8239, otherwise known as the Philippine Passport Act of 1996, which expressly allows the Secretary of Foreign Affairs or any of the authorized consular officers to cancel the passport of a citizen, even those of persons under preliminary investigations, for crimes affecting national security and public safety. This course of action, while undoubtedly a legally viable solution to the DOJ's dilemma, would nevertheless require the conduct of a hearing, pursuant to Section 4<sup>3</sup> of the law. This would inevitably alert the said persons of interest of the cause and purpose of the cancellation of their passports that could, in turn, facilitate, rather than avert, their disappearance to avoid the processes of the court.

As an alternative solution, it is my humble submission that the above predicament can be effectively addressed through the *ex-parte* issuance of precautionary warrants of arrest (PWAs) and/or precautionary hold departure orders (PHDOs) prior to the filing of formal charges and information against suspected criminal personalities.

The issuance of PWAs or PHDOs is moored on Section 2, Article III of the Bill of Rights of the Constitution, to wit:

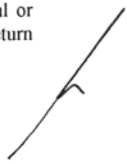
Section 2. x x x no search warrant or warrant of arrest shall issue except upon **probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce**, and particularly describing the place to be searched and the persons or things to be seized. (Emphasis supplied)

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<sup>3</sup> SEC. 4. *Authority to Issue, Deny, Restrict or Cancel.* – Upon the application of any qualified Filipino citizen, the Secretary of Foreign Affairs or any of his authorized consular officer may issue passports in accordance with this Act.

Philippine consular officers in a foreign country shall be authorized by the Secretary to issue, verify, restrict, cancel or refuse a passport in the area of jurisdiction of the Post in accordance with the provisions of this Act.

In the interest of national security, public safety and public health, the Secretary or any of the authorized consular officers may, **after due hearing** and in their proper discretion, refuse to issue a passport, or restrict its use or withdraw or cancel a passport: *Provided, however*, That such act shall not mean a loss or doubt on the person's citizenship: *Provided, further*, That the issuance of a passport may not be denied if the safety and interest of the Filipino citizen is at stake: *Provided, finally*, That refusal or cancellation of a passport would not prevent the issuance of a Travel Document to allow for a safe return journey by a Filipino to the Philippines. (Emphasis supplied)



It bears noting that the warrant clause permits the issuance of warrants, whether it be a search warrant or a warrant of arrest, **even prior to the filing of a criminal complaint or information in court.** This interpretation finds support in the crafting of the provisions in our Rules of Criminal Procedure that govern the issuance of search warrants. As stated in Sections 4 to 6<sup>4</sup> of Rule 126, a search warrant may be issued by the courts if, after personally examining the complainants/applicants and the witnesses produced, they are convinced that probable cause exists for the issuance thereof. The rules do not require that 1) a criminal action or even a complaint must have already been filed against an accused; and that 2) persons of interest are notified of such application before law enforcement may avail of this remedy. The application for and issuance of a search warrant are not conditioned on the existence of a criminal action or even a complaint before an investigating prosecutor against any person.

Anchored on Section 2, Article III of the Constitution, a rule on precautionary warrant of arrest, akin to a search warrant, may be crafted by the Court. The application will be done *ex-parte*, by a public prosecutor upon the initiative of our law enforcement agencies, *before* an information is filed in court, and only in certain serious crimes and offenses. Before filing the application, the public prosecutor shall ensure that probable cause exists that the crime has been committed and that the person sought to be arrested committed it. The law enforcement agencies may also opt to ask for a PWA with PHDO or simply a PHDO.


The judge's determination of probable cause shall be done in accordance with the requirements in Section 2, Article III of the Constitution. He shall set a hearing on the application to personally examine under oath or affirmation, in form of searching questions and answers, the applicant and the witnesses he may produce on facts personally known to them and attach to the record their sworn statements. If satisfied of the existence of probable cause based on the application and its attachments, the testimonies of the witnesses, and other evidence presented during the hearing, the judge may issue the warrant and direct the Philippine National Police or the National Bureau of Investigation to effect the arrest.

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<sup>4</sup> Section 4. *Requisites for issuing search warrant.* — A search warrant shall not issue except upon probable cause in connection with one specific offense to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the things to be seized which may be anywhere in the Philippines.


Section 5. *Examination of complainant; record.* — The judge must, before issuing the warrant, personally examine in the form of searching questions and answers, in writing and under oath, the complainant and the witnesses he may produce on facts personally known to them and attach to the record their sworn statements, together with the affidavits submitted. (4a)

Section 6. *Issuance and form of search warrant.* — If the judge is satisfied of the existence of facts upon which the application is based or that there is probable cause to believe that they exist, he shall issue the warrant, which must be substantially in the form prescribed by these Rules. (5a)



The suggested revision in the Rules, to my mind, will help solve the problem caused by the declaration of nullity of the HDOs and WLOs issued by the DOJ. The law enforcement agencies can apply for a PWA or PHDO to prevent suspects from fleeing the country and to detain and arrest them at the airport. This may also solve the problem of extrajudicial killings as the law enforcement agency is now provided with an adequate remedy for the arrest of the criminals.

I vote to **GRANT** the petition.



**PRESBITERO J. VELASCO, JR.**  
Associate Justice

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EDGAR O. ARICHETA  
Clerk of Court En Banc  
Supreme Court