

**HON. RAUL S. MANGLAPUS, IN HIS CAPACITY AS SECRETARY OF
FOREIGN AFFAIRS, PETITIONER, VS. HON. ANDRES E. MATIAS,
JUDGE OF THE REGIONAL TRIAL COURT OF MANILA (BRANCH 45)
AND GAVIN...**

G.R. No. 89618. December 20, 1990

Ponente: NARVASA, J.

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NARVASA, J.:

In early 1988, Gavino P. Abaya, Jr., who up to that time had been serving in the Philippine Mission to the United Nations in New York from September 1, 1971 -- continuously except for a brief period in 1983--1984 when he was recalled to the Home Office -- received in Assignment Order (No. 10-88 dated January 29, 1988) transferring him to the Philippine Embassy in Beijing as Minister-Counsellor and Consul General.[1] On March 16, 1988 he requested deferment of his transfer to his new assignment in Beijing, to "give him ample time wind up official and pending family matters." [2]

On April 15, 1988 the Office of Personnel and Management Services recommended to the Secretary of the Department of Foreign Affairs -

1) the appointment, in place of Abaya, of Ariel Abadilla to the Embassy a Beijing, Abaya's suitability having been questioned by Ambassador Rodolfo Severino, who had expressed preference for said Ariel Abadilla, then assigned at Seattle; and

2) Abaya's recall to the Home Office in line with the Department's program of recalling "overstaying" officers and employees assigned abroad.[3]

It appears that several days later, Chairman Ramon Diaz of the Presidential Commission on Good Government (PCGG) requested that Abaya be allowed to testify before a grand jury then investigating the Marcoses' ill-gotten wealth in the United States. Acting thereon, and apparently also on the recommendation of the Office of Personnel and Management Services (OP S), Foreign Affairs Secretary Manglapus sent a cablegram dated April 26, 1988 to Ambassador Emmanuel Pelaez at the Philippine Mission to the United Nations -

1) advising of the waiver of Abaya's diplomatic immunity "to allow him to appear and testify before (said) U.S. grand jury;"

2) revoking Assignment Order No. 10-88 assigning Abaya to Beijing and directing that he remain in New York until further instructions; and

3) directing that the Home Office be apprised "of developments, particularly (of the) termination of Mr. Abaya's testimony." [4]

On September 19, 1988, the OPMS addressed a memorandum to Secretary Manglapus reiterating its recommendation to recall Abaya from New York to the home office. It stated that although Abaya's stay in New

York had been extended on request of the PCGG, there was "no indication that he could appear in court or grand jury in the U.S. as it would entail a waiver of his diplomatic immunity." [5] Secretary Mangalpus then issued on December 20, 1988, Assignment Order no. 186--88 recalling Abaya, effective immediately, "to the Home Office from the Philippine Mission to the United Nations, New York." A copy of this recall order was received by Abaya on December 28, 1988. [6]

More than a month later, Abaya sent a telex message to the home office dated January 30, 1989, requesting reconsideration of the recall order and a deferment of its effectivity, for the reason that in the case of eight (8) members of the UN Mission, their recalls were allegedly made effective "some 16 to 23 months from receipt of recall orders," this being "in consonance with Foreign Service Circular No. 11-89" dated January 11, 1989 providing that "recall orders are served one year in advance to cushion those concerned against harsh transition." [7]

On February 13, 1989, Ambassador Teehankee (Permanent Representative to the UN) wired the home office -- his telex message being identified as ZMS-41-89 -- asking for advice on the action taken on Abaya's motion for reconsideration, stating that "since notice of his recall order was received by him on 28 Dec. 1988 his usual 60-day period to wind up business expires on 28 Feb. 1989." In response, Secretary Manglapus sent the following telex message under date of March 13, 1989, to wit:

" ** URTEL ZMS-41-89 FOR GAVINO ABAYA: IN VIEW REPRESENTATIONS MADE BY ATTY. ANTONIO ABAYA, YOU ARE DIRECTED REPORT MANILA 1 JUNE 1989 WITHOUT FAIL. OTHERWISE, DFA MIGHT BE COMPELLED TO DECLARE YOU AWOL AND DROP YOU FROM ITS ROSTER. PLEASE NOTE THAT THERE IS NO SPECIAL TREATMENT GIVEN TO EIGHT STAFF MEMBERS OF MISUNPHIL WHO ARE BEING RECALLED UNDER NORMAL CIRCUMSTANCES. YOUR SERVICE RECORDS SHOW THAT YOU STAYED IN NEW YORK FOR 13 YEARS INITIALLY IN VIOLATION OF MAXIMUM STAY ONLY FOR 3 YEARS. AFTER SERVING FOR BARELY A YEAR IN MANILA, AGAIN IN VIOLATION OF RULES, YOU WERE ASSIGNED TO NEW YORK, AGAIN IN VIOLATION OF RULES. IT IS CLEAR THAT REPEATED VIOLATIONS HAVE BEEN COMMITTED WHICH IS NOT TRUE WITH YOUR CO-WORKERS THAT POST. FURTHER, PLEASE NOTE THAT MEMO CIRCULAR CITED IS SUBJECT TO D.O. 42-88 WHICH EMPHASIZES SECFORAF'S PREROGATIVE TO REDEPLOY DFA STAFF IN INTEREST OF SERVICE AND IN EXERCISE OF HIS POWER OF SUPERVISION AND CONTROL. END."

