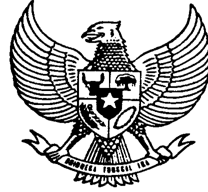

D E C I S I O N

Number 028-029/PUU-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a Decision in the case of petition for judicial review of the Law of the Republic of Indonesia Number 39 Year 2004 regarding the Placement and Protection of Indonesian Migrant Workers (State Gazette of the Republic of Indonesia Year 2004 Number 133 and Supplement to the State Gazette of the Republic of Indonesia Number 4445, hereinafter referred to as the PPTKI Law) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) filed by:

I. PETITIONERS OF CASE NUMBER 028/PUU-IV/2006

1. JAMILAH TUN SADIAH, Date/Place of Birth: Bogor, November 6, 1986, 20 years of age, with her address at Kampung Parung Panjang Atas RT. 01, RW. 08, Leuwiliang;
2. NURYANIH, Date/Place of Birth: Bogor, January 1, 1987, 19 years of age, with her address at Kampung Parung Panjang Lebak RT. 02, RW. 07, Leuwiliang;

3. SITI MUNAWAROH, Date/Place of Birth: Bogor, June 6, 1988, 18 years of age, with her address at Kampung Sengkol, Leuwiliang;
4. ROHMAWATI, Date/Place of Birth: Bogor, April 2, 1988, 18 years of age, with her address at Kampung Parung Panjang Lebak RT. 02, RW. 07, Leuwiliang;
5. DANIATI, Date/Place of Birth: Bogor, December 10, 1986, 20 years of age, with her address at Kampung Parung Panjang Lebak RT. 03, RW. 07, Leuwiliang;

based on a Special Power of Attorney dated November 20, 2006, the Petitioners respectively authorized:

1. SOEKITJO J.G., Position: General Chairman/Coordinator of the NGO, *Indonesia Manpower Watch*, with his address at Jalan Casablanca (Kampung Melayu Besar) Number 55 South Jakarta 12480, and at Jalan Karehkel Number 26 RT. 01/08 Leuwiliang;
2. KURNIA WAMILDA PUTRA, S.H., LL.M., Position: Member of the NGO, *Indonesia Manpower Watch*, with his address at Jalan Casablanca (Kampung Melayu Besar) Number 55 South Jakarta 12480, and at Jalan Pemuda Number 712, East Jakarta 13220;

Hereinafter referred to as -- **Petitioner I**;

II. PETITIONERS OF CASE NUMBER 029/PUU-IV/2006

1. ESTI SURYANI, Place/Date of Birth: Magetan, October 13, 1986, 20 years of age, with her address at Dusun Jaranan RT. 02, RW. 02, Ngadirejo Village, Kawedanan District, Magetan;
2. MARTINA SEPTI MAYASARI, Place/Date of Birth: Lampung, September 9, 1987, 19 years of age, with her address at Sumurlipan RT. 05, RW. 02, Negara Saka Subdistrict, Jabung District, East Lampung, Lampung;
3. DENIYATI, Place/Date of Birth: Bumirestu, July 23, 1986, 20 years of age, with her address at Dusun Bumirestu RT. 029/RW. 07, Bumirestu Subdistrict, Palas District, South Lampung;
4. SUMIYATI, Place/Date of Birth Subang, April 12, 1986, 20 years of age, with her address at Desa Bojong Sari RT. 10, RW. 04, Sukatani Village, Compreng District, Subang;

based on the Special Power of Attorney dated December 18, 2006 and December 13, 2006, the Petitioners respectively authorized SANGAP SIDAURUK, S.H. and HARISON MALAU, S.H. occupation: Advocates/Legal Consultants whose office is in *SANGAP & PARTNERS*, with its address at Jalan Raya Jenderal Basuki Rachmad Number 21, East Jakarta 13410;

Hereinafter referred to as --- **Petitioner II**;

Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having read the written statement of the People's Legislative Assembly of the Republic of Indonesia;

Having heard and read the written statement of the Government

Having heard the statement of the experts presented by the Petitioners;

Having heard the statement of the experts presented by the Government;

Having read the concluding opinion of the Petitioners;

Having examined the evidence presented by the Petitioners;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the Petitioners' petition are as described above;

Considering whereas prior to further considering the principal issue of the petition, the Constitutional Court (hereinafter referred to as the Court) needs to first take the following matters into account:

1. Whether the Court has the authority to examine, hear, and decide upon the *a quo* petition;

2. Whether the Petitioners have the legal standing to act as Petitioners in the *a quo* petition;

In respect of the foregoing two issues, the Court is of the following opinion:

1. AUTHORITY OF THE COURT

Considering whereas in accordance with the provision of Article 24C Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), Article 10 Paragraph (1) of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law), the Court has the authority to hear at the first and final level, the decision of which shall be final, among other things, to review a law against the 1945 Constitution;

Considering whereas the petition filed by the Petitioners is concerned with judicial review of a law, *in casu* the Law of the Republic of Indonesia Number 39 Year 2004 regarding the Placement and Protection of Indonesian Migrant Workers (State Gazette of the Republic of Indonesia Year 2004 Number 133, Supplement to the State Gazette of the Republic of Indonesia Number 4445, hereinafter referred to as the PPTKI Law), and therefore the Court

has the authority to examine, hear, and decide upon the aforementioned petition of the Petitioners;

2. LEGAL STANDING OF THE PETITIONERS

Considering whereas based on the provision of Article 51 Paragraph (1) of the Constitutional Court Law and its Elucidation, Petitioners in judicial review of a law against the 1945 Constitution shall be the parties which deem that their constitutional rights and/or authority have been impaired by the coming into effect of a law, namely: (a) individual Indonesian citizens; (b) customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law; (c) public or private legal entities; or (d) state institutions;

Considering whereas following the Decision Number 006/PUU-III/2005, the Court has declared its stand that the impairment of the constitutional rights of the Petitioner as intended in Article 51 Paragraph (1) of the Constitutional Court Law must fulfill 5 (five) requirements, namely:

a. The Petitioner must have constitutional rights and/or authority granted by the 1945 Constitution;

b. the Petitioner's constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;

c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;

d. the existence of a causal relationship (*causal verband*) between the impairment of rights and/or constitutional authority and the coming into effect of the law petitioned for review;

e. if the petition is granted, it is expected that such impairment of constitutional rights and/or authority will not or does not occur any longer;

Considering whereas the Petitioners in the petition for judicial law of the PPTKI Law consist of 2 (two) groups of Petitioners:

