



DECISION

NUMBER 40/PUU-IX/2011

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final level, has passed a decision in the case of petition for Judicial Review of Law Number 6 Year 2011 regarding Immigration under the 1945 Constitution of the State of the Republic of Indonesia, filed by:

- [1.2] 1. Name : **Dr. Rico Pandeirot, S.H., LL.M**
Place/date of birth : Tondano, May 8, 1971
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Majapahit Permai Complex, Block 122-
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2. Name : **Afrian Bondjol, S.H., LL.M**
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3. Name : **Yulius Irawansyah, S.H., M.H**
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4. Name : **Slamet Yuono, S.H., M.H**
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5. Name : **Rachmawati**
Place/date of birth : Jakarta, January 17, 1979
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Place/date of birth : Selong, March 24, 1970
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Hereinafter referred to as -----**Petitioners;**

[1.3] Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having heard and read the written statements of the Government;

Having heard and read the statements of experts presented by the Petitioners;

Having heard and read the statements of experts presented by the
Government;

Having examined the written evidence of the Petitioners;

Having read the written conclusions of the Petitioners and the Government.

2. CASE POSITION

[2.1] Whereas the Petitioners have filed a petition with letter of petition dated June 10, 2011, which was received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Constitutional Court) on Wednesday, June 22, 2011 based on the Deed of Petition File Receipt Number 239/PAN.MK/2011 and which was registered on Monday, June 27, 2011 under Number 40/PUU-IX/2011, which was revised and received at the Registrar's Office of the Constitutional Court on Friday, July 29, 2011 which is, in substance, as follows:

I. BASIS OF PETITION

A. Authority of the Constitutional Court

Whereas, Indonesia has made a new history in the development of a modern state system. This was marked by the establishment of various state institutions, one of which was the Constitutional Court. As one of the institutions exercising judicial authority, the Constitutional Court is expected to be able to enforce the constitution and the principle of rule-of-law state according to the authority granted to it. The Constitutional Court is also required to be able to provide checks and balances among state institutions and to settle constitutionality disputes so as to preserve the basic law contained in the 1945 Constitution (hereinafter referred to as the 1945 Constitution).

Whereas in accordance with its duties and authority as specified in Article 24 sub-article c paragraph (1) of the 1945 Constitution, the Constitutional Court has 4 (four) areas of authority, namely:

1. to review laws under the Constitution;
2. to decide upon disputes over the authority of state institutions whose authority is granted by the Constitution;
3. to decide upon dissolution of political parties; and
4. to decide upon disputes over the results of general elections.

Whereas the authority granted to the Constitutional Court is subsequently confirmed by Article 10 paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as the Constitutional Court Law) stating that,

“The Constitutional Court shall have authority to hear at the first and final levels, whose decisions shall be final:

- a. *to review laws under the 1945 Constitution of the State of the Republic of Indonesia;*
- b. *to decide upon the authority of state institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia;*
- c. *to decide upon dissolution of political parties; and*

d. to decide upon disputes over the results of general elections”.

Whereas in addition to the provision referred to above, the authority of the Constitutional Court is also regulated in Law Number 48 Year 2009 regarding Judicial Power, particularly Article 29 paragraph (1) which states as follows:

“(1) The Constitutional Court shall have authority to hear at the first and final levels, whose decisions shall be final:

- a. to review laws under the 1945 Constitution of the State of the Republic of Indonesia;*
- b. to decide upon disputes over the authority of state institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia;*
- c. to decide upon dissolution of political parties; and*
- d. to decide upon disputes over the results of general elections*
- e. other authorities granted by law”.*

Whereas the Constitutional Court shall have the right to conduct judicial review of laws based on the parameters of the Constitution. Such review can be conducted as a substantive review or formal review. Substantive review is concerned with the review of the substance of a law so that it must be clear which part of the relevant law is

inconsistent with which provision of the 1945 Constitution. Parts to be reviewed may consist of only 1 chapter, 1 article, 1 sentence or 1 word in the relevant law.

Whereas the review petition filed by the Petitioners is one of a substantive review, being defined as the judicial review of the substance in any paragraph, article or part of a law considered inconsistent with the Constitution of the Republic of Indonesia.

Whereas in this respect, the Petitioners have filed a petition for substantive review of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration (State Gazette of the Republic of Indonesia Year 2011 Number 52) under Article 28A and Article 28D paragraph (1) of the 1945 Constitution to the Constitutional Court.

Whereas, the intended 1945 Constitution refers to no merely the understanding of its articles but rather, according to Soepomo, the 1945 Constitution consists of the Preamble and the Corpus. The Preamble explains the points of thoughts or the philosophy of the establishment of the Unitary State of the Republic of Indonesia. The Corpus contains articles explaining the implementation of the points of thoughts or the philosophy of the Preamble to the 1945 Constitution. Therefore, the petition of the Petitioners in respect of Article 16 paragraph (1) sub-paragraph b is not limited to its inconsistency with the corpus, as the Constitutional Court must also pay attention to and examine the points of thoughts or the philosophy of the Preamble to the 1945 Constitution in respect of the law petitioned for review.

Whereas since the Constitutional Court's authority to hear this petition has been in accordance with the provisions, the Petitioners request the Chief Justice of the Constitutional Court to stipulate that the Constitutional Court has authority to hear the petition *a quo*.

B. Legal Standing of the Petitioners as Petitioners with the Right to Constitutionality Review

Whereas based on the provision of Article 51 paragraph (1) of the Constitutional Court Law, the parties that may become Petitioners in the hearing of the Constitutional Court are:

"The petitioners shall be the parties considering that their constitutional rights and/or authority are 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;*

Whereas in addition to the provision of Article 51 paragraph (1) of the Constitutional Court Law, Article 3 of Regulation of the Constitutional Court Number 06/PMK/2005 regarding the Guidelines on the Proceedings in Judicial Review regarding legal standing also regulates the following requirements:

“Petitioners in Judicial Review of Laws under the 1945 Constitution shall be:

- a. individual Indonesian citizens or groups of people having a common interest;*
- 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.”*

Based on the foregoing description of the regulation, it can be concluded that the legal subjects which may file a petition for judicial review of laws under the 1945 Constitution shall be public or private legal entities, in addition to individual Indonesian citizens (including groups of people having a common interest), 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, and state institutions. Therefore, these

legal subjects have the potential legal standing to file a petition for judicial review of laws under the 1945 Constitution.

Furthermore, although the Constitutional Court Law does not explain what and who are categorized as public or private legal entities, added with non-existence of any provision regulating legal entities in general, the elucidation of the Constitutional Court Law states,

“Referred to as individuals shall include groups of people having a common interest.”

Whereas Petitioners 1 through 6 are Indonesia citizens having similar occupation, namely as Advocates. Therefore, the Petitioners have the opportunity to have deeper knowledge of the Immigration Law which becomes the guideline for law enforcement apparatuses in performing their profession along with its application in practices.

Whereas the Jurisprudence of the Constitutional Court in Decision Number 006/PUU-III/2005 and subsequent decisions, provide an interpretation of Article 51 paragraph (1) of the Constitutional Court Law in relation to constitutional rights, as follows:

- a. the existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners consider that such 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, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
- e. the possibility that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur;

Whereas in relation to the legal standing of the Petitioners as Indonesian citizens together having a common interest in their profession as advocates. Therefore, if related to the type of impairment of constitutional rights and/or authority which must be specific and actual, the constitutional impairment experienced by the Petitioners is categorized as potential impairment which, according to logical reasoning, can be assured of occurring.