Abaya sent a telex communication to Secretary Manglapus dated March 20, 1989, duly noting the latter's instructions to report at Manila on June 1, 1989, and stating that: (1) the period of his initial tour of duty at the UN Mission at New York was not 13 years but 11 years and some 7 months, and he served in the home office for 14 months before being reassigned to New York in June, 1984; (2) that these assignments involved no violation of rules but had been "lawfully made by the then Minister of Foreign Affairs in the exercise of his legal prerogative to redeploy DFA staff in (the) interest of (the) service -- a prerogative of any secretary of foreign affairs, past or incumbent **;" (3) that said prerogative was not being disputed, the issue being his right to "one-year advance notice of recall orders," a right unconditionally conferred by FS Circular 11-89; and (4) that his request for one-year notice should thus be granted. [8]

On April 20, 1989, Abaya having apparently made no move to return to Manila, Secretary Manglapus directed that if Abaya was unable to return to the home office, "he should file leave application with salaries computed at home office rate and payable in pesos." [9]

On May 2, 1989, Abaya went to court. He filed a petition for certiorari, prohibition and mandamus (with application for preliminary injunction) against Secretary Manglapus with the Regional Trial Court of Manila. [10] The case was docketed as Sp. Proc. No. 89-48665 [11] and assigned to Branch 45, presided over by Hon. Andres

E. Matias.[12]

On May 18, 1989, Secretary Manglapus moved to dismiss the action on the ground that (1) Abaya's "recall to the Home Office is an exercise of respondent Secretary's prerogative and discretion which may not be interfered with by the Court," and (2) petitioner "has not exhausted his administrative remedies." [13]

After both incidents (the matter of the preliminary injunction and the motion to dismiss) had been heard and extensively argued, the Trial Court denied the motion to dismiss by Order dated June 5, 1989 and granted the application for preliminary injunction.[14] The Court ruled that Manglapus had no authority to disregard Foreign Service Circular No. 11-89; he had not shown "with convincing evidence that the 'exigencies of the service' require the immediate and peremptory recall" of Abaya; Abaya's case was substantially identical to those of eight (8) other members of the Philippine Mission who had been accorded advance notice of their recall of more than a year; and since only a question of law was involved, the relevant facts not being in dispute, the doctrine of exhaustion of remedies had no application.

A motion for reconsideration was filed on July 1, 1989 in Secretary Manglapus' behalf; this was denied by Order dated July 25, 1989.

On August 17, 1989, Abaya still having made no move to return to the home office, Secretary Manglapus wired the following instructions to the UN Mission at New York: "CONSISTENT WITH DEPARTMENT REGULATIONS GAVINO ABAYA WILL BE PAID HIS SALARY AT HOME OFFICE RATES STARTING 01 JUNE 1989 ** ISSUE OF RECALL NOW PENDING WITH SUPREME COURT **." [15]

On August 29, 1989, the Secretary of Foreign Affairs, through the Solicitor General, instituted the instant action of certiorari and prohibition praying for invalidation of the Trial Court's Orders of June 5, 1989 and July 25, 1989 because supposedly "issued in excess of jurisdiction or with grave abuse of discretion amounting to lack of jurisdiction." He submits that –

1) respondent Court had no jurisdiction over the nature of the action because:

- a) Abaya's "recall to the Home Office was an exercise of petitioner's prerogative and discretion which may not be interfered with by the court;"
- b) "Circular 11-89, being a mere administrative issuance of petitioner, does not confer a legal right on Abaya upon which any action in a court of law may be predicated;"

2) Abaya has no cause of action, not having exhausted his administrative remedies; and

3) Abaya "has not shown that he will undergo 'harsh transition' if recalled to the Home Office."

Abaya's entire case turns about Circular 11-89. It is the foundation for his claim that he is entitled to a one-year period to wind up his affairs prior to transferring to a new assignment, and that he was being discriminated against, considering that eight (8) other members of the staff of the UN Mission had been accorded more than one year advance notice of their recall or assignment to new posts.