A. The Petitioners in Case Number 028/PUU-IV/2006 are Jamilah Tun Sadiah, Nuryanih, Siti Munawaroh, Rohmawati, Daniati;

B. The Petitioners in Case Number 029/PUU-IV/2006 are Esti Suryani, Martina Septi Mayasari, Deniayati, Sumiyati;

Considering whereas the abovementioned Petitioners are individual Indonesian citizens who deem that their constitutional rights have been impaired because they are unable to work overseas due to the minimum age restriction for Indonesian migrant workers working for individual Users as regulated in Article 35 Sub-Article a of the PPTKI Law. On that basis, the Petitioners deem that their constitutional rights as regulated in Article 27 Paragraph (2) and Article 28D

Paragraph (2) of the 1945 Constitution have been impaired. Whereas therefore, the Court is of the opinion that the Petitioners have the legal standing to file a petition for judicial review of the PPTKI Law. However, specifically the issue concerning the status of Soekitjo J.G. and Kurnia Wamilda Putra, S.H., LL.M. who act on behalf of Indonesia Manpower Watch as the Petitioners' Attorneys-in-Fact will not be considered. The provision regarding the power to act before the Constitutional Court will be separately regulated in the Constitutional Court Regulation in accordance with the provision of Article 43 of the Constitutional Court Law;

Considering whereas due to the fact that the Petitioners have the legal standing, hence the Court shall further consider the Principal Issue of the Petition;

3. Principal Issue of the Petition

Considering whereas the Petitioners, as described in the Principal Case, argued that in essence, Article 35 Sub-Article a of the PPTKI Law which reads, *"The recruitment of prospective Indonesian migrant workers by private executive agencies for Indonesian migrant workers placement must be conducted for prospective Indonesian migrant workers who have fulfilled the requirements: a. ... except for individual Users must be at least 21 (twenty-one) years of age ..."*; is contrary to Article 27 Paragraph (2) of the 1945 Constitution which reads, *"Every citizen shall have the right to work and to a living befitting human beings",* and Article 28D Paragraph (2) of the 1945 Constitution which

reads, *“Every person shall have the right to work and to receive fair and proper remuneration and treatment in work relationships“,* based on the following grounds:

I. Case Number 028/PUU-IV/2006

- Whereas the Petitioners are Prospective Indonesian Migrants Worker (hereinafter referred to as Prospective TKI-LN) who could not be sent overseas by Private Executive Agencies for Indonesian Migrant Workers Placement (hereinafter referred to as PPTKIS) namely PT. Gayung Mulya IKIF;

- Whereas PT. Gayung Mulya IKIF refused to send the Petitioners due to the provision of Article 35 Sub-Article a of the PPTKI Law which require a minimum of 21 (twenty-one) years of age for Indonesian Migrant Workers who will be employed by individual Users;

- Whereas Article 35 Sub-Article a of the PPTKI Law specifically in the clause which reads *“...except for Indonesian Migrant Workers who will be employed by individual Users must be at least 21 (twenty-one) years of age”,* according to the Petitioner, is a regulation which reflects the inconsistent stand of the Government or the legislator. Elucidation of Article 35 Sub-Article a of the PPTKI Law states, *“In practice, Indonesian Migrant Workers working for individual Users always have an intense personal relationship with their Users, which may cause the*

involved Indonesian Migrant Workers to be in circumstances prone to sexual harassment. In view of the matter, hence it is required in the occupation that the workers be personally and emotionally mature. In such a way, the risk of sexual harassment may be minimized". According to the Petitioner, the ground of minimum age restriction for Indonesian Migrant Workers working for individual Users is inappropriate, due to the following arguments:

- Sexual harassment threatens not only workers under 21 years of age, but also workers at all age levels;
- Sexual harassment does not occur only to Indonesian Migrant workers working for individual Users, but also to workers working in other lines of work;
- Sexual harassment seldom occurs to male Indonesian Migrant Workers under 21 years of age, and thus the minimum age restriction is extremely disadvantageous for male Indonesian Migrant Workers;
- Conceptually, the restriction regulated in the clause of Article 35 Sub-Article a of the PPTKI Law is contrary to the logical reasoning and conception;
- The abovementioned restriction which does not have clear direction and purpose is contrary to the rights of the citizens to

work and to a living befitting human beings as regulated in Article 27 Paragraph (2) of the 1945 Constitution as well as the right to work and to receive fair and proper remuneration and treatment in work relationships according to Article 28D Paragraph (2) of the 1945 Constitution;

- Concerning the issue of the provision of employment opportunities and payment based on the standard and the classification of employment, discrimination is not allowed;

II. Case Number 029/PUU-IV/2006

- Whereas the Petitioners are Prospective Indonesian Migrant Workers who could not be sent overseas by PPTKIS PT. Bama Mapan Bahagia and PPTKIS PT. Manpower Indonesia, because the individuals have yet to reach 21 (twenty-one) years of age as required in Article 35 Sub-Article a of the PPTKI Law;

- Whereas the minimum restriction of 21 (twenty-one) years of age for Indonesian Migrant Workers working for individual Users is a discriminatory form of provision and denies the right to an occupation and the right to work as regulated in the 1945 Constitution;

- Whereas the minimum age restriction in Article 35 Sub-Article a of the PPTKI Law is not the restriction intended in Article 28J of the 1945 Constitution, because Article 28J has defined the restriction, namely

"With the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society *";*

- Whereas the form of minimum age restriction regulated in Article 35 Sub-Article a of the PPTKI Law with the intention of minimizing the risk of sexual harassment is not in line with the following facts:

  - In fact, most sexual harassments to Indonesian Migrant Workers occur to Indonesian Migrant Workers over the age of 21 because by the "perpetrator", they are considered more mature;

  - Indonesian Migrant Workers working for individual Users are not always females;

  - The right to work which directly relates to the right to earn a living is closely related to the right to sustaining one's life and livelihood;

  - The provision of Article 35 Sub-Article a of the PPTKI Law is extremely impairing to prospective Indonesian Migrant Workers of 18 to 20 years of age, because they are thus unable to work for individual Users;

– An Indonesian citizen being 18 (eighteen) to 20 (twenty) years of age yet unable to work for individual Users overseas is a form of discriminatory provision and denies the right to employment and the right to work which are regulated and guaranteed by the 1945 Constitution;

Considering whereas in order to support their arguments, in addition to presenting written evidence, the Petitioners have also presented an expert namely Prof. Dr. Aloysius Uwiyono, S.H., M.H., Professor of Labor Law at the Faculty of Law of the University of Indonesia whose statement was heard in the hearing on March 1, 2007;

Expert Prof. Dr. Aloysius Uwiyono, S.H., M.H.