Whereas Article 16 paragraph (1) sub-paragraph b of the Immigration Law expressly provides:

“(1) The Immigration Official shall reject a person to go out of Indonesian territory in the event that the person:

- b. *is needed for the interests of preliminary investigation and investigation at the request of a competent official”.*

Whereas the phrase stating the prohibition of “a person” does not define who the person is. Therefore, it can be concluded that the intended person is any person and any person may automatically become an investigation object, including without limitation to the Petitioners. The article in a Law only defines a group of people. For example, if it is only intended for a customary community group or a certain group of people and if it is clear that the Petitioners are the intended community then the Petitioners do not have legal standing because it is impossible for the aforementioned article to impair the constitutional interests of the Petitioners. However, since it is intended for any person, then it is potential for this article to be applied to the Petitioners if the Petitioners become the objects in a preliminary investigation. Moreover, a preliminary investigation is a series of activities without requiring the existence of a criminal act, as an alleged criminal act is sufficient with the potential of being applied to any person without any previous criminal act.

In this respect, if at any time the Petitioners are involved in an investigation process, then the Petitioners will experience constitutional impairment due to erroneous application of a law by law enforcement apparatuses (*in casu* the Preliminary Investigator, Investigator, Prosecutor and Judge), whereby the Petitioners’ right to live and to defend their livelihood, as well as their right to the

recognition, guarantee, protection and certainty of just laws and equal treatment before the law, may be deprived by the coming into effect of the provision of Article 16 paragraph (1) sub-paragraph b.

Whereas the element of common interest of the Petitioners is the interest to prevent the occurrence of constitutional impairment potential to occur and to be experienced personally by the Petitioners. Besides, in addition to having the status of Indonesian citizens, the Petitioners also have a common profession or occupation, namely as Advocates, as Article 1 sub-article 1 of Law Number 18 Year 2003 regarding Advocates states that:

“An Advocate is a person having the profession of providing legal services, both within and outside the court who meets the requirements based on the provisions of this law.”

Whereas the application of Article 16 paragraph (1) sub-paragraph b may, in practice, open up the opportunity leading to the loss of constitutional rights of the Petitioners as provided in the 1945 Constitution as well as the living constitutional values within the Unitary State of the Republic of Indonesia.

Whereas Article 16 paragraph (1) sub-paragraph b of the Immigration Law is extremely unfair that it has violated the constitutional rights granted by the 1945 Constitution to the Petitioners, particularly in Article 28 sub-article D paragraph (1):

“Any person shall have the right to the recognition, guarantee, protection and certainty of just laws as well as equal treatment before the law.”

Such is the elucidation by the Petitioners of the bases for legal standing of the Petitioners. The violation of constitutional rights of the Petitioners referred to in this part has indicated the existence of constitutional rights possessed by the Petitioners.

In an effort to prove the legal standing, it is unavoidable to include arguments related to the Law to be reviewed. However, in the *posita* of this petition, the facts of the case as well as violations of constitutional rights occurring will be further explained in relation to the application of Article 16 paragraph (1) sub-paragraph b of the Immigration Law.

Furthermore, Prof. Dr. Jimly Asshidiqie, S.H. states that the aforementioned criteria, in implementation, are abstract and cannot be applied in absolute terms. To see whether there are any rights, authority or constitutional impairment, the constitution of a state must be considered.

II. CONCERNING CONSTITUTIONAL IMPAIRMENT

Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration is consistent with and has violated the constitutional rights of the

Petitioners as included in Article 28 sub-article A and Article 28 sub-article D paragraph (1) of the 1945 Constitution.

Protection of Human Rights (HR) has a long history from the inherent dignity and rights as humans which are equal and non-derogable. The recognition of the aforementioned dignity and rights constitutes the basis for the freedom, justice and world peace. We consider HR vital to maintain a humane life and to maintain the most precious right, namely the right to be human beings. As terms, such human dignity and rights are called HR. Article 4 of Law Number 39 Year 1999 regarding Human Rights mentions a number of absolute human rights which are cannot be reduced under any circumstances and by anyone. Such rights are, among other things:

1. Right to life;
2. Right not to be tortured;
3. Right to individual freedom, freedom of thought and conscience;
4. Right to have a religion;
5. Right not to be enslaved;
6. Right to be acknowledged as a person and equality before the law;
7. Right not to be prosecuted under retroactive laws;

The formulation of Article 4 of Law Number 39 Year 1999 regarding Human Rights is similar to the formulation of Article 28 sub-article I paragraph (1) of the Amended 1945 Constitution, namely:

“The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive law shall constitute human rights which cannot be reduced under any circumstances whatsoever”.

The sentence *“...cannot be reduced under any circumstances whatsoever”* indicates that such rights are absolute rights which cannot be limited although Article 28 sub-article J paragraph (2) of the 1945 Constitution recognizes the obligation to respect the rights and freedom of other people within the limits stipulated by law.

Therefore, the recognition as a person and equal treatment and protection before the law create for a person the right to demand the government to fulfill it and to provide protection and equal treatment before the law.

In this petition, the constitutional rights which may and/or which have been violated are constitutional rights granted by the 1945 Constitution, to be exact, in Article 28 sub-article A and sub-article D paragraph (1) which read:

Article 28 sub-article A:

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

Article 28 sub-article D paragraph (1):

“Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law”.

Pursuant to the aforementioned Article 28 sub-article A and Article 28 sub-article D paragraph (1) of the 1945 Constitution, every person, including the Petitioners, shall have the right to defend their life/living and to obtain the status as well as equal treatment before the law, to obtain the recognition, guarantee, protection and certainty of just laws.

Whereas in relation to the right to life, according to the Petitioners, the application of Article 16 paragraph (1) sub-paragraph b of the Immigration Law to the extent it is concerned with the word preliminary investigation, going outside the Indonesian territory clearly has a connection, in the wide sense of the term. In working for a living, the Petitioners in perform their profession as Advocates are sometimes required to go outside the Indonesian territory, while in handling a case the Petitioners are related to a case they handle and the case is still at the preliminary investigation stage and the Petitioners have been prevented and deterred, then it clearly leads to constitutional impairment to the Petitioners.

Whereas Article 16 paragraph (1) sub-paragraph b of the Immigration Law has expressly given room to the preliminary investigator as well as the investigator to violate the human rights of the Petitioners, as it reads:

“(1) The Immigration Official shall reject a person to go out of Indonesian territory in the event that the person:

b. is needed for the interests of preliminary investigation and investigation at the request of a competent official”.

Whereas the formulation of the provision of Article 16 paragraph (1) sub-paragraph b regulating the authority of the preliminary investigator to ask the immigration official to apply prevention and deterrence against a person, although the investigation has only reached the preliminary investigation stage violates a person's human rights.

The aforementioned provision clearly gives room and the opportunity for law enforcement institutions such as the Corruption Eradication Commission (KPK) to easily prohibit a person's human right to travel for his/her live and living.

In addition, if the Petitioners are still in the preliminary investigation process when they are prohibited from going on a travel, as the immigration official rejects the Petitioners to go out of the Indonesian territory at the request of the investigator, while the suspect has not been determined, the constitutional rights of the

Petitioners regulated in Article 28 sub-article D paragraph (1) have been clearly violated. Such practices occurred in the case of M. Nazaruddin who was prevented and deterred at the request of the Corruption Eradication Commission, while there had been no case with respect to M. Nazaruddin and that he had not been summoned by KPK.

