

Juridical Analysis of Indonesian Migrant Workers From The Perspectives of Labor and Immigration Law

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Abstract. The Indonesian information system of immigration management or called as SIMKIM which has been issued since 2013 and applied in 2015 has given a great impact to Indonesian people in particularly for those who live abroad such as migrant workers. The issuing of SIMKIM is in purpose to manage a better system since there were a lot of legal fraud happened in immigration sector such as fraud of passport by using false data as on names, date of birth or other information. With SIMKIM which using an integrated digital system, the false data cannot be done anymore. However, the migrant workers, whose passport has been arranged previously by the employment agency and use such false data, found difficulties to return their data to the original ones and are threatened to be criminalized not only by Indonesian government but also by the state where they live in. This article studies on this issue aimed to explore the real problem between migrant workers and their immigration status. The research uses secondary methods data such as academic books, articles, journals, etc. The research is expected to give recommendation on citizens' rights of migrant workers to get an original passport.

Keywords: Immigration system; immigration status; undocumented; migrant workers; human rights

1 Introduction

Globalization has brought increasing mobility of people to move from one country to another, and this is also the case with Indonesian migrant workers where movement has not been only within national borders but also beyond these borders. Although international migration of Indonesian workers has occurred since long time ago, the placement and protection of migrant workers began to be regulated in 2004 under Law no. 39 and was amended by Law no.18 year of 2017. Countries in the Middle East and developed countries in Asia, as well as European countries, USA and Canada have become the destination of Indonesian migrant workers.

There are an estimation of 4,5 million Indonesian migrants abroad and most of them are migrant workers. These numbers are not including the undocumented ones which undoubtedly higher. Economy issue is one of motivations for Indonesians to find work abroad. The difficulty to find work or low salary level in Indonesia is one of the reasons of most Indonesians to look for job abroad. High expenses, not only for daily costs, but also for health care and education become also one of many reasons. The social security, though it was regulated since 2004, but it was just applied in 2014. Therefore, the economic situation was difficult particularly to mid and low class society in Indonesia and they have no choice but find work abroad to earn better income.

Most of the departure process of Indonesian migrant workers is conducted by employment agencies. This has been regulated in Law 39/2004 (amended by Law 18/2017). The people trusted employment agencies to proceed the departure because there is no other option. The lack information on how the procedure is and how complicated the procedure is become reasons why the people depend to do the departure process to the employment agency. The process by employment agencies becomes an issue since they proceed the departure of migrant workers with high cost and provide a passport which includes false data. Such fraud has been applied so many years and migrant workers had no choice besides accepting the condition and the false passport since they have paid a lot of money and need to work as soon as possible to return the loan to the family or friends.

The fraud of passport happened not only because the level of corruption in immigration sector is high but also the system which does not support the data to be connected from one to other immigration offices. Therefore in 2013, Indonesia began to use Information system of immigration management or called as SIMKIM, an integrated digital online system for immigration management. SIMKIM is established to minimize the fraud of passport and give more integrated system of immigration management. However, a lot of migrant workers abroad have already used a passport with false data. This has not been considered by the government before and at the end; the migrant workers become the victim of this new system. Some of migrant workers found difficulties to extend their passport and return the data to the original ones. In Hong Kong, they could also be criminalized by using fake passport. In the Netherlands, some of them cannot get a passport. At the end, they remain live without any identity document.

Most studies on Indonesian migrant workers have conducted research from the point of view of labor or human rights, particularly since the establishment of Law no 39 year of 2004 which deals with the procedure of recruitment and placement as well as protection of migrant workers. There is yet hardly any study focusing on Indonesian migrant workers from the point of view of immigration issues of migrant workers. The working conditions and the bargaining position of migrant workers cannot be separated from their immigration status. And yet existing studies on the immigration status of migrant workers are usually separated from their labor rights. Meanwhile, migrant workers' social, economic and political positions are always attached to their immigration status, not only the immigration status to the receiving country but also to the country of origin.

The aim of this research is to examine the problem faced by Indonesian migrant workers in Hong Kong and in the Netherlands on their immigration status in particular on the rights of identity such as passport. Passport as identity document which is recognized internationally has a significant role to the person attached to it. Without an identity document, a person could not be recognized as citizens and cannot access his rights such as in doing remittance, opening a bank account, renewing the work contract, and many more.

