

INTRODUCTION

CHAPTER 1

1.1 Background

In today's world, as time goes by there are many things that have changed. Now it is more diverse which one of them is in the way that people think. Many people tend to move abroad to other countries. Maybe some of them want to experience a different life in a different environment or to invest in other countries. To go abroad to other countries there are many things to consider and one of them is the immigration law. With this saying, in Article 1 (1) of Law No. 6 the Year 2011 concerning Immigration ("Immigration Law"), it is stated that immigration shall mean the traffic subjects of people that enter or exit the Indonesian Territory and the control to safeguard the enforcement of state sovereignty.¹

Today's economic growth is pushing greater migration of people around the world, creating several impacts, either to the good or loss of the Republic of Indonesia's national and state interests and life, laws, and regulations are needed to ensure legal certainty by the respect, protection, and promotion of human rights. Law No. 6 the Year 2011 is enacted based on the principle of 'lex specialis derogate legi generali', under which Law No. 6 the Year 2011 is related to the 1945 Constitution ("UUD 1945"). Regarding Law No. 6 of the Immigration Year 2011, Government Regulation No. 31 of 2013 concerning Implementing

¹Article 1 (1) of Law No. 6 Year 2011 on Immigration

Regulations of Law No. 6 of 2011 concerning Immigration (“Immigration Law”) was released with a purpose to provide more information on some articles of the Immigration Law which entered into force on 16 April 2013.

In Regulation No. 31 the Year 2013, there are many things to consider which are visas, visit visas, limited stay visas, stay permits, visit stay permits, limited stay permits, and permanent stay permits.

The provisions of Article 16 paragraph (1) letter b of the Immigration Law of 2011 which reads: “Immigration officials refuse people to leave the territory of Indonesia in the event that the person: b. necessary for the purposes of investigation and preliminary investigation at the request of the competent authority”, has been tested in the same year as the issuance of this Law and has been decided in the Decision of the Constitutional Court Number 40/PUU-IX/2011. In this decision, the Constitutional Court granted the applicant's request by omitting the phrase "investigation" with the consideration in its decision that in the investigation stage there is no certainty whether it will be investigated or not investigated. The search and collection of evidence has not yet been carried out, it is only the stage of gathering information.

Referring to Law no. 8 of 1981 concerning the Criminal Procedure Code, explains the definition of investigation and preliminary investigation. According to Article 1 point 5 of the Criminal Procedure Code, preliminary investigation is a series of actions of investigators to seek and find an event that is suspected of being a criminal act in order to determine whether or not an investigation can be

carried out according to the method regulated in this law.² The initial response to a notification that an incident has happened is the preliminary investigation. The preliminary investigation's main goal, like with any investigative work, is to identify the perpetrator and capture him or her.³

The first investigation gathers information to help prove that a crime has been committed, identify the culprit, and lead to the arrest and eventual conviction of the criminal. The following primary responsibilities form the foundation of the preliminary investigation's structure: (1) confirming the commission of an offense; (2) identifying the victim, the scene of the crime, and the time it happened; (3) identifying variables that make the crime more likely to be solved; and (4) communicating the details of the crime; and (5) the listing of the investigation tasks that have been accomplished and those that still need to be done.⁴

When considering initial operations and investigations as a stage of preliminary examination of a report of a crime, it is important to note that "initial it is aimed not only at solving the crime, that is, at obtaining the data that confirms the crime, but also at obtaining the data that prepare and carry out investigative actions." In this sense, the necessity for such evidence's admission is a crucial safeguard for a fair trial, manifested in the manner in which such evidence complies with the legal standards of the criminal process. This criterion establishes adequate circumstances for the admission of information as evidence

² Law No. 8 of 1981 concerning the Criminal Procedure Code

³ U.S. Department of Justice Office of Justice Program. [online](2022). Preliminary Investigations Manual. Available at: <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/preliminary-investigations-manual>>

⁴ Ibid

for the case, along with other requirements (of relevance and sufficiency). Evidence may become inadmissible, lose its legal validity, and lose its capacity to be used in the proof process if it deviates from the established legal requirements.⁵

While the investigation (Article 1 point 2 of the Criminal Procedure Code) is a series of actions by investigators in terms of and according to the method regulated in this law to seek and collect evidence which with that evidence makes clear about the crime that occurred and in order to find the suspect.⁶ So, to determine whether an event is categorized as a criminal act or not, the investigator will carry out a stage called an investigation. The continuation of the investigation stage, namely the investigation, is the task of the investigator to collect evidence and find the suspect from the criminal event so that it becomes clear and clear.