It is noteworthy that when Circular 11-89 was promulgated by respondent Manglapus on January 11, 1989, all the relevant events generating the controversy had already taken place, to wit:

1. Abaya was ordered transferred to the Beijing Embassy; this, on January 29, 1988.
2. A month and a half later, or on March 18, 1988 he requested deferment of the effectivity of his new assignment for six (6) months to "give him ample time to wind up official and pending family matters."

3. The OPMS proposed (a) Abaya's recall to the Home Office and (b) revocation of his assignment to Beijing because Ambassador Rodolfo Severina, under whom he would have served, had questioned his (Abaya's) suitability and expressed preference that in his stead, Ariel Abadilla of Seattle be assigned.
4. After Abaya was directed to stay on at New York in the expectation of his testifying before a grand jury (pursuant to a PCGG request) the OPMS again proposed his recall to the Home Office.
5. As recommended, Abaya's recall to the Home Office was again directed, advice thereof having been received by him on December 28, 1988.

Certain conclusions are necessarily generated by these facts.

1. During the period from January 29, 1988 (date of the order for his transfer to Beijing) to December 28, 1988 (date of receipt by him of the reiterated order for his recall to Manila), Abaya could not but have known that whatever be his new assignment -- Manila or Beijing -- he could no longer stay on at the New York Mission; this, notwithstanding the interim order that he stay at New York to give evidence before a grand jury, the stay thus directed being obviously a temporary one, at best.
2. As of December 28, 1988 -- when he received notice of the iterated order for his recall to Manila -- eleven (11) months had already elapsed since his transfer to Beijing was ordered, and nine (9) months, since he requested for deferment of his transfer for six (6) months.
3. As of December 28, 1988, he had no "right" to one-year advance notice of any recall order, since that was granted only on January 11, 1989, when Manglapus issued Circular 11-89.
4. Considering that he knew all along that he could no longer count on staying indefinitely in New York and that there was no alternative to his accepting his recall or reassignment; considering that he had already had more than the six-month extension requested by him on March 18, 1988 to "give him ample time to wind up official and pending family matters;" and considering that he makes no pretense that he has not yet been able, within that time, to "wind up official and pending family matters," there appears to be no reason for him to refuse to comply with the recall order received by him on December 28, 1988. Indeed, the only reason advanced by him for seeking a one-year extension of stay in his New York post was simply and exclusively because other foreign service officers or employees had been given more than a year to wind up their affairs, and the grant of such an extension to him would be in consonance with a subsequently promulgated circular (No. 11-89). Clearly, the request for extension was unreasonable under the uncontroverted facts of the case.
5. Given the foregoing admitted facts, too, no "harsh transition" could possibly attend Abaya's recall from New York to the Home Office in Manila; hence, there is no reason to apply Circular No. 11-89, which notes "that recall orders are served one year in advance to cushion those concerned against harsh transition." Given these same facts, the circumstance that other officers and employees of the Foreign Service might have received more than one year's advance notice of their recall orders, is utterly inconsequential.
6. The logical inference from all these undeniable considerations is that Abaya simply wished to take advantage of Circular 11-89 for purely personal motives and considerations, without regard to the interests of the service, or to set at naught the orders of his superior because he did not agree with them, or just to spite the latter. This circumstance also exposes the paucity of his claim to equal treatment in relation to the eight whose case he would cite as precedent.
7. In any event, as of date hereof, considerably more than a year has already elapsed since December 28, 1988 when he received notice of the last order for his recall to the Home Office. His insistence on one-year advance

notice of recall, counted from such a date, has clearly become moot and academic. This would appear reason enough to dismiss Abaya's petition at this time.

Be this as it may, it may not be amiss also to look further into the merits of Abaya's claim. There is no question, indeed it is explicitly admitted by Abaya himself, that the Secretary of Foreign Affairs has the authority under the law to recall and reassign officers as the interests of the service may in his discretion require. Section 6,[16] Republic Act No. 708 as amended, provides as follows:

" **. Assignments and Transfers. -- A Foreign Affairs Officer may be assigned by the Secretary to serve in the department or in a diplomatic or consular post abroad: Provided, however, That the minimum period which he may serve in any foreign post shall be one year and the maximum period four years, except in case of emergency or extraordinary circumstances, in which event he may be transferred from one foreign post to another or to the Department by order of the Secretary without regard to his length of service in his former post."

Where an officer has served in a foreign post for at least four years, as in Abaya's case, it would appear that the Secretary's power of assignment and transfer rests entirely in his discretion, guided chiefly by his perception of what is necessary for the good of the service. There is no need in that event that some "emergency or extraordinary circumstances" exist, this being required only where the officer has served less than four years in a foreign post.