The complete statement has been described in the Principal Case section, which in essence, as follows:

- Whereas Article 35 Sub-Article a of the PPTKI Law regulates the minimum age restriction for Indonesian Migrant Workers who will work for individual Users overseas. In principle, the restriction is intended to provide protection for the workers, in practice however, the protection in fact represses and even eliminates the workers' rights. The expert is of the opinion that Article 35 Sub-Article a of the PPTKI Law is contrary to the fundamental right to perform one's occupation and is contrary to the principle of equality before the law;

- Whereas the ground of the restriction as regulated in the Elucidation of Article 35 Sub-Article a of the PPTKI Law is inappropriate, because sexual harassment does not always occur to individuals under 22 years of age, but may also occur to individuals over 22 years of age;

- Whereas the discrimination is distinguished into two types, namely the detrimental discrimination and the non-detrimental discrimination. The prohibited one is the detrimental discrimination, in relation to Article 35 Sub-Article a of the PPTKI Law, and hence the article has restricted the right to work;

Considering whereas the Court has also heard the verbal statement of the Government, and read the written statement of the Government dated February 14, 2007, as well as supplement to the written statement of the Government dated March 15, 2007.

Statement of the Government

The complete statement has been described in the Principal Case, which in essence, as follows:

- Whereas the best protection must arise from the workers themselves, and therefore it is necessary to impose certain restrictions to workers who are going to work overseas. The aforementioned restriction includes several matters, for instance the skills or educational level and the minimum age for individuals to be allowed to work overseas. Whereas therefore, it is necessary to impose

different regulations for individuals with more skills and more advanced education. The aforementioned difference in service or treatment, is not intended to discriminate one group of society with the other, but is instead to protect the rights of the citizens in obtaining employment and living befitting human beings;

- Whereas the Indonesian Migrant Workers working for individual Users are extremely prone to various problems, and hence physical and mental preparedess is necessary to protect themselves. The Government is of the opinion that individuals of at least 21 (twenty-one) years of age are regarded to be capable of protecting themselves in engaging in an occupation overseas. The treatment is different from that which is intended for Indonesian Migrant Workers working in formal sectors the normative provisions of which are already clear and the working condition of which is collective in nature and thus the workers are able to protect each other, and therefore individuals of at least 18 (eighteen) years of age may already be employed in formal sectors;

- Whereas the minimum restriction of 21 years of age for prospective Indonesian Migrant Workers who will be employed by individual Users as regulated in Article 35 Sub-Article a of the PPTKI Law, is solely intended to protect the prospective Indonesian Migrant Workers from the possibility of unlimited exploitative treatments by the Users, and also to foster and to encourage a sense of responsibility over the safety of the body and the soul

of the workers themselves. Whereas therefore, the Government is of the opinion that Article 35 Sub-Article a of the PPTKI Law does not impair the Petitioners' constitutional rights and/or authorities, and hence it is not contrary to the 1945 Constitution;

Considering whereas in relation to the *a quo* petition, the Court has also read the written statement of the People's Legislative Assembly dated February 19, 2007.

Statement of the People's Legislative Assembly

The complete written statement has been described in the Principal Case, which in essence elucidates the following matters:

- whereas Article 35 Sub-Article a of the PPTKI Law includes the exceptional provision for prospective Indonesian Migrant Workers who will work for individual Users to be at least 21 (twenty-one) years of age is based more upon the consideration of providing legal protection for prospective Indonesian Migrant Workers in order to guarantee child welfare both physical and mental, as mandated in the provision of the Law of the Republic of Indonesia Number 4 Year 1979 regarding Child Welfare, which provides that a child be guaranteed of welfare until 21 years of age;

- whereas the minimum restriction of 21 years of age for prospective Indonesian Migrant Workers who will work for individual Users is a requirement which is indeed necessary for the intended type of work. It is in

view of the fact that in practice, the Indonesian Migrant Workers working for individual Users always have an intense personal relationship with their Users who may cause the involved Indonesian Migrant Workers to be in circumstances prone to treatments which may degrade their dignity and humanity status;

- whereas an individual of 21 years of age is considered as already having maturity in emotions and personality, and is thus expected to be capable of protecting himself/herself;
- whereas the minimum restriction of 21 years of age as intended in Article 35 Sub-Article a of the PPTKI Law is not contrary to Article 27 Paragraph (2) or Article 28D Paragraph (2) of the 1945 Constitution, because such a restriction is allowed in Article 28J Paragraph (2) of the 1945 Constitution;

Considering whereas in order to support its arguments, the Government has presented an expert namely R. Gunawan Oetomo, S.H., Chairman of Manpower Law Study Center and Lecturer at the Faculty of Law of Universitas Trisakti Jakarta whose statement was heard in the hearing on March 1, 2007.

Expert R. Gunawan Oetomo, S.H.

The complete statement has been described in the Principal Case section, which in essence elucidates the following matters:

- whereas sexual harassment is not the only ground to restrict the age of Indonesian Migrant Workers working for individual Users, but the aforementioned restriction is public in nature namely in order to prevent acts of violence and violations of law;

- whereas not all discriminations are prohibited, the minimum age restriction as regulated in Article 35 Sub-Article a of the PPTKI Law is included in positive acts of discrimination allowed, because such a restriction is intended to provide protection for Indonesian Migrant Workers working for individual Users overseas from violent acts or other violations of law;

- whereas age of 21 is regarded as the age where an individual is already more mature personally and emotionally, and is therefore capable of protecting himself/herself;

- whereas the Government cannot provide direct protection for Indonesian Migrant Workers working for individual Users overseas, because one regulation in a placement destination state prohibits the state of origin to interfere in the household affairs of the Users. Whereas therefore, a form of Government protection is stipulated in the PPTKI Law namely by imposing a minimum restriction of 21 years of age for Indonesian Migrant Workers who will be employed by individual Users;

Considering whereas upon hearing and reading the statements of all parties as described above, as well as the evidence presented by the

Petitioners, the legal issue of the *a quo* petition is whether the minimum restriction of 21 (twenty-one) years of age as a requirement for prospective Indonesian Migrant Workers who will work for individual Users overseas as included in Article 35 Sub-Article a of the PPTKI Law violates the constitutional rights of the Petitioners as regulated in Article 27 Paragraph (2) and Article 28D Paragraph (2) of the 1945 Constitution, and hence such a provision must be declared contrary to the 1945 Constitution;

Considering whereas prior to addressing the abovementioned issue, the Court shall first take the following matters into account:

- whereas one of the duties of the state is to provide protection for the citizens and their interests. Such a duty is expressly stated in the Preamble to the 1945 Constitution, which among other things, reads, *"Furthermore, in order to form a Government of the State of Indonesia which shall protect the entire Indonesian nation and the entire Indonesian motherland…"* The aforementioned duty of the state to protect the citizens and their interests has presently been accepted and put into effect as a universal principle as reflected in various provisions of the international law, both the law of convention and the written international law, for instance the provision of the 1961 Vienna Convention on Diplomatic Relation which has been ratified by the Government of Indonesia with the Law of the Republic of Indonesia Number 1 Year 1982. Article 3 Paragraph (1) Sub-Article b of the intended Convention expressly states that one of the tasks of a diplomatic

representative is "protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law";

- whereas the duty of the state as described above, in its relation to the citizens (including Indonesian legal entities) residing overseas, is also affirmed in the Law of the Republic of Indonesia Number 37 Year 1999 regarding Foreign Relations, which in its Chapter V even specifically regulates "the Protection for Indonesian Citizens". However, in performing the duty to provide protection for the citizens outside its territorial jurisdiction, the state must comply with the restrictions and/or prohibitions stipulated by general international law which restrict the freedom of a state to perform its aforementioned duty. Such restrictions or prohibitions arise due to the general principle of the international law that "a sovereign state is prohibited from conducting actions which in nature are the realization of its sovereignty towards other sovereign states" (*par im parem non habet imperium*);

Considering whereas the provision of the law petitioned for judicial review in this petition, *in casu* Article 35 Sub-Article a of the PPTKI Law, is a provision which regulates Indonesian citizens who will become Indonesian migrant workers who will be employed by individual Users. As workers working for individuals within the territory of other states, the freedom of the state in performing its duty to protect its citizens in such a condition becomes very restricted because the state is bound by the restrictions stipulated and recognized by the international law. One of the implications is that it is not

possible for the state to conduct direct and immediate action against any violation to the law committed against the aforementioned Indonesian citizens working for the individual Users because such an action is a violation to the principle of *par im parem non habet imperium* as described above. In other words, whenever such circumstances arise, in initial stages, the steps needed to be taken will solely depend on the inflicted Indonesian citizen and the provisions of the applicable law of the User's state. It is within this relation that the personal and emotional maturity of the inflicted Indonesian citizen play an exceptionally important role. Whereas concerning the fact that the law stipulates the appropriate minimum age of having personal and emotional maturity to be 21 (twenty-one) years of age, such a provision cannot be said as hampering an individual's right to work, especially the right to life. Such an argument cannot be accepted not only because: *firstly*, there exists no judicial criterion of general nature concerning the minimum age of having personal and emotional maturity which applies to such a condition, which implies that in such a condition, the stipulation concerning the minimum age of having personal and emotional maturity is a domain for the state to decide; *secondly*, it is also because the underlying notion of the stipulation concerning such age restriction is the state's full awareness of its duty to provide protection for its citizens in such a condition where it is not possible for the state to freely perform its duty of protection due to the existence of restrictions stipulated by the international law. Whereas therefore, the requirements containing restrictions as stipulated in Article 35 Sub-Article a of the PPTKI Law, is in line with the principle of restriction which is

objectively and reasonably justified by a legitimate aim;

Considering whereas the minimum age restriction for an individual to be entitled to work is included as one of the matters which are under the authority the legislators. The ground for the intended restriction is subjective in nature which may lead to several alternatives, and hence it is very likely for such a ground to invite pros and cons, as the ground contained in Elucidation of Article 35 Paragraph a of the PPTKI Law. The ground in the aforementioned Elucidation of Article 35 Sub-Article a of the PPTKI Law is one example concerning the importance of the minimum restriction of 21 (twenty-one) years of age for Indonesian Migrant Workers who will work for individual Users overseas. Such a matter does not constitute a constitutionality issue of the *a quo* law, and hence the argument of the Petitioners, insofar as it relates to the Elucidation of Article 35 Sub-Article a of the PPTKI Law, shall not be further considered;

Considering whereas in addition to the foregoing issue, if one follows the line of thought of the Petitioners, it will seem that the right to work is derivative of the right to life. Whereas in fact, the right to work and the right to life belong to two different categories of rights. The right to work is a part of the category of the economic, social and cultural rights, whereas the right to life is a part of civil and political rights. The aforementioned two categories of human rights have extremely distinct characteristics. The civil and political rights, which include the right to life, are the rights in which the state acts passively and are enforceable (*enforceable rights*). Whereas in the economic, social and cultural

rights, which include the right to work, the role of the state must be active and the fulfillment of which may not be demanded individually (*non-enforceable rights*). Whereas hence, it is evident that the right to work is in fact not derivative of the right to life, but instead is derivative of the economic, social and cultural rights;

Considering whereas the stand of the Court concerning the principle of protection for Indonesian citizens pursuing occupations overseas, has been described in general in Decision Number 019-020/PUU-III/2005, which among other things states, "*Certain age requirement is highly appropriate in order to be prevented from underage employment practices, and such is the requirement of good physical and mental health, as well as the prohibition for pregnant women is intended to protect both the mother and the conceived child from any harmful health conditions. Such prohibitions can be accepted because they are in fact intended to protect employment seekers who morally, legally, and humanly need to be protected*".

Considering whereas, in addition to the aforementioned argument, the Petitioners also argued that Article 35 Sub-Article a of the PPTKI Law which required a minimum of 21 years of age for Indonesian Migrant Workers who will be employed by individual Users has discriminated the rights of the Petitioners to working and the right to an occupation, and hence is contrary to Article 27 Paragraph (2) and Article 28D Paragraph (2) of the 1945 Constitution. Concerning the aforementioned arguments of the Petitioners, the Court is of the opinion that in order to observe whether or not the provision of Article 35 Sub-

Article a of the PPTKI Law is discriminatory, it is necessary to first establish the definition of discrimination within the scope of human rights law. Article 1 Paragraph (3) of Law Number 39 Year 1999 regarding Human Rights reads, "*Discrimination is every restriction, harassment, or expulsion which is directly or indirectly based on the distinction of human beings on the basis of religion, nationality, race, ethnicity, group, level, social status, economic status, sex, language, political belief, which causes the reduction, deviation, or the elimination, recognition, implementation or utilization of human rights and basic freedom in life both individually and collectively in the fields of politics, economy, law, social, culture, and other aspects of life*". The provision regarding the abovementioned prohibition of discrimination is also regulated in the International Covenant on Civil and Political Rights (ICCPR) which has been ratified by Indonesia with Law Number 12 Year 2005 (State Gazette of the Republic of Indonesia Year 2005 Number 119, Supplement to the State Gazette of the Republic of Indonesia Number 4558). Article 2 of the ICCPR reads, "*Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as* ***race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status***".