If it is in the investigation stage because there is indeed a search and collection of evidence, it is natural that a refusal to travel abroad may be carried out because there is a possibility that the investigators may bring evidence related to criminal acts abroad, making it difficult for investigators to conduct searches and collect evidence to make clear about the crimes committed happened to find the suspect. Preventing someone from leaving the country at this stage can be misused for interests outside the interests of law enforcement so that it violates a person's rights guaranteed by the constitution, namely in Article 28E of the 1945 Constitution of the Republic of Indonesia.

⁵ Parfenov, Aleksei. (2018). The issues of the process of evidence collection during preliminary investigation in the Republic of Tajikistan. SHS Web of Conferences. 50. 01240. 10.1051/shsconf/20185001240.

⁶ Law No. 8 of 1981 concerning the Criminal Procedure Code

Investigation of immigration crimes is carried out based on criminal procedural law, where the Immigration PPNS according to Article 105 The 2011 Immigration Law was given the authority to implement it. In carrying out the investigation process, PPNS coordinates with Polri investigators. Types of immigration crime violations that are often carried out by Indonesian citizens include: Entering and entering the territory of Indonesia without going through TPI, providing accommodation or work to foreigners illegally, acting as a fictitious sponsor in providing guaranteed residence permits to foreigners, being involved in trafficking syndicates. human, providing incorrect data when applying for a passport. Meanwhile, the types of criminal offenses that are often committed by foreigners include: abusing residence permits, being in Indonesia using a fictitious sponsor, entering Indonesia with a fake visa/passport, and being involved in a human trafficking syndicate network.⁷

In Article 16 paragraph (1) letter b of Law No. 6 Year 2011 stated that:

“The Immigration Officer shall reject the people who exit the Indonesian Territory in case of such people: required for the interest of examination and investigation upon request of an authorized officer”.

In Article 28A of the 1945 Constitution, it is stated:

“Every person shall have the right to live and to defend his/her life and experience”.⁸

In Article 28D paragraph (1) of the 1945 Constitution it is stated:

⁷Hamidi, Jazim and Charles Christian, Immigration Law for Foreigners in Indonesia, (Jakarta: Sinar Graphic, 2015)

⁸Article 28A of the 1945 Constitution

“Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law”.⁹

In Article 16 paragraph (1) letter b of Law No. 6 Year 2011, the phrase which states rejecting “person”, without limiting who that person is can make people think it is referring to everyone. In practice, however, the implementation of Article 16 paragraph (1) letter b could open up opportunities resulting in the loss of the constitutional rights of the petitioner (a person who presents a petition to an authority in respect of a particular cause), as contained in the Constitution of 1945, and of living constitutional values in the Unitary State of the Republic of Indonesia.

In case No. 40/PUU-IX/2011, in relation to the legal standing of the Petitioners who are Indonesian citizens who collectively have the same interests due to their profession as advocates. Therefore, if it is related to the type of loss of constitutional rights and/or authority that must be specific and actual, then the constitutional loss suffered by the Petitioners is included in the type of potential loss which according to reasonable reasoning can certainly occur.

In this case, if at any time the Petitioners are in the process of being investigated, the Petitioners will suffer constitutional losses due to the wrong application of laws by law enforcement officers (in case Investigators, Public Prosecutors and Judges), in which the rights of The applicant to live and defend his life, and has the right to recognition, guarantee, protection and fair legal

⁹Article 28D paragraph (1) of the 1945 Constitution

certainty as well as equal treatment before the law, can be taken away with the enactment of the provisions of Article 16 paragraph (1) letter b.

We can know much further about Immigration law through this case: No. 40/PUU-IX/2011 which the Constitutional Court decided on one of the articles in Immigration law. In this case, the petitioners submitted a material review regarding Article 16 paragraph (1) letter b of Law No. 6 Year 2011 concerning Immigration against Article 28A and Article 28D paragraph (1) of the 1945 Constitution to Constitutional Court.

Article 16 paragraph (1) letter b which regulates the authority of an investigator to request immigration officials to ban someone, even though a new examination at the stage of investigation violates a person's human rights.