Whereas with the authority granted by the aforementioned Article 16 paragraph (1) sub-paragraph b, it is evident that a citizen's constitutional rights have been greatly impaired while they should be protected, namely the human rights regulated in Article 28 sub-article D paragraph (1) of the 1945 Constitution. The impairment due to the violation of Constitutional Rights due to the coming into effect of the aforementioned Article 16 paragraph (1) sub-paragraph b also has the potential to impair the constitutional rights of the Petitioners in the future.

Whereas in essence, the Petitioners have a great objection to the rejection of a person while in the investigation process or basically when a person is basically prohibited from going overseas because such action is a form of deprivation of freedom or a form of forceful measure.

Definition of preliminary investigation (*penyelidikan*) pursuant to Article 1 sub-article 5 of the Penal Code (KUHP):

“Preliminary investigation (penyelidikan) is a series of actions of the preliminary investigator (penyelidik) to search and find an event alleged to be a criminal act

in order to determine whether or not an investigation (penyidikan) can be conducted according to the procedures regulated in this law”

Therefore, based on the formulation of the article, it is extremely premature to apply a forceful measure to a person still at the preliminary investigation level. Whereas the existence of a *ratio legis* preliminary investigation institution is intended to minimize forceful measures.

A case sample is when a theft occurred at the office of O. C. Kaligis, and for such purpose the investigator through the immigration officials applied the measure of prevention and deterrence against the employees of O. C. Kaligis. It might be still reasonable. However, if there “might” be a theft or the theft at the office of O. C. Kaligis was uncertain and then the preliminary investigator through immigration officials performed prevention and deterrence against the employees of O. C. Kaligis, such an act would be extremely unreasonable because a forceful measure had been taken while there had not been necessarily a criminal event.

Whereas in fact, such an act of the preliminary investigator through immigration officials as described in the aforementioned example has been allowed to occur based on Article 16 paragraph (1) sub-paragraph b of the Immigration Law.

Whereas at the moment, the Petitioners do not act as the attorneys for the person directly affected by the coming into effect of Article 16 paragraph (1) sub-paragraph b or that at the moment the Petitioners have not been or are not being

prevented and deterred due to the coming into effect of the aforementioned article. Once again the Petitioners, with reference to Decision Number 006/PUU-III/2005, assert the impairment which is at least potential which, based on logical reasoning, can be assured of occurring.

Whereas the aforementioned action of KPK is the evidence of the application of Article 16 paragraph (1) sub-paragraph b by KPK, so that in the future it is always likely that the constitutional rights related to the recognition, guarantee, protection and certainty of just laws as stated in Article 28 sub-article D paragraph (1) of the 1945 Constitution will be violated.

Whereas the clear and noticeable application of Article 16 paragraph (1) sub-paragraph b of the Immigration Law by KPK to M. Nazaruddin has the potential to cause impairment to the constitutional rights of the Petitioners which, based on logical reasoning, can be assured of occurring. It is likely that at a time in the future if the Petitioners are related to an event which is not necessarily a criminal act, the Petitioners will be prevented and deterred first.

Therefore, to avoid arbitrary actions by law enforcement apparatuses, the Petitioners have filed the petition to the Constitutional Court to conduct substantive review of Article 16 paragraph (1) sub-paragraph b of the Immigration Law to the extent it is concerned with the word "*preliminary investigation (penyelidikan)*" which is extremely unconstitutional as it is inconsistent with Article 28 sub-article D paragraph (1) of the 1945 Constitution.

IV. PETITION

Whereas based on the matters described by the Petitioners above, the Petitioners hereby request the Panel of Constitutional Court Justices to kindly hear the petition of the Petitioners with the following decisions:

1. Accepting and granting the Petitioners' petition in its entirety;
2. Declaring that the word "Preliminary Investigation (*Penyelidikan*)" in Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration (State Gazette of the Republic of Indonesia Year 2011 Number 52) and in the Elucidation of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration (Supplement to the State Gazette of the Republic of Indonesia Year 2011 Number 52) has been inconsistent with Article 28A and Article 28D paragraph (1) of the 1945 Constitution;
3. Declaring that the word "Preliminary Investigation (*Penyelidikan*)" in Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration (State Gazette of the Republic of Indonesia Year 2011 Number 52) and in the Elucidation of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration (Supplement to the State Gazette of the Republic of Indonesia Year 2011 Number 52) has no binding legal force;

4. Ordering the inclusion of this decision in the Official Gazette of the Republic of Indonesia properly.

However, if the Panel of Constitutional Court Justices is of a different opinion, it is requested for the decisions to be passed according to what is equitable and good (*ex aequo et bono*).

[2.2] Whereas to prove their arguments, the Petitioners have submitted written evidence, namely Exhibit P-1 through Exhibit P-2 as follows:

1. Exhibit P-1 : Photocopy of Law Number 6 Year 2011 regarding Immigration;
2. Exhibit P-2 : Photocopy of the 1945 Constitution of the State of the Republic of Indonesia.

Whereas to prove their arguments, at the hearing on September 27, 2011, statements of experts were presented by the Petitioners who also submitted written statements through the Registrar's Office of the Court dated September 29, 2011 which are principally as follows:

1. Prof. Dr. O.C. Kaligis

- Whereas if Article 16 paragraph (1) of the Immigration Law is related to the Penal Code (KUHAP), then it can be concluded that the immigration

officials rejected the exit from the Indonesian Territory in the event that the person is needed for the interest of preliminary investigation, namely that they can reject a person to go out of Indonesian territory in the event of an alleged criminal act. According to the expert, this is inconsistent with the law, considering its premature/early nature. How could it be possible for a person to be rejected to go out of the Indonesia territory merely due to the existence of an alleged criminal act;

- Whereas the legal bases used by the expert are as follows:
 - a. Article 13 of the Universal Declaration of Human Rights (“UDHR”)

which reads:

“1. Everyone has the right to freedom of movement and residence within the borders of each state. 2. Everyone has the right to leave any country, including his own, and return to his country;

Translation by the expert is as follows:

[Indonesian translation]

- b. Article 27 of Law Number 39 Year 1999 regarding Human Rights (“Human Rights Law”) which reads:

1. Every citizen of Indonesia has the right to freedom of movement, travel and residence within the territory of the State of the Republic of Indonesia;
2. Every citizen of Indonesia has the right to leave and return to the territory of the State of the Republic of Indonesia, in accordance with the provisions of laws and regulations;

Article 16 paragraph (1) sub-paragraph b of the Immigration Law is inconsistent with the formulation of the aforementioned Article 27 of the Human Rights Law;

- c. Article 12 of the International Covenant on Civil and Political Rights (“ICCPR”) which Indonesia has ratified by Law Number 12 Year 2005 regarding the Ratification of the International Covenant on Civil and Political Rights (ICCPR), which reads as follows:
 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence;
 2. Everyone shall be free to leave any country, including his own;

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
 4. No one shall be arbitrarily deprived of the right to enter his own country.
- d. Article 28E paragraph (1) of the 1945 Constitution which reads “Every person shall be free to adhere to a religion and to worship in accordance with his/her religion, to choose education and teaching, to choose occupation, to choose citizenship, to choose residence in the state territory and to leave it, and shall have the right to return”
- Whereas the formulation of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration not only inconsistent with the national law and the Constitution, but it also violates international law instruments which have been recognized and which must be implemented by Indonesia;
 - Prevention and deterrence at the preliminary investigation level is a deprivation of freedom and constitutes an occupational crime as referred

to in Article 421 of the Penal Code. The status of witness and suspect will exist only at the investigation level, so that prevention and deterrence should be conducted only at the investigation level.