Considering whereas hence, discrimination must be interpreted as every restriction, harassment, or isolation which is based on the distinction of human beings on the basis of religion, race, color, sex, language, political

opinion. Moreover, in the practice of the European Community, as included in Council Directive 2007/78/EC of November 27, 2000 establishing a general framework for **equal treatment in employment and occupation**, in Article 6 it is stated that*, "(1) Notwithstanding Article 2(2), Member States may provide that differences of treatment* ***on grounds of age shall not constitute discrimination****, if, within the context of national law, they are* ***objectively and reasonably justified by a legitimate aim****, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, among other things:*

(a). the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b). ***the fixing of minimum conditions of age****, professional experience or seniority in service for access to employment or to certain advantages linked to employment;"*

Considering whereas based on the above description, it is evident to the Court that the provision contained in Article 35 Sub-Article a of the PPTKI Law is not an elimination of the right to an occupation, but is instead a justifiable requirement in the interest of fulfilling the duty of the state to protect its citizens

who are employed for individual Users overseas. From the above description, it is also evident that Article 35 Sub-Article a of the PPTKI Law does not contain any discriminatory nature as argued by the Petitioners and is not contrary to Article 27 Paragraph (2) and Article 28D Paragraph (2) of the 1945 Constitution either. Moreover, both the intended provisions of the 1945 Constitution do not regulate the constitutional rights related to discrimination;

Considering whereas based on the entire description of considerations above, it appears that the petition of the Petitioners who argue that Article 35 Sub-Article a of the PPTKI Law is contrary to Article 27 Paragraph (2) and Article 28D Paragraph (2) of the 1945 Constitution is not grounded, and therefore the petition of the Petitioners must be rejected;

In view of Article 56 Paragraph (5) of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

PASSING THE DECISION

To declare that the petition of the Petitioners is rejected.

Hence this decision was made in the Consultative Meeting of Constitutional Court Justices attended by 9 (nine) Constitutional Court Justices on **Wednesday, April 11, 2007**, and was pronounced in the Plenary Session of the Constitutional Court open for public on this day, **Thursday, April 12, 2007** by

8 (eight) Constitutional Court Justices namely **Jimly Asshiddiqie** as the Chairperson and concurrent Member, **H.M. Laica Marzuki, Maruarar Siahaan, Soedarsono, H.A.S. Natabaya, H. Abdul Mukthie Fadjar, H. Harjono,** and **I Dewa Gede Palguna**, respectively as Members, assisted by **Sunardi** as the Substitute Registrar, and in the presence of the Petitioners and their Attorneys-in-Fact, the Government or its representative, the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

sgd.

JIMLY ASSHIDDIQIE

JUSTICES,

Sgd.	**Sgd.**
H. M. LAICA MARZUKI	**MARUARAR SIAHAAN**
Sgd.	**Sgd.**
SOEDARSONO	**H.A.S. NATABAYA**
Sgd.	**Sgd.**
H. ABDUL MUKTHIE FADJAR	**H. HARJONO**

Sgd.

I DEWA GEDE PALGUNA

*** *** ***

DISSENTING OPINION

Against the abovementioned decision of the Court which rejects the petition of the Petitioners, four Constitutional Court Justices have dissenting

opinions, namely Constitutional Court Justices H.M. Laica Marzuki, H. Abdul Mukthie Fadjar, Maruarar Siahaan, and H. Harjono respectively as follows:

CONSTITUTIONAL COURT JUSTICE H.M. LAICA MARZUKI

The Petitioners of this case questioned the requirement of *at least 21 (twenty-one) years of age* for prospective Indonesian Migrant Workers who will work for individual Users, as stipulated in Article 35 Sub-Article a of the PPTKI Law, which by the Petitioners is regarded as contrary to Article 27 Paragraph (2) and Article 28D Paragraph (2) of the 1945 Constitution;

Article 35 Sub-Article a of the PPTKI Law reads, *"The recruitment of prospective Indonesian migrant workers by the private executive agencies for Indonesian migrant workers placement must be conducted for prospective Indonesian migrant workers who have fulfilled the requirements:*

a. *must be at least 18 (eighteen) years of age except for prospective Indonesian Migrant Workers who will be employed by individual Users who must be at least 21 (twenty-one) years of age;*

b. ....

c. ....

d. ...."

The Petitioners deem that their constitutional rights have been impaired by the coming into effect of the *a quo* article, when as the prospective Indonesian Migrant Workers they cannot be sent overseas by PPTKIS because it

appears that they are yet to reach 21 years of age, as required by the *a quo* article;

The Petitioners in their petition for judicial review of the *a quo* petition were essentially questioning their constitutional rights *in casu* to a decent occupation befitting human beings, and the right to work and a fair and proper remuneration and treatment in work relationship, as guaranteed by the constitution, on the bases of Article 27 Paragraph (2) and Article 28D Paragraph (2) of the 1945 Constitution;

Article 27 Paragraph (2) of the 1945 Constitution reads, *"Every citizen shall have the right to work and to a living befitting human beings".*

Article 28D Paragraph (2) of the 1945 Constitution reads, *"Every person shall have the right to work and to receive fair and proper remuneration and treatment in work relationships*"*;*

According to Expert Prof. Dr. Aloysius Uwiyono,S.H, M.H. during the hearing, in order for human beings to make a living in the world, they must work. If they do not work, they will not be able to fulfill their needs. Whereas therefore, the right to work is a fundamental right, a basic right for every human being. The expert is of the opinion that the requirement of being at least 21 years of age for Indonesian Migrant Workers who will work for individual Users, according to Article 35 Sub-Article a of the PPTKI Law, is contrary to the basic

rights of human beings, and is discriminatory in nature, because it contradicts the principle of equality before the law;

Firstly, it may be necessary to consider the grounds of the legislators (*de wetgever*) in relation to the requirement of being at least 21 years of age for prospective Indonesian Migrant Workers who will work for individual Users;

Elucidation of Article 35 Sub-Article a of the PPTKI Law reads:
"In practice, Indonesian Migrant Workers working for individual Users always have an intense personal relationship with their Users, which may cause the involved Indonesian Migrant Workers to be in circumstances prone to sexual harassment. In view of the matter, hence it is required in the occupation that the workers be personally and emotionally mature. In such a way, the risk of sexual harassment may be minimized".

Does the *a quo* article contain a discriminatory sense, and therefore violates the principle of equality before the law?