Moreover, Article 4 of Law No. 39 of Year 1999 concerning Human rights is the same as the formulation of Article 28 letter I paragraph (1) of the Amendments to the 1945 Constitution, namely: "The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not be enslaved, the right not to be recognized as a person before the law and the right not to be prosecuted on the basis of retroactive law are human rights that are not can be reduced under any circumstances". Legal authority is the authority to be a supporter of rights and obligations under the law. So it is an authority to become a legal subject. The authority to act is a special authority, which only applies to certain people and for certain legal actions. With the conclusion that what determines that a person is authorized to take legal action is determined by the laws and regulations that specifically regulate it. The authority

to act is the general authority to take legal action. After humans are declared to have legal authority, they are then given the authority to carry out their rights and obligations, therefore they are given the authority to act.¹⁰

Here, in the sentence “... cannot be reduced under any circumstances” indicates that these rights are absolute rights, which cannot be limited, even though Article 28 letter J paragraph (2) of the 1945 Constitution contains recognition of the obligation to respect people’s rights and freedoms other within the limits stipulated by law. Thus, recognition as a person and fair treatment and protection before the law give rise to the right for a person to sue the government to fulfill and offer equal protection and treatment before the law. Immigration crime investigations are carried out based on criminal procedure law, where the Immigration PPNS according to Article 105 of the Immigration Law of 2011 is given the authority to implement it.

According to Article 28 letter A of the 1945 Constitution:

“Everyone has the right to live and the right to defend his/her life and existence”.¹¹

Article 28 letter D paragraph (1) of the 1945 Constitution:

“Everyone has the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law”.¹²

Therefore, based on Article 28 letter A and Article 28 letter D paragraph (1) of the 1945 Constitution mentioned above, everyone, including the Petitioners,

¹⁰Indonesia. Law on Immigration, Law no. 6 of 2011, LN No. 52 of 2011, TLN No. 5216, Article 48 paragraph (1)

¹¹Article 28 letter A of the 1945 Constitution

¹²Article 28 letter D paragraph (1) of the 1945 Constitution

has the right to defend their life and existence to obtain recognition, guarantee, protection, and fair legal certainty.

For instance, if the petitioners are already in the investigation process but have been restricted from traveling, at the request of the investigator, immigration officials reject the petitioners to leave the territory of Indonesia, where the suspect has not been decided, the constitutional rights of the petitioners, as provided under article 28, letter D, paragraph (1), have been violated. The petitioners strongly argue that if an individual is already being prosecuted, a form of liberty deprivation or coercion can already be rejected or in general prohibited.

Therefore, self-investigation according to the provisions of Article 1 (2) of the Criminal Procedural Code it is stated that “Investigation is a series of acts by an investigator in matters and by means regulated in this law to seek and gather evidence with which to clarify whether an offense has occurred and to locate the suspect”¹³. We can see that based on the article above, it's incredibly premature because someone who may be subjected to forced attempts is as well at the investigation level. Interference at the stage of the investigation is liberty deprivation, as specified in Article 421 of the Criminal Code, and constitutes a crime of office¹⁴. Witnesses or suspects are only at the investigation stage so that only after the investigation phase the ban is issued.

Decision of the Constitutional Court No.40/PUU/IX/2011 concerning the Review of Law No.6 of 2011 concerning Immigration (Article 16 paragraph (1) Letter b). This research is motivated by the provisions of Article 16 paragraph (1)

¹³Article 1 (2) of Criminal Procedural Code

¹⁴Article 421 of Criminal Code

letter b concerning Immigration, which is considered to be detrimental to the constitutionality of the applicant, the Article is considered contrary to Article 28A and Article 28D paragraph (1) of the 1945 Constitution. In its decision the Constitutional Court declared a material test of the Immigration Act is accepted and accepted.

Based on the matters that have been discussed above, the Petitioners request that the Panel of Justices of the Constitutional Court be pleased to try the Petitioners' petition with the following rulings:

1. To accept and grant the Petitioners' petition in its entirety.
2. State the word "Investigation" in Article 16 paragraph (1) letter b of Law No. 6 Year 2011 concerning Immigration and Elucidation of Article 16 paragraph (1) letter b of Law No. 6 Year 2011 concerning Immigration has contradicted Article 28 A and Article 28 D paragraph (1) of the 1945 Constitution.
3. State the word "Investigation" in Article 16 paragraph (1) letter b of Law No. 6 Year 2011 concerning Immigration and Elucidation of Article 16 paragraph (1) letter b of Law No. 6 Year 2011 concerning Immigration does not have binding power.
4. Order the loading of this decision in the State Gazette of the Republic of Indonesia accordingly. However, if the Panel of Justices of the Constitutional Court has a different opinion, then ask for a fairest decision (*ex aequo et bono*).