2. Dr. Arbijoto

- Whereas the formulation of Article 16 paragraph (1) sub-paragraph b regulating the authority of the investigator to request immigration officials to apply prevention and deterrence to a person although the examination has only reached the level of preliminary investigation, seriously violates a person's human rights;
- Prevention and deterrence against a person at the stage of preliminary investigation are inconsistent with the provision of Article 28A of the 1945 Constitution stating that "Every person shall have the right to live and to defend his/her life and living";
- Whereas with the authority under the aforementioned Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration, a citizen's constitutional rights have proven to be impaired while they should be protected, namely the human rights regulated in Article 28D paragraph (1) of the 1945 Constitution. The impairment due to violation with the coming into effect of Article 16 paragraph (1) sub-paragraph (b) of Law

Number 6 Year 2011 regarding Immigration, also has the potential to impair the Petitioners' constitutional rights in the future;

[2.3] Whereas at the hearing on September 13, 2011, the oral statement of the government was heard and on October 4, 2011 the Government submitted a written statement through the Registrar's Office of the Court which is principally as follows:

I. SUBSTANCE OF THE PETITIONERS' PETITION

- a. Whereas the Petitioners are Indonesian citizens having a common profession as Advocates so that the Petitioners have the opportunity to have deeper knowledge of the Immigration Law serving as the guidelines for law enforcement apparatuses in performing their profession along with the implementation in practice, and therefore, the law *a quo* has resulted in potential impairment which, according to logical reasoning, can be assured of occurring;
- b. Whereas according to the Petitioners, particularly the word "a person" in Article 16 paragraph (1) of the Immigration Law being intended for any person is very potential to be applied to the Petitioners if they become objects in a preliminary investigation, while the preliminary investigation may be conducted without the existence of any criminal act as an alleged criminal act will be sufficient without any event of criminal act first;

- c. Whereas according to the Petitioners, the provision *a quo* which regulates the authority of the preliminary investigator to ask the Immigration Officials to conduct prevention and deterrence against a person, although the examination has only reached the preliminary investigation level, seriously violates a person's human rights, and this may allow law enforcement apparatuses to easily prohibit a person to go overseas;
- d. In summary, according to the Petitioners, the provision *a quo* has led to unfair treatment, and therefore, it is inconsistent with the provisions of Article 28A and Article 28D paragraph (1) of the 1945 Constitution;

II. LEGAL STANDING OF THE PETITIONERS

Article 51 paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court as amended by Law Number 8 Year 2011 provides that the Petitioners shall be the parties who consider that their constitutional rights and/or authority are 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.

The provision above is emphasized in its elucidation, namely that "constitutional rights" refer to the rights regulated in the 1945 Constitution.

Therefore, for a person or a party to be eligible as a Petitioner who has legal standing in a petition for judicial review of a Law under the 1945 Constitution of the State of the Republic of Indonesia, the person or party must explain and evidence:

- a. His/her qualification in the petition *a quo* as referred to in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011;
- b. His/her constitutional rights and/or authority in the intended qualification which are deemed to have been impaired by the coming into effect of the law petitioned for review;
- c. The impairment of the constitutional rights and/or authority of the Petitioner due to the coming into effect of the Law petitioned for review.

Furthermore, following its Decision Number 006/PUU-III/2005 and Decision Number 11/PUU-V/2007, as well as subsequent decisions, the Constitutional Court has provided the definition and cumulative limitations concerning the impairment of constitutional rights and/or authority arising due to the coming into

effect of a law according to Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011, which must meet 5 (five) requirements namely:

- a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners believe that such 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, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
- e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur.

With respect to the foregoing, according to the Government, it is necessary to question the interests of the Petitioners, namely whether they are the proper parties who consider that their constitutional rights and/or authority have been

impaired by the coming into effect of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration, and also whether there is any constitutional impairment to the Petitioners which is specific and actual or at least potential in nature which, according to logical reasoning, can be assured of occurring, and whether there is a causal relationship (*causal verband*) between the impairment and the coming into effect of the law being petitioned for review.

Whereas according to the Government, the provisions on the prevention shall apply to any person fulfilling the provisions in Law Number 6 Year 2011 regarding Immigration and shall apply not only to the Petitioners having the profession of Advocates so that the provision *a quo* is not discriminatory in nature and it upholds equality before the law.

Whereas the Petitioners in the petition for the review *a quo* are not the people being requested by competent official to be rejected to go out of Indonesian territory, so that according to the government, there is no constitutional impairment suffered by the Petitioners.

In addition, according to the Government, the provision petitioned for review is not in the position to reduce, limit or at least prevent the Petitioners from performing their duties as Advocates.

Based on the foregoing, the Government is of the opinion that the Petitioners in this petition do not meet the qualification as the parties having legal standing as

intended by the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court as amended by Law Number 8 Year 2011 as well as based on the previous decisions of the Constitutional Court.

Therefore, according to the Government, it is proper for the Honorable Chief Justice/Panel of Constitutional Court Justices to wisely declare that the Petitioners' petition cannot be accepted (*niet ontvankelijk verklaard*).

However, if the Honorable Chief Justice/Panel of Constitutional Court Justices is of a different opinion, the Government's Explanation is as follows:

III. EXPLANATION OF THE GOVERNMENT WITH RESPECT TO THE MATTERS PETITIONED BY THE PETITIONERS

Whereas before giving a detailed explanation of the matters of normative substance in Law Number 6 Year 2011 regarding Immigration petitioned for review by the Petitioners as referred to above, the Government shall first convey the philosophical foundation of the prevention as well as the implementation of prevention in the Law *a quo*, as follows:

A. PHILOSOPHY OF PREVENTION

The freedom of movement of any person which is recognized as a human right as contained in international conventions, namely among other things, the Universal Declaration of Human Rights and the International Covenant on Civil

and Political Rights, as well as in the provision of Article 28E paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia, although the human rights recognize and guarantee the every person's freedom of movement, the intended freedom is not unlimited freedom (absolute freedom). In this respect, the state may limit the freedom of movement of humans based on the consideration of the interests of a state for the reasons which are legally and rationally clear, namely among other things, reasons of national security, public order, health and morality of the community and public interest.

In addition, internationally, the freedom of movement is limited by the international convention in article 12 sub-article 3 of the International Covenant on Civil and Political Rights, as well as other legal instruments which are regional in nature, such as the 4th Protocol of the European Convention and the American Convention and the African Charter. All of them point to the limitation of the freedom of movement which must be based on legally and rationally clear reasons in relation to the efforts to protect national security and public interest.

The limitation requirements in the 4th Protocol of the European Convention and the American Convention point to the reasons which are indeed necessary in a democratic society. To be more clear, the American Convention and the African Charter add the welfare of the community and public morality as the reasons, and the American Convention and the 4th Protocol of the European Convention add public safety as the reason.

Therefore, the limitation of the freedom of movement of a person internationally is allowed for the reasons adjusted to the interests of a state the implementation of which is included in the laws and regulations of the relevant state.

Article 283 paragraph (2) of the 1945 Constitution of the State of the Republic Indonesia also recognizes the existence of the limitation of the right to the freedom of movement of any person under the Law for the sole purpose of guaranteeing 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.

Law Number 6 Year 2011 regulating Immigration nationally regulates the freedom of movement, in this matter to go out of Indonesian territory being implemented in the framework of prevention, and therefore, the travel of any person whose freedom is limited overseas can be rejected for a certain reason by Immigration Officials at the place of international transit which, in this matter, is regulated in this Law as the "Immigration Inspection Place" (TPI).