The Constitution prohibits discrimination, and does not allow any violation to the principle of equality before the law. Article 27 Paragraph (1) of the 1945 Constitution reads, *"Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government";*

With respect thereto, *in casu* Article 6 of the International Covenant on Economic, Social and Cultural Rights, which has been ratified and legalized by the Government of Indonesia based on Law Number 11 Year 2005 (State Gazette of the Republic of Indonesia Year 2005 Number 118 and Supplement to the State Gazette of the Republic of Indonesia Number 4557), affirms:

1. *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right;*
2. *The steps to be taken by State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual*;

The *a quo* article contains two age requirements for prospective Indonesian Migrant Workers who will be employed overseas, namely:

a. To be at least 18 (eighteen) years of age for prospective Indonesian Migrant Workers who will be employed in companies or similar workplaces;
b. To be at least 21 (twenty-one) years of age for prospective Indonesian Migrant Workers who will be employed by individual Users;

As set out in Elucidation of the *a quo* article, the requirement of being at least 21 (twenty-one) years of age for prospective Indonesian Migrant Workers who will be employed by individual Users is implemented because the legislators are concerned that in practice, the Indonesian Migrant Workers working for individual Users always have an intense personal relationship with their Users, which may lead the involved Indonesian Migrant Workers to circumstances prone to sexual harassment. According to the Legislators, the occupations provided by the Users require individuals who are truly mature in the aspects of personality and emotions, in order that the risk of sexual harassment may be minimized;

The intended grounds of consideration *(ratio legis)* of the Legislators contain unreasonable distinction of both categories of prospective Indonesian Migrant Workers. How to guarantee that no sexual harassment will ever occur to a female Indonesian Migrant Worker of 21 (twenty-one) years of age in the workplace owned by the individual User for whom she works? Such a case may even occur to a female Indonesian Migrant Worker of 33 years of age who, according to the Elucidation of the *a quo* petition, has already had personal and emotional maturity. Conversely, the issue is how to guarantee that there will never be sexual harassment cases occurring to female Indonesian Migrant Workers who work in companies;

Unreasonable distinction of the treatment towards the minimum age requirement for the intended two categories of prospective Indonesian Migrant

Workers appears to be not as a protection effort for prospective Indonesian Migrant Workers who will work in workplaces owned by individual Users, but instead as merely a restriction for a certain category of prospective Indonesian Migrant Workers who apparently are unable to work in workplaces owned by individual Users because they are yet to reach 21 (twenty-one) years of age, while another category of prospective Indonesian Migrant Workers may work in companies or such workplaces, under the condition of being at least 18 (eighteen) years of age. An unreasonable treatment thus occurs towards both categories of Indonesian Migrant Workers in relation to the two different age requirements, namely 18 years of age and 21 years of age;

"*Discrimination happens when someone is treated worse (less favourable in legal terms) than another person in the same situation*" (Community Legal Service, London, June 2001). The definition of a *child*, according to Article 1 Sub-Article 26 of Law Number 13 Year 2003 regarding Manpower, *is every individual under 18 (eighteen) years of age;*

A child, according to Article 1 Sub-Article 1 of Law Number 23 Year 2002 regarding Child Protection, *is an individual who is yet to reach 18 (eighteen) years of age, including a conceived child.* In accordance with Law Number 1 Year 2000 regarding the Ratification of the ILO Convention on the Worst Forms of Child Labor, children under 18 years of age are not allowed to be employed as a worker;

According to Expert Prof. Dr. A. Uwiyono, SH, MH, by the coming into effect of the ILO Convention Number 138, which is ratified by the Government of Indonesia based on Law Number 20 Year 1999, the minimum age for a child to work is 15 (fifteen) years of age. Expert Uwiyono considers that ILO itself realizes that age restriction is discrimination;

Based on the description of considerations above, the petition for judicial review of Article 35 Sub-Article a of the PPTKI Law by the Petitioners is grounded to be granted because the provision is contrary to Article 27 Paragraph (2) and Article 28D Paragraph (2) of the 1945 Constitution, namely because it includes the minimum age restriction, which disallows the Petitioners to freely obtain a work befitting human beings, and denies the Petitioners of the right to work and to receive fair and proper remuneration and treatment in work relationships freely according to their choice, for the Petitioners ("on grounds of age discrimination") .

CONSTITUTIONAL COURT JUSTICE H. ABDUL MUKTHIE FADJAR

The petition of the Petitioners concerning judicial review of Article 35 Sub-Article a of Law Number 39 Year 2004 regarding the Placement and Protection of Indonesian Migrant Workers (hereinafter referred to as the PPTKI Law) against the 1945 Constitution, insofar as it concerns the phrase "...*except for prospective Indonesian Migrant Workers who will be employed by individual Users must be at least 21 (twenty-one) years of age",* **should have been granted**, based on the following arguments:

1. Elucidation of Article 35 Sub-Article a of the PPTKI Law reads as follows: "*In practice, Indonesian Migrant Workers working for individual Users always have an intense personal relationship with their Users, which may cause the involved Indonesian Migrant Workers to be in circumstances prone to sexual harassment. In view of the matter, hence it is required in the occupation that the workers be personally and emotionally mature. In such a way, the risk of sexual harassment may be minimized*." The grounds stated in the aforementioned Elucidation and used also by the Government in its statement during the hearing in my opinion do not have strong constitutional bases, either philosophically, sociologically, or judicially because :
    a. Philosophically, there is no sufficient ground for the argument of separating the Indonesian Migrant Workers of 18 years of age with the Indonesian Migrant Workers of 21 years of age based on the possibility of sexual harassment and from the viewpoint of emotional maturity. In addition, philosophically also, it is in fact the Government/the state which must open various opportunities for its citizens to work, including to work overseas when domestic employment is difficult to obtain. Have the rights of every citizen and every individual to work not been guaranteed by our Constitution, namely Article 27 Paragraph (2) which reads "*Every citizen shall have the right to work and to a living befitting human beings*"*;* and also Article 28D Paragraph (2) which reads, "*Every person shall have the right to work ...*"? Work is related to the right to life and to defend one's livelihood (Article 28A of the 1945