1.2 Formulation of Issues

In regards to the topic of this thesis, the Author will discuss the following formulation of issues:

1. What are the results of legal analysis and evaluation of Article 16 paragraph (1) letter b of Law No. 6 Year 2011 on Immigration?
2. Whether the Article 16 paragraph (1) letter b of Law No. 6 Year 2011 concerning Immigration contradicts the Indonesian legal system by seeing the decision of the Constitutional Court (No. 40/PUU-IX/2011).

1.3 Research Purposes

The Author's purpose of writing this thesis is to answer the formulation of issues stipulated above, namely:

1. To analyze and evaluate the law against Article 16 paragraph (1) letter b of Law No. 6 Year 2011 on Immigration.
2. To know whether the Article 16 paragraph (1) letter b of Law No. 6 Year 2011 concerning Immigration contradicts any of the Indonesian legal system by seeing the decision of the Constitutional Court (No. 40/PUU-IX/2011). To analyze the recommendations on the results of the legal analysis and evaluation that have been carried out on the case.

1.4 Research Benefits

1.4.1 Theoretical Benefits

Theoretically, the Author hopes that this research will give a wider insight into immigration law and how it contradicts the Indonesian legal system based on Law No. 6 the Year 2011, 1945 Constitution, Law No. 39 of the Year 1999, Criminal Procedure Code, Government Regulation No. 31 of the Year 2013, and Constitutional Court decision (No. 40/PUU-IX/2011). The Author hopes that this research will successfully point out the confusion in the wordings of Article 16 paragraph (1) letter b of Law No. 6 the Year 2011 and determine the prevailing policy as compared to others. Moreover, the Author's hope that this research will give a much better understanding of Indonesian law, especially in the field of immigration, along with different laws and regulations and Constitutional Court decisions under the Indonesian legal system.

1.4.2 Practical Benefits

Practically, the Author hopes that this research will be able to provide the Government with a contribution to the modification of Article 16 paragraph (1) letter b of Law No. 6 of 2011 as provided for in Decision No. 40/PUU-IX/2011 by the Constitutional Court. As a preventive action for potential practical problems arising from the multi interpretation of that provision, particularly regarding the application of immigration law to individuals, the Author recognizes that clearer wording in the form of a law or regulation is needed.

Furthermore, the Author hopes that this research would be beneficial to the general public and to other officials, who have a direct or indirect relation with immigration law and are unclear regarding the implementation of immigration law. Finally, this research would also address the confusion with other laws and regulations throughout Article 16 paragraph (1) letter b of Law No. 6 of 2011.

1.5 Framework of Writing

This thesis is arranged into five main chapters that will ease the readers to understand the discussion of this thesis.

CHAPTER I: INTRODUCTION

This chapter consists of the introduction, which is further divided into five parts, which are background, research question, research purpose and research benefits.

CHAPTER II: LITERATURE REVIEW

The author will split this into four sub-chapters in the chapter of the literature review. In the first place, the author will look into the concept and elements of immigration law in Indonesia. Secondly, the Author will address obligations under the Indonesian Law. Third, it will be followed by the concept of Investigation related to the Constitutional Court Decision (No. 40/PUU-IX/2011). Fourth, the Author will explain the concept of Human Rights related to the Constitutional Court Decision (No. 40/PUU-IX/2011).

CHAPTER III: RESEARCH METHODS

In this chapter the author will generally discuss the type of analysis, the type of data, methods for analyzing data and the type of research approach. Followed by the types of research, data, data analysis techniques and research approach used in this thesis by the author to address the problems.

CHAPTER IV: DISCUSSION AND ANALYSIS

In Chapter four, problems will be discussed and solutions will be addressed. This chapter will be split into two sub-chapters and the research question as stipulated in Chapter two of the thesis will be answered in each sub-chapter. The first sub-chapter will consist of analysis and evaluation of the law against Article 16 paragraph (1) letter b of Law No. 6 Year 2011 on Immigration. The second sub-chapter will to know whether the Article 16 paragraph (1) letter b of Law No. 6 Year 2011 concerning Immigration contradicts any of the Indonesian legal system by seeing the decision of the Constitutional Court (No. 40/PUU-IX/2011). To analyze the recommendations on the results of the legal analysis and evaluation that have been carried out on the case.

CHAPTER V: CLOSING

The Author will explain the conclusion in this last chapter as a response to the issues analyzed in Chapter four. In addition to concluding, the author will also provide suggestions and recommendations on these issues and probable regulations which should be put in place and implemented in the future in order to make it clearer for the public to understand the immigration law policies so as to provide legal protection and reliability for all.