Abaya's reassignment to Beijing in January, 1988, and his recall to the Home Office reiterated in December, 1988, were thus well within the authority granted to the Foreign Affairs Secretary by law. Those acts were based on reasoned conclusions of the OPMS and the head of the Beijing Embassy -- including the fact that, as affirmatively appears on the record, Abaya is really an "overstaying" officer in the UN Mission, having served in that post for much more than the maximum term of four (4) years prescribed by Section 6 of the Foreign Service Law, as amended -- and hence, could not in truth be said to be in any sense capricious or whimsical, no matter how debatable Abaya might think the validity of those conclusions is.

The question that now arises is whether or not Circular No. 11-89 subsequently issued by the Secretary himself,[17] invalidated his prior acts, just described. Said circular reads as follows:

"The Department regrets its inability to extend the tours of duty of foreign service personnel for reasons of health, schooling of children, or any reason other than the interest of the service. The Department is no longer in a position to finance the school and medical fees of foreign service personnel or their families. Those ailing are suggested to apply for sick leave, which they may spend abroad or in Manila. Inasmuch as they are considered on home assignment the day after their scheduled date of recall, their salaries shall be computed at home office rates and payable in pesos. Those with school children should be able to provide them with housing, school and personal expenses until the academic year ends or, they could send them back to Manila in time for the opening of the school year in June.

It must be noted that recall orders are served one year in advance to cushion those concerned against harsh transition. Extension of tours are a drain in the country's foreign reserve; is unfair to foreign service personnel without family; and destroys the *raison d'etre* of the Department's rotation program.

Please be guided accordingly."

As will at once be noted, the Circular deals mainly with the matter of extensions. What the Circular does essentially, is –

1) to advise of the Department's inability to extend tours of duty "for reasons * * other than the interest of the service," on account of financial constraints, extensions being "a drain in the country's foreign reserve, ** unfair

to ** personnel without family, and ** (destructive of) the raison d'etre of the Department's rotation program;" and

2) to note -- when extensions are thus refused -- "that recall orders," consistently with what appears to be theretofore prevailing practice, "are served one year in advance to cushion those concerned against harsh transition."

The Circular must of course be construed in relation to the power of the Secretary of Foreign Affairs to promulgate administrative rules and regulations, and his authority to transfer and reassign personnel for the good of the service in accordance with Section 6 of the Foreign Service Act, as amended, above cited. In this context, and as framed, the Circular should be considered as primarily laying down a policy against extensions of foreign assignments, and, corollarily -- extensions sought by officers receiving orders of recall or reassignment being generally proscribed -- drawing attention to the normal practice of giving one-year notice in advance of such orders. The Circular cannot be read as prohibiting recalls or reassignments without advance one-year notice under any and all circumstances and conditions, and even when no "harsh transition" is entailed by a recall or reassignment, or as absolutely precluding amendment or modification thereof by the Secretary himself.

No grave abuse of discretion, or lack or excess of authority, may rightfully be ascribed to the respondent Secretary. Indeed, it is the Regional Trial Court which the facts disclose to have gravely abused its discretion in having so utterly misread the facts and the applicable law and overruling the Secretary's plainly valid and legally authorized actuations. The writ prayed for will therefore issue, to nullify the challenged orders of said Trial Court and -- to avert unnecessary proceedings, all the facts necessary to adjudicate the issues raised by the parties having been laid by them before this Court, and those issues having in fact been dealt with in this opinion -- to direct that the action a quo be aborted.

WHEREFORE, the Orders of respondent Court in Sp. Proc. No. 89--48665 dated June 5, 1989 and July 25, 1989 are hereby NULLIFIED AND SET ASIDE, and said Court is ORDERED TO DISMISS Sp. Proc. No. 89--48665. Costs against private respondent.

SO ORDERED.

Fernan, C.J., Melencio-Herrera, Gutierrez, Jr., Cruz, Paras, Padilla, Bidin, Sarmiento, Griño-Aquino, Medialdea, and Regalado, JJ., concur.

Feliciano, J., on leave.

Gancayco, J., no part as private respondent is a close friend and kumpadre.

[1] Rollo, p. 4; Annex C, petition

[2] Id., Annex D, petition

[3] Id., p. 34: Annex E, petition

[4] Id., p. 36: Annex F, petition

[5] Id., p. 37: Annex G, petition

[6] Id., p. 39: Annex H, petition

[7] Id., pp. 83, 102

[8] Id., p. 52

[9] Id., p. 50

[10] Id., pp. 41-47: Annex J, petition

[11] This is an erroneous categorization. What was instituted was a special civil action under Rule 65, and not a special proceeding.

[12] Judge Matias has since retired. His sala was for a time presided over by a Judge on detail. Thereafter, Hon. Benito C. Se, Jr. was appointed permanent Judge thereof.

[13] Id., pp. 54-60

[14] Id., pp. 23-28

[15] Id., p. 119

[16] Part B, Title III

[17] SEE footnote 7, supra

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