Constitution), and therefore the right to work is a human right, as the provision of Article 23 Paragraph (1) of the 1948 Universal Declaration of Human Rights states, "*Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and* ***to protection against unemployment**.*" This provision is further affirmed in Article 6 Paragraph (1) of the International Covenant on Economic, Social, and Cultural Rights which has been ratified by Indonesia through Law Number 11 Year 2005. Whereas in fact due to this right to work being included as a human right in the economic, social and cultural rights, hence the Government/the state must not only respect and protect it, but in fact fulfill it;

b. Sociologically, the reality shows that the percentage of sexual harassment occurring to Indonesian Migrant Workers is extremely low and sexual harassment does not occur to Indonesian Migrant Workers of 18 years of age, but in fact to the upper age levels. Reality also shows that the Government/the State is not/not yet capable of providing employment opportunities for its citizens;

c. Judicially, in Law Number 13 Year 2003 regarding Manpower has stipulated the following matters: (i) Every worker shall have equal opportunity and treatment to obtain employment without discrimination (Article 5); (ii) Companies are not allowed to employ children, except when the children are 13 to 15 years of age (Article 68); (iii) Article 76 regulates that females under 18 years of age are not allowed to work

between 11.00 p.m. – 07.00 a.m. Whereas further, in the ILO Convention Year 1973 Number 138 (Minimum Age Convention) it is stipulated that the minimum age to work shall not be less than the schooling age, namely shall not be less than 15 years of age [Article 2 Paragraph (3)] and in Article 3 Paragraph (1) it is stipulated that "*The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely jeopardise the health, safety or morals of young persons shall not be less than 18 years.*" Whereas moreover, an individual of 18 years of age according to Law Number 23 Year 2002 regarding Child Protection is not categorized as a child (*vide* Article 1 Point Number 1);

2. Although the provision of Article 35 Sub-Article a of the *a quo* Law is intended for PPTKIS with a sanction of imprisonment if violated [Article 103 Paragraph (1) Sub-Article c], but it extensively affects the employment seekers (the Indonesian Migrant Workers) under 21 years of age, namely in the form of an inhibition for them to work for individual Users (for instance as a housemaid or a driver) overseas. Whereas in fact, the majority of the quality condition of the human resource of the Indonesian Migrant Workers is indeed still at the level of housemaids. Will they thus be left unemployed in their own state?
3. The Provision of Article 35 Sub-Article a of Law Number 39 Year 2004 regarding the Placement and Protection of Indonesian Migrant Workers which requires 21 years of age for Indonesian Migrant Workers to work for individual Users overseas, has injured the human rights, namely the right to work and

the right to protection from unemployment, which implies that it has injured the 1945 Constitution. Whereas therefore, it is proper for the provision to be declared as not having any binding legal force.

CONSTITUTIONAL COURT JUSTICE MARUARAR SIAHAAN

The prohibition included in Article 35 Sub-Article a of Law Number 39 Year 2004, regardless of the fact that it is addressed to the Indonesian Migrant Workers Placement Agency (PPTKI), which relates to recruitment conditions, specifically the provision of "...must be at least 21 (twenty-one) years of age for Indonesian Migrant Workers who will be employed by individual Users", has a direct implication to employment seekers who have yet to reach 21 years of age;

Law Number 13 Year 2003 concerning Manpower, which is a guideline in drafting policies and strategies for the development of Manpower in Indonesia, based on *Pancasila* and the 1945 Constitution. The Law has stipulated that every worker shall have equal opportunity without discrimination, and the aforementioned Indonesian workers shall be every individual of 18 (eighteen) years of age. Such a matter is also in line with ILO Convention Number 138 concerning Minimum Age for Admission to Employment which has been ratified by Indonesia. As having been recognized by the Government and the People's Legislative Assembly in Law Number 20 Year 1999 regarding the Ratification of ILO Convention No. 138 Concerning Minimum Age for Admission to Employment, employment has a significant meaning in the human life, as a

source of income to fulfill the needs of oneself and one's family. Employment may even be interpreted as a means of self-actualization in order that an individual regards himself/herself as more valuable to himself/herself, his/her family and his/her surroundings. Whereas therefore, the right to work is a human right embedded in the self of an individual which must be highly upheld. The recognition of the right to work as a human right, has been included in Article 28D Paragraph (2) of the 1945 Constitution, which reads; "*Every person shall have the right to work and to receive fair and proper remuneration and treament in work relationships*";

The right for every person to work is a basic right which is closely related or linked with **the right to life**, which is regulated and protected in Article 28I of Paragraph 1 of the 1945 Constitution, as a human right which cannot be reduced in any circumstances. A person will never be able to live without having the support to sustain his/her livelihood, namely proper clothing and food, which can be obtained from the payment or the income of his/her job. It will imply that an individual will be deprived of his/her life, when his/her right to obtain the supporting means of his/her life namely the occupation s/he has obtained is also taken away. Whereas therefore, the right to work which allows a person to obtain clothing and food to sustain his/her life, is very closely related to the right to life. The 1945 Constitution stipulates a more advanced and strict standard, since in several other states, the right to livelihood which is viewed as an integral element of the right to life, is obtained from the interpretation in the Court decision as evolving new rights from the right to life which is regulated in the Constitution. In

the decision of the Indian Constitutional Court concerning the case of Olga Tellis v Bombay Municipal Corp, it is stated, among other things, that:

> *"The right to life cannot be restricted solely in its physical existence, but is instead includes the right to life in dignity with basic needs of living, with which the right to life includes the right to perform functions and activities which generate the need to express oneself. The expression of life is not merely a physical existence, but rather, in a broader sense, includes full enjoyment of life, which includes the right of enjoyment of pollution-free water and air. In a civilized community, the right to life must include not only the basic needs for clothing and food, but also the right to a decent natural environment and proper accommodation to reside*". (Prof. M.P. Jain, Indian Constitutional Law, Wadhwa Nagpur, Fifth Edition 2004, p. 1123)

Article 35 Sub-Article a of Law Number 39 Year 2004, which requires that workers for individual Users to be recruited must be at least 21 years of age, which is an exception for workers in general who are required to be at least 18 years of age, is stipulated based on the notion that individual Users always have an intense personal relationship with Indonesian Migrant Workers, which may cause the involved Indonesian Migrant Workers to become victims of sexual harassment. Whereas for such occupations, it is necessary for the workers to have maturity in the aspects of personality and emotions, in order that

the risk of sexual harassment may be minimized. Such an argument is included in Elucidation of Article 35 of Law Number 39 Year 2004, statements of the Government and the People's Legislative Assembly as well as the statement of the expert presented by the Government. The best form of protection for Indonesian Migrant Workers must arise from the Indonesian Migrant Workers themselves through the main restrictions for recruitement namely the required skills, educational level and minimum age to work overseas, in order to be prevented from circumstances which may degrade the dignity and status of the Indonesian Migrant Workers themselves as well as the dignity and status of the State of Indonesia as a sovereign nation and as a nation which highly upholds the values of humanity;