B. IMPLEMENTATION OF ARTICLE 16 PARAGRAPH (1) SUB-PARAGRAPH b REGARDING IMMIGRATION

Whereas Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration states that Immigration Officials' rejection for a person to go out of Indonesian territory is intended for the purpose of preliminary

investigation and investigation by a law enforcement agency or institution. The context of such rejection is the cancellation of departure of a person out of Indonesia territory upon the request of competent Officials. Competent Officials intended in the Law as regulated in Article 91 paragraph (2) of the Immigration Law consist of:

- a. Minister of Finance;
- b. Attorney General;
- c. Chief of Police of the Republic of Indonesia;
- d. Chairperson of the Corruption Eradication Commission;
- e. Head of National Narcotics Board; or
- f. Head of ministry/agency who, based on the law, have Prevention authority.

The request of the competent official shall be submitted in writing both to the Minister to carry out the prevention and/or directly to the Immigration Official on duty at the Immigration Inspection Place (TPI) or the technical implementation unit in charge of the TPI under a state of exigency as regulated in Article 92 of the Immigration Law, which reads:

“In a state of exigency, the official as intended in Article 91 paragraph (2) may directly request a certain Immigration Official to conduct Prevention”

Referred to as “a state of exigency“ shall be, for example, when it is worried that the Prevented person will escape overseas at that time or has been at the Immigration Inspection Place to go overseas before a prevention decision is passed. The interest to be protected here with the regulation of rejection for a person to go out of Indonesian territory at TPI is related to the national interests which include national security, public order and interest of the community.

This state of exigency has also been regulated in another law namely Law Number 2 Year 2002 regarding the Police of the Republic of Indonesia, to be exact, in Article 16 paragraph (1) sub-paragraph j which reads:

“For the purpose performing the duties as intended in Article 13 and Article 14 in the field of criminal process, the Police of the Republic of Indonesia shall have authority to:

- j. submit a request directly to the competent immigration official in a state of exigency or sudden situation to prevent or deter a person alleged to have committed a criminal act.”*

In this respect, the request is submitted for the interest of preliminary investigation and investigation of all criminal acts in accordance with the criminal procedure law and other laws and regulations as regulated in Article 14

paragraph (1) sub-paragraph g, by the Chief of Police of the Republic of Indonesia (*Kapolri*) and by lowest position at the level of Chief of Resort Police (*Kapolres*) which shall subsequently within no later than 20 (twenty) days be confirmed in a written decision of the Chief of Police of the Republic of Indonesia (*Kapolri*).

Furthermore, with Law Number 6 Year 2011, the interest of direct request for the purpose of preliminary investigation and investigation as intended in Article 16 paragraph (1) sub-paragraph J of Law Number 2 Year 2002 has been accommodated in Article 92 of Law Number 6 Year 2011. Even the aforementioned Article 92 accommodates the interest of preliminary investigation and investigation not only by the Police, but also by, among other things:

- a. The Corruption Eradication Commission as intended in Article 12 paragraph (1) sub-paragraph b of Law Number 30 Year 2002;
- b. The National Narcotics Board as intended in Article 71 of Law Number 35 Year 2009; and
- c. Attorney General of the Republic of Indonesia as intended in Article 35 sub-article f of Law Number 16 Year 2004;

Therefore, the rejection by immigration officials for a person to go out of Indonesian territory is carried out in the context of prevention.

Prevention conducted must meet certain criteria as regulated in Article 94 of Law Number 6 Year 2011, namely:

1. It must be stipulated by a written decision by the competent Official;
2. The written decision shall contain at least:
 - a. name, gender, place and date of birth or age and photograph of the Prevented person;
 - b. reason for Prevention; and
 - c. duration of Prevention.

If such criteria are not fulfilled, the Minister may reject the request for the implementation of Prevention which will be submitted to the competent official within no later than 7 (seven) days as from the date of receipt of the request along with the reason for rejection.

With respect to the normative substance of the Immigration Law petitioned for review by the Petitioners, namely Article 16 paragraph (1) sub-paragraph b of the Immigration Law stating that:

Article 16 of the Immigration Law

“(1) The Immigration Official shall reject a person to go out of Indonesian territory in the event that the person:

- a.
- b. *is needed for the interests of preliminary investigation and investigation at the request of a competent official”.*

The Petitioners consider the aforementioned provision inconsistent with the provisions of Article 28A and Article 28D paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia stating that:

Article 28A of the 1945 Constitution:

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

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

“Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law”

With respect to the assumptions of the Petitioners above, the Government can explain as follows:

1. whereas based on Article 1 sub-article 5 of Law Number 8 Year 1981 regarding Criminal Procedure Law (KUHAP), Preliminary Investigation is defined as is a series of actions of the preliminary investigator (*penyidik*) to search and find an event alleged to be a criminal act in order to determine

- whether or not an investigation (*penyidikan*) can be conducted according to the procedures regulated in this law. Investigation in this respect must be conducted based on the letter of order/assignment to conduct Investigation.
2. whereas the authority to reject a person to go out of Indonesian territory while the person is needed for the interest of preliminary investigation and investigation, is a small part of the criminal law enforcement process in Indonesia known as the mechanism of integrated criminal justice system. Whereas the mechanism of integrated criminal justice system is a system which views the criminal case settlement as an integrated process as from the preliminary investigation, investigation, prosecution, case decision, up to the imposition of criminal sanction and its settlement at the correctional institution level, where there restricting authorities in the form of prevention and/or detention measures.
 3. Whereas the authority of the competent officials to request for and/or to order prevention and deterrence of a person at the stage of preliminary investigation and investigation is contained in various Laws, namely:
 - a. Law Number 6 Year 2011 regarding Immigration, which reads:

Article 92

“In a state of exigency, the official as intended in Article 91 paragraph (2) may directly request a certain Immigration Official to conduct Prevention”

- b. Law Number 30 Year 2002 regarding the Corruption Eradication Commission, which reads:

Article 12 paragraph (1) sub-paragraph b

“(1) In performing the duties of preliminary investigation, investigation and prosecution as intended in Article 6 sub-article c, the Corruption Eradication Commission shall have authority:

- b. to order the relevant agency to prohibit a person from going overseas;”*

- c. Law Number 2 Year 2002 regarding the Police of the Republic of Indonesia, which reads:

Article 16 paragraph (1) sub-paragraph j

“(1) For the purpose performing the duties as intended in Article 13 and Article 14 in the field of criminal process, the Police of the Republic of Indonesia shall have authority to:

j. submit a request directly to the competent immigration official in a state of exigency or sudden situation to prevent or deter a person alleged to have committed a criminal act.”

- d. Law Number 35 Year 2009 regarding the National Narcotics Board, which reads:

Article 71

“In performing the duty of eradicating the abuse and illicit distribution of Narcotic Drugs and Precursors, the National Narcotics Board (BNN) shall have authority to conduct preliminary investigation and investigation on the abuse and illicit distribution of narcotic drugs and precursors.”

- e. Law Number 16 Year 2004 regarding the Attorney General’s Office of the Republic of Indonesia, which reads:

Article 35 sub-article f

“The Attorney General has the duties and authority:

f. to prevent or deter a certain person to enter or go out of the Unitary State of the Republic of Indonesia due to his/her

involvement in a criminal case in accordance with the laws and regulations.”

Therefore, according to the Government, the Petitioners have wrongly determined the article to be reviewed in the hearing since the authority of the competent official to request for and/or to order the prevention and deterrence of a person at the stage of preliminary investigation and investigation is not in Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration.