It cannot be denied that to protect the entire Indonesian nation and the entire Indonesian motherland, and in order to promote general welfare, to develop the intellectual life of the nation, and to partake in implementing world order based upon independence, eternal peace and social justice are the objectives of the formation of the Government of the State of Indonesia, which simultaneously become the source of constitutional duties and authorities of the Government. Whereas therefore, it is the constitutional duty of the Government to honor, to protect, and to fulfill the human rights in such manners, and within the framework as well, because the 1945 Constitution does not treat the aforementioned Human Rights as an absolute matter, the state is allowed to impose certain restrictions and respect for the rights and freedoms of others and in order to fulfill a fair demand in accordance with considerations of morality,

religious values, security and public order in a democratic society, the restrictions of which are stipulated in law. In other words, the restriction imposed must be reasonable and rational in such a way that it does not eliminate its constitutional duty to respect, to protect, and to fulfill the basic rights of the citizens;

However, the protection for the citizens to safeguard their own dignity and the dignity of the state, should be imposed through state policy, in the context of manpower issues encountered nowadays by providing information for the state, and access for Indonesian Migrant Workers, which allows Indonesian Migrant Workers to obtain legal protection in the state which provides employment. The data presented by the Petitioners hints that the percentage of sexual harassment is insignificant compared to violations of law suffered by Indonesian Migrant Workers, in order to justify the minimum age restriction for Indonesian Migrant Workers to work for individual Users. Moreover, the Government also fails to produce the data concerning the general age level at which sexual harassment frequently occurs. It appears that the clause of employment agreement which opens up an intensive protection, as well as the agreement between the providing country and the Users of Indonesian Migrant Workers, which guarantees the upholding of law for Indonesian Migrant Workers, and ongoing efforts from the Government through Ambassadors in the Users' states, are yet to reach an optimum implementation. Such constitutional omission is a fundamental constitutional issue, which causes the restriction in Article 35 Sub-Article a of Law Number 39 Year 2004 not to be reasonable and rational, because the minimum age restriction imposed leads to the distinction of

treatment towards Indonesian Migrant Workers who will work for individual Users which constitutes **discrimination**. Such a restriction is a violation of **the right to work** as a basic right which becomes a part of **the right to life**, as **the most fundamental right**, which is guaranteed and protected by the 1945 Constitution, which cannot be disregarded without any constitutional grounds. Whereas therefore, the Court should have granted the petition, and declared the aforementioned Article 35 Sub-Article a contrary to the 1945 Constitution and that accordingly it shall not have any binding legal force.

CONSTITUTIONAL COURT JUSTICE H. HARJONO

Article 35 Law Number 39 Year 2004 states that the Recruitment of prospective Indonesian Migrant Workers by PPTKIS must be conducted for prospective Indonesian Migrant Workers who have fulfilled the requirements:

a. Must be at least 18 (eighteen) years of age except for prospective Indonesian Migrant Workers who will be employed by individual Users who must be at least 21 (twenty-one) years of age;

Whereas although the provision is intended for PPTKIS, it will have a direct implication to the Petitioners as Indonesian Migrant Workers, because the Petitioners who have yet to reach 21 years of age will be denied by PPTKIS from working for individual Users overseas because they are yet to reach 21 years of age. An individual who is 18 years of age is essentially included in the definition of an adult, which is evident from various stipulations of law which define an adult

as an individual who is over 17 years of age. ILO Convention Number 138 concerning the Minimum Age for Admission to Employment has been ratified by Law Number 20 Year 1999. Whereas in the Attachment to the aforementioned law, the Government of Indonesia has issued a statement concerning the minimum age for admission to employment in line with Article 2 Paragraph (1) of the ILO Convention, namely that the minimum age for admission to employment is 15 (fifteen) years of age. Whereas the Convention stipulates for occupations which threatens the health, safety, or morality of the child the state must strive for a minimum requirement of 18 years of age, except for light works it shall not be less than 16 years of age. Whereas hence, the minimum 18 years of age for admission to employment for Indonesian Migrant Workers has fulfilled the stipulation of the statement of the Government of Indonesia in Law Number 20 Year 1999, and the restriction recommended by the Convention;

Whereas in the 1945 Constitution, the right to work has a legal basis in Article 28A namely the right to defend one's life and livelihood, such a matter is evident because may people are unable to defend their lives and livelihood due to the factor of lacking the fulfillment of minimum basic needs because the people involved do not work and as a consequence, they are unable fulfill their basic needs. Therefore, the sooner one can work the better, especially for the people living in the countryside or lower-class people, the needs must urgently be fulfilled not only to satisfy themselves but often times to satisfy greater needs namely the needs of their families; their parents; and their underage siblings. The absence of employment vacancies leads to greater

uncertainties for an individual to be able to fulfill his/her needs. Article 28D Paragraph (2) of the 1945 reads, "*Every person shall have the right to work and to receive fair and proper remuneration and treatment in work relationships"*. The existing concern regarding the violation of this provision does not imply that the Government should hence immediately formulate a regulation which in the future will cause people to encounter difficulties or to be inhibited from working which will therefore cause people to be in a more complicated position;

In its relation to Indonesian Migrant Workers, which implies that an Indonesian citizen must leave the Indonesian territory to work, the existence of a prohibition which will further restrict the freedom of a person to venture overseas must also be considered, such a matter is in relation to the existence of the right as stated in Article 28E Paragraph (1) of the 1945 Constitution which among other things, reads; … *"Every individual shall be free… to choose any occupation, ... , to choose any domicile within the territory of the state of Indonesia and to leave the domicile, and shall also have the right to return"*. With this stipulation, in principle, an individual is free to leave the territory of Indonesia for any purposes and with any motives. Certainly, such a departure may only be restricted when it is intended to avoid any legal responsibilities imposed to the aforementioned individual and such a prohibition must be imposed by means of a clear legal procedure and based on clear grounds. An Indonesian Migrant Worker who will venture overseas has an equal right with other citizens to venture overseas, such a matter is guaranteed by Article 28E of the 1945 Constitution. Therefore, the minimum age requirement included in Article 35 of

Law Number 39 Year 2004 in addition to potentially impairing the constitutional right of an individual to work, may also indirectly impair the right of the citizen to choose any domicile within the territory of the state and to leave the domicile as guaranteed by Article 28E of the 1945 Constitution whenever it is assumed that the aforementioned individual intends to work overseas.

Whereas by considering the abovementioned arguments, hence the petition of the Petitioners should have been granted.

SUBSTITUTE REGISTRAR,

sgd.

SUNARDI