4. Whereas in relation to Article 16 paragraph (1) sub-paragraph b petitioned by the Petitioners, it is worth noting that Preliminary Investigation cannot be conducted immediately without the letter of order/assignment issued by a competent official and intended for the purpose of searching or finding an event alleged to be a criminal act.
5. Whereas the rejection not allow departure of a person out of Indonesian territory for the purpose of this Preliminary Investigation is still needed based on the consideration of the competent official in order to protect national interest based on the law. Therefore, the arguments of the Petitioners considering arbitrary preliminary investigation which is considered potential to impair their constitutional rights cannot be

accepted because arbitrary preliminary investigation shall not be conducted and that it is restricted by law.

6. Whereas according to the Government, the Petitioner have been wrong in interpreting the content of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration petitioned for review, where the aforementioned article does not give authority to the preliminary investigator to request immigration official to conduct prevention and deterrence against a person, but it only constitutes an implementing provision giving authority to Immigration Officials to reject a person to go overseas in the event that the person is needed for preliminary investigation and prosecution at the request of a competent official.

Whereas far before Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration was applied, the Law had granted authority to the preliminary investigator and/or investigator and/or competent official to request for or to order prevention and deterrence against a person being involved in the preliminary investigation, investigation and prosecution of a criminal case.

For example, Article 12 paragraph (1) sub-paragraph b of Law Number 30 Year 2002 regarding the Corruption Eradication Commission has granted authority to the Corruption Eradication Commission in performing preliminary investigation, investigation and prosecution duties, to order

- Immigration Officials to prohibit a person from going out of Indonesian territory.
7. Whereas in relation to the arguments of the Petitioners on the case in the name of M. Nazaruddin who was prevented and deterred at the request of the Corruption Eradication Commission while M. Nazaruddin had not been involved in a case and had not been summoned by KPK, that was wrong and the Government needs to make a clarification that based on the Letter of Decision of the Chairperson of the Corruption Eradication Commission of the Republic of Indonesia Number Kep-235/01/V/2011 regarding the Prohibition from Going Overseas against Muhammad Nazaruddin, Yulianis and Oktarina Furi, it is known that at the time the prevention and deterrence decision was issued by the Corruption Eradication Commission, the legal process of the case *a quo* had reached the Investigation stage, based on the Warrants of Investigation Number Sprin.Dik-11/01/IV/2011 dated April 22, 2011, Number Sprin.Dik-12/01/IV/2011 dated April 22, 2011 and Number Sprin.Dik-13/01/IV/2011 dated April 22, 2011.
 8. Whereas the Government can make a comparison with the implementation of prevention in other countries, in this case the comparison with that in the Netherlands. Prevention practices in the Netherlands is concretely (*zakelijk*) conducted for the reasons related to

the interests of the state, for example, a person who wants to go out of the Dutch territory will not be allowed to leave the Netherlands if he/she is listed in a tax issue case for not paying the fine for the decision passed on him/her. This provision is applied, among other things, for the interest of the state such as investigation. A citizen of the Netherlands who wishes to apply for visa to another European country will not be given the visa and of course cannot go to the destination country if due to a certain problem his name is included in the “alert” list of the Schengen Information System (SIS).

Based on the foregoing description, according to the Government, the provision of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration has been in line with the mandate of the constitution and therefore, it is not inconsistent with the 1945 Constitution of the State of the Republic of Indonesia, particularly Article 28A and Article 28D paragraph (1) of the 1945 Constitution, and therefore it does not impair the constitutional rights and/or authority of the Petitioners, either.

IV. CONCLUSION

Based on the foregoing explanation and arguments, the Government requests the Honorable Chief Justice/Panel of Constitutional Court Justices hearing the petition for review of Law Number 6 Year 2011 regarding Immigration under the

1945 Constitution of the State of the Republic of Indonesia to pass the following decisions:

1. Rejecting the Petitioners' petition in its entirety or at least declaring that the Petitioners' petition for review cannot be accepted (*niet onvankelijk verklaard*).
2. To accept the Government's Statement in its entirety;
3. Declaring the provision of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration not inconsistent with the provisions of Article 28A and Article 28D paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia and that it shall continue to have binding legal effect and shall remain in effect throughout the territory of the Unitary State of the Republic of Indonesia.

[2.4] Whereas at the hearings on September 27, 2011 and on October 12, 2011, the statements of the Government's experts were heard, which were principally as follows:

1. Prof. Dr. Eddy OS Hiariej, S.H., M.Hum

- Whereas every person's freedom of movement recognized as a human right as referred to in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights is actually included in

Article 28E paragraph (1) of the 1945 Constitution. Although the human rights recognize and guarantee every person's freedom of movement, the intended freedom is not absolute. Such freedom can be limited by considerations of state interest based on legally and rationally clear reasons;

- Whereas the freedom of movement as intended by the Petitioners is not in the articles which cannot be breached under any circumstances. This is different from Article 28I paragraph (1) of the 1945 Constitution which specifies expressly and in detail the rights which cannot be breached under any circumstances although some may be of the opinion that the limitation of Article 28I paragraph (1) is included in Article 28J of the 1945 Constitution;
- Whereas based on the case position of the issue and the judicial analysis, the provision of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration is not inconsistent with Article 28A and Article 28D paragraph (1) of the 1945 Constitution;

2. Prof. Dr. Denny Indrayana, S.H.

- Whereas the freedom of movement is not the freedom which cannot be reduced under any circumstances or non-derogable rights. It is a basic right which can be breached with the requirements as regulated in the

legal provisions or in this context in the Provisions of the Immigration Law, and therefore the provision of Article 16 of the Immigration Law particularly paragraph (1) sub-paragraph b petitioned for constitutionality review, in the expert's opinion, is not inconsistent with the constitution.

- The authority of prevention given to immigration officials does not necessarily cause the relevant persons to lose the right to the recognition, guarantee, protection and legal certainty as regulated in Article 28D because they are actually still recognized in the existing process, not being absolute authority which is without supervision or which cannot be cancelled. Article 96 paragraph (1) of the relevant immigration law regulates the mechanism that every person subject to prevention may raise an objection to the official issuing the prevention decision. Thus, there is a procedure provided by law which also allows for the challenge to the prevention conducted.
- Deterrence or prevention does not limit the right to life of the relevant person. He/she can still live, while his/her life is indeed limited as he/she is in the law enforcement process, especially the criminal law.
- Limitations of basic rights in criminal processes is legal, non inconsistent with the constitution, especially when it is not a non-derogable right and regulated by law. Whereas the provision of Article 16 paragraph (1) sub-

paragraph b of the Immigration Law is not inconsistent either with Article 28A or Article 28D of the 1945 Constitution;

3. Prof. Dr. Ahmad M. Ramli, S.H., M.H

- Law Number 6 Year 2011 regarding Immigration, particularly articles on the rejection of a person to go out of Indonesian territory are intended to respond to various complaints of the community, in relation to the frequently late measures of prevention and deterrence by law enforcement apparatuses. This is important to provide certainty in the efforts of law enforcement for those potentially escaping overseas.
- The Immigration Law which states that immigration officials shall reject a person to go out of Indonesian territory in the event that the person is needed for the interest of preliminary investigation and investigation at the request of competent officials is, in fact, intended for effective enforcement of the law, protection of public interest, and maintaining the sense of justice for all the people. The sense of justice of the people will be torn apart if the community views the fact that a perpetrator who has caused loss to the state or who has devastated public order or destroyed the future of the nation's generation, is allowed to freely go overseas while we can only watch it without being able to do anything.

- Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration is not inconsistent with Article 28A and Article 28D of the 1945 Constitution. In fact, it constitutes the implementation of Article 28J paragraph (2) of the 1945 Constitution because the aforementioned Article expressly states that *“In exercising his/her right and freedom, every person must submit to the restrictions stipulated in laws and regulations 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”*.
- One of the footholds of the expert, Thomas Hack, made a teaching called the jurisprudence of interests, the teaching of law of interests. He stated, “When greater interests, when the interest of state sovereignty protection, when the interest of law enforcement, when the interest of public order must be prioritized, then se must make such limitations”.

[2.5] Whereas the Petitioners and the Government submitted their written conclusions through the Registrar’s Office of the Court on October 19, 2011 and on October 24, 2011;

[2.6] Whereas to shorten the description of this Decision, all that happened at the hearing are indicated in the Hearing Minutes, and shall constitute an integral and inseparable part of the Decision.

3. LEGAL CONSIDERATIONS

[3.1] Whereas the purpose and objective of the Petitioners' petition are to review the constitutionality of Article 16 paragraph (1) sub-paragraph b to the extent of the word "preliminary investigation" and its Elucidation of Law Number 6 Year 2011 regarding Immigration (State Gazette of the Republic of Indonesia Year 2011 Number 52, Supplement to the State Gazette of the Republic of Indonesia Number 5216, hereinafter referred to as Law No. 6/2011) under Article 28A and Article 28D paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia, hereinafter referred to as the 1945 Constitution;

[3.2] Whereas before considering the substance of the petition, the Constitutional Court, hereinafter referred to as the Court, will first consider the following matters:

1. Authority of the Court to hear the petition *a quo*;
2. Legal standing of the Petitioners to act as Petitioners in the case *a quo*;

With respect to the aforementioned two matters, the Court is of the following opinion:

Authority of the Court

[3.3] Whereas Article 24C paragraph (1) of the 1945 Constitution states that “*The Constitutional Court shall have authority to hear cases at the first and final levels the decisions of which shall be final, in conducting judicial review on laws against the Constitution, to decide disputes concerning the authorities of state institutions whose authorities are granted by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the results of general elections,*” which is repeated in Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court, as amended by Law Number 8 Year 2011 regarding the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law) which states “*The Constitutional Court shall have authority to hear at the first and final levels the decision of which shall be final to:* a. *Review laws under the 1945 Constitution of the State of the Republic of Indonesia*”, *juncto* Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076) which states *The Constitutional Court shall have authority to hear at the first and final levels the decision of which shall be final to:* a. *Review laws under the 1945 Constitution of the State of the Republic of Indonesia*”;

[3.4] Whereas the Petitioners' petition is concerned with the constitutionality review of Article 16 paragraph (1) sub-paragraph b to the extent of the word "preliminary investigation" and its Elucidation of Law Number 6 Year 2011 regarding Immigration so that the Court has authority to hear the petition *a quo*;

Legal Standing of the Petitioners

[3.5] Whereas pursuant to Article 51 paragraph (1) of the Constitutional Court Law, the Petitioners in a judicial review under the 1945 Constitution shall be those who consider that their constitutional rights and/or authorities have been impaired by the coming into effect of a Law namely:

- a. individual Indonesian citizens (including groups of people having a common interest);
- 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.

Therefore, the Petitioners in a judicial review under the 1945 Constitution must first explain and prove:

- a. Their standing as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. Existence of impairment of constitutional rights and/or authority granted by the 1945 Constitution due to the coming into effect of the Law petitioned for review.

The Petitioners in the petition *a quo* qualify themselves as individual Indonesian citizens having the profession as Advocates who consider that their constitutional rights and/or authority are impaired by the coming into effect of Article 16 paragraph (1) sub-paragraph b of Law No. 6/2011 to the extent of the word “preliminary investigation” and its Elucidation;

[3.6] Whereas with respect to the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law, following its Decision Number 006/PUU-III/2005 dated May 31, 2005, and Decision Number 11/PUU-V/2007 dated September 20, 2007 as well as subsequent decisions, the Constitutional Court has been of the opinion that 5 (five) requirements must be fulfilled, namely:

- a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;

- b. the Petitioners believe that such 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, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
- e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur.

[3.7] Whereas the Petitioners argue that they are individual Indonesian citizens and consider having constitutional rights granted by the 1945 Constitution, namely:

- Article 28A which states that “Every person shall have the right to live and to defend his/her life and living”;
- Article 28D paragraph (1) which states that “Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law”.

[3.8] Whereas the Petitioners claim to have been harmed by the coming into effect of:

- Article 16 paragraph (1) sub-paragraph b of Law No. 6/2011 to the extent of the word **preliminary investigation and its elucidation**;
- Whereas the Petitioners argue that the Law petitioned for review, to the extent of the word *preliminary investigation* sometimes demands the Petitioners who will go out of Indonesian territory, while in handling a case the Petitioners are related to a case handled by them and the aforementioned case has only reached the stage of preliminary investigation while the Petitioners have been prevented and deterred so as to cause constitutional impairment to the Petitioners;

[3.9] Whereas in view of the consequences potentially experienced by the Petitioners related to the constitutional rights of the Petitioners, according to the Court, the Petitioners meet the legal standing requirements in order to file the petition for review of Article 16 paragraph (1) sub-paragraph b of Law No. 6/2011;

[3.10] Whereas based on the description in paragraph **[3.6]** and paragraph **[3.8]** above, according to the Court, the Petitioners meet the legal standing requirements in order to file the petition *a quo*;

[3.11] Whereas since the Court has authority to hear the petition *a quo*, and the Petitioners have legal standing to file the petition *a quo*, then the Court shall further consider the substance of the petition;

Substance of the Petition

[3.12] Whereas in their petition, the Petitioners petition for substantive review of Article 16 paragraph (1) sub-paragraph b of Law No. 6/2011 to the extent of the word “preliminary investigation” which principally questions the constitutionality of the article *a quo* whereby during the process at the preliminary stage, a person can already be rejected or, in essence, prohibited from going overseas, which, according to the Petitioners, is a form of deprivation of freedom or a form forceful measure;

[3.13] Whereas the Court has examined the written evidence submitted by the Petitioners (Exhibit P-1 through Exhibit P-2) to support their arguments, as described in full in the Case Position part above;

Whereas the Court has heard and read the statements of experts presented by the Petitioners, which principally state as follows:

1. Prof. Dr. O.C Kaligis

- Whereas the formulation of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration is not only inconsistent

with the national law as well as the constitution, but it also violates international law instruments which has been recognized and which must be implemented by Indonesia;

2. Dr. Arbijoto

- Whereas the formulation of Article 16 paragraph (1) sub-paragraph b regulating the authority of the preliminary investigator to request immigration official to conduct prevention and deterrence against a person, although the examination has only reached the stage of preliminary investigation, seriously violates a person's human rights;

Whereas the Court has heard the oral statement and read the written statement of the Government which principally state that Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration has been in line with the mandate of the constitution and which, therefore, is not inconsistent with the 1945 Constitution, particularly Article 28A and Article 28D paragraph (1) of the 1945 Constitution, and also it does not impair the constitutional rights and/or authority of the Petitioners.

To evidence its statements, the Government has presented three experts principally stating as follows:

1. Prof. Dr. Eddy OS Hiariej, S.H., M.Hum

- Whereas based on the case position of the issue and the judicial analysis, the provision of Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration is not inconsistent with Article 28A and Article 28D paragraph (1) of the 1945 Constitution;

2. Prof. Denny Indrayana, S.H., LL.M., Ph.D

- Whereas the freedom of movement is not one which cannot be reduced under any circumstances or non-derogable rights. It is the basic right which can be breached with the requirements as regulated in the legal provisions or in this context in the Provisions of the Immigration Law, and therefore, the provisions of Article 16 of the Immigration Law, particularly paragraph (1) sub-paragraph b, is not inconsistent with the constitution.

3. Prof. Dr. Ahmad M. Ramli, S.H., M.H

- Article 16 paragraph (1) sub-paragraph b of Law Number 6 Year 2011 regarding Immigration is not inconsistent with Article 28A and Article 28D of the 1945 Constitution. In fact, it is the implementation of Article 28J paragraph (2) of the 1945 Constitution because the intended Article expressly states that “In exercising his/her right and freedom, every person must submit to the restrictions stipulated in laws and regulations 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”

Opinion of the Court

[3.14] Whereas the Petitioners petition for constitutionality review of the word “preliminary investigation” in Article 16 paragraph (1) sub-paragraph b of Law Number 6/2011 which states that “(1) The Immigration Official shall reject a person to go out of Indonesian territory in the event that the person: a. ...; b. is needed for the interests of preliminary investigation and investigation at the request of a competent official; or” because, according to the Petitioners, the word “preliminary investigation” is inconsistent with the right of every person to live and defend his/her living [*vide* Article 28A of the 1945 Constitution] and the right of every person to the recognition, guarantee, protection and certainty of just laws as well as equal treatment before the law [*vide* Article 28D paragraph (1) of the 1945 Constitution];

[3.15] Whereas it is necessary to first understand the definition of “preliminary investigation” to subsequently consider whether or not it is inconsistent with both articles of the 1945 Constitution which, according to the Petitioners, are inconsistent with the word “preliminary investigation”;

[3.16] Whereas pursuant to Article 1 sub-article 5 of Law Number 8 Year 1981 regarding Criminal Procedure Law (State Gazette of the Republic of Indonesia

Year 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209, hereinafter referred to as KUHAP), “Preliminary investigation (*penyelidikan*) is a series of actions of the preliminary investigator (*penyelidik*) to search and find an event alleged to be a criminal act in order to determine **whether or not** an investigation (*penyidikan*) **can** be conducted according to the procedures regulated in this law”;

[3.17] Whereas based on the aforementioned definition of preliminary investigation, it is uncertain whether investigation is to be conducted, meaning that there has not been any legal certainty to conduct investigation while the rejection to go out of Indonesian territory can be conducted by the Immigration;

[3.18] Whereas the Petitioners do not object to the prevention from going out of Indonesian territory at the stage of investigation. Investigation is a series of actions of the investigator in the event and in a manner regulated in this law in order to find as well as collect evidence to be used to clarify the criminal act occurring and in order to find the suspect (*vide* Article 1 sub-article 2 of KUHAP);

[3.19] Whereas at every stage of preliminary investigation, it is uncertain whether it is to be investigated or not. Evidence has not been searched and collected, and it has only reached collection of information. As at the stage of investigation evidence is searched and collected, the rejection to go overseas will be reasonable because it is likely that the investigated will carry the evidence related to a criminal act abroad so as to make it difficult for the investigator to search and

collect the evidence to clarify the criminal act occurring in order to find the suspect;

[3.20] Whereas the Court is of the opinion that preliminary investigation is still at the stage conducted by the preliminary investigator in order to determine whether or not there is any criminal act in a certain case and to search initial evidence to determine the suspect. Therefore, the rejection of a person to go out of Indonesia territory when his/her status as suspect is uncertain in a criminal case as it has only reached the stage of preliminary investigation will be easy to be used to prevent the movement of a person to go abroad. Moreover, at the stage of preliminary investigation, a person does not know whether or not he/she is in the preliminary investigation process and that the period for preliminary investigation is uncertain so that when it shall end is not known. Prevention of a person from going abroad at the stage can be misused for the interest other than law enforcement interests so that it violates a person's right guaranteed by the constitution, namely the right provided for in Article 28E of the 1945 Constitution which states that "*Every person shall be free to adhere to a religion and to worship in accordance with his/her religion, to choose education and teaching, to choose occupation, to choose citizenship, to choose residence in the state territory and to leave it, and shall have the right to return*". The provision *a quo* also violates the constitutional provision requiring the state to provide the guarantee, protection and certainty of just laws, as referred to in Article 28D paragraph (1) of the 1945 Constitution;

[3.21] Whereas although only the word “preliminary investigation” is petitioned by the Petitioners to be declared unconstitutional, the word “and” between the words “preliminary investigation” and “investigation” no longer has any meaning, because the remaining word “investigation” shall cause the word “and” in Article 16 paragraph (1) sub-paragraph b of Law No. 6/2011 to be deleted as well. Therefore, Article 16 paragraph (1) sub-paragraph b of Law No. 6/2011 shall fully read, “*The Immigration Official shall reject a person to go out of Indonesian territory in the event that the person: a. ...; b. is needed for the interests of investigation at the request of a competent official; or*”;

[3.22] Whereas based on the foregoing consideration, according to the Court, the Petitioners’ petition has legal grounds;

4. CONCLUSION

Based on the assessment of the facts and laws as described above, the Court concludes that:

[4.1] The Court has authority to hear the Petitioners’ petition;

[4.2] The Petitioners have legal standing to file the petition *a quo*;

[4.3] The substance of the Petitioners’ petition has legal grounds.

Based on the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 regarding the Constitutional Court as amended by Law Number 8 year 2011 regarding the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Number 5226), Law Number 48 Year 2009 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette Number 5076).

5. DECISIONS

Passing the decision,

Declaring:

- to grant the Petitioners' petition;
- the words "preliminary investigation and" in Article 16 paragraph (1) sub-paragraph b of Law No. 6 Year 2011 regarding Immigration (State Gazette of the Republic of Indonesia Year 2011 Number 52, Supplement to the State Gazette of the Republic of Indonesia Number 5216) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;
- that the words "preliminary investigation and" in Article 16 paragraph (1) sub-paragraph b of Law No. 6 Year 2011 regarding

Immigration (State Gazette of the Republic of Indonesia Year 2011 Number 52, Supplement to the State Gazette of the Republic of Indonesia Number 5216) shall have no binding legal effect;

- to order the inclusion of this decision in the Official Gazette of the Republic of Indonesia properly.

Hence this decision was made in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Muhammad Alim, Anwar Usman, Maria Farida Indrati, Ahmad Fadlil Sumadi, Hamdan Zoelva, Harjono, and M. Akil Mochtar, respectively as Members, on **Tuesday January the twenty-fourth year two thousand and twelve** and was pronounced in the Plenary Session of the Constitutional Court open for the public on **Wednesday, February the eighth year two thousand and twelve**, by eight Constitutional Court Justices namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Muhammad Alim, Anwar Usman, Maria Farida Indrati, Ahmad Fadlil Sumadi, Hamdan Zoelva, and M. Akil Mochtar, respectively as Members, assisted by Ida Ria Tambunan as Substitute Registrar, in the presence of the Petitioners, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

JUSTICES,

Sgd.

Achmad Sodiki

Sgd.

Muhammad Alim

Sgd.

Anwar Usman

Sgd.

Maria Farida Indrati

Sgd.

Ahmad Fadlil Sumadi

Sgd.

Hamdan Zoelva

Sgd.

M. Akil Mochtar

Substitute Registrar

Sgd.

Ida Ria Tambunan