Indonesian Migrant Workers and the Misconduct of Employment Agencies

The departure process of migrant workers is conducted by employment agencies. The agency arranges all the bureaucratic process including providing passport for migrant workers. Most of the time, although the workers depend on the agency, the agency is often unable to provide the original and correct data of passport. Their aim to obtain quick profit has caused the agency to provide passports quickly without providing the correct data of passport. This has happened often with Indonesian migrant workers. They obtain passports but the data is not correct. The low income of a large portion of the population and the high level of corruption in Indonesia, just to obtain basic needs of education, employment, and the bureaucratic

requirements to obtain these resources, are the main reasons why lower class workers try to find jobs abroad. This situation has become a strong factor why workers are forced to trust the agencies to deal with their documents in a short period of time.

Most of the time, the migrant workers accept what the agency gave to them. They pay some amount of money between 15 to 60 million to go abroad and rely on the agency for the departure process. Some of the workers receive the passport in their departure time without having any chance checking the data in the passport. They have no choice to refuse the passport since they have paid and the departure is approaching. The destination country is also chosen by the agency. Some of workers have no intention to go to Europe because European countries are not considered as formal destination countries for migrant workers. However at the end, they have no choice and are stranded in Europe.

The issue of migrant workers using false documents or false data on passport has existed for years. However, the problematic issues of documents and working abroad are not only the responsibility of immigration department. The other departments such as BNP2TKI (National Body for the Placement and Protection of Indonesian Overseas Workers) and the Ministry of Manpower are also responsible because they are the bodies that establish the regulations and procedures for workers to work abroad. The existence of these different bodies creates various spaces for control which do not yet fulfill by each other.

SIMKIM

In order to eliminate false documents, in 2013, the Indonesian Department of Immigration has started to introduce the information system of immigration management (called as SIMKIM) and biometric passport. SIMKIM is established to give better and transparent service on the providing of Indonesian passports. It integrates the immigration information in Jakarta and abroad (at embassies or consulate) via online connection. SIMKIM is not yet applied in every Indonesian embassy. Indonesian embassy in Malaysia and Hong Kong started to apply SIMKIM in 2015. In the Netherlands, the application of the system has started in 2017. With a new system of immigration, the false document of passport could be reduced and the state could give more control and protection to its citizens.

With the application of SIMKIM and more control from the state, it will be problematic for the agency to provide documents instantly. There is a transparent procedure that should be followed. Workers cannot easily have documents and work abroad. Some should stay and face their economic problems in Indonesia. Meanwhile abroad, a lot of migrant workers who already use the fake passport found difficulties to extend their passport and return the data to the original ones. Some are also threatened to be criminalized by the receiving country such as the migrant workers in Hong Kong.

SIMKIM could be a very sensitive system to the issue of governance on bureaucracy of departments that are issuing state's documents for migrant workers. The intervention of government to make a better system is very important. However, it has effect. As Tania Murray Li said government interventions are important because they have effect.

The Case in Hong Kong

SIMKIM has been implemented in Hong Kong since 2015. Since then, the problem of passport for Indonesian migrant workers has begun. In Malaysia, it's possible for migrant workers who use the passport with false data to change the data to the original ones and get new passport. The embassy in Malaysia can give an option to the workers to choose on which data they would like to use. But in Hong Kong, it is not possible. The migrant workers

threatened to be criminalized by Hong Kong government based on the fraud of identity document and they can be jailed.

Based on the circular letter of Indonesian immigration directorate general (Surat Edaran/ SE) No. IMI-UM 01.01.2413 July 2016, the workers, whose the residence permit is still valid in Hong Kong, can make data correction of their passport. The correction data is significant to be done since it is important for the workers to have and to use a passport with the correct data. However, when they changed the data, they must also change all the original related documents in Hong Kong such as the work contract, residence permit and so on. This became the reason why they are threatened to be criminalized. The good intention of the workers to obey the regulation of Indonesian immigration becomes a blunder for them because based on the regulation of Hong Kong, they can be charged to do fraud of passport. At the end, some of workers are accused to do fraud and be jailed.

Meanwhile in other hand, based on the above circular letter, the workers, whose the residence permit is not valid anymore or staying as undocumented, cannot get any passport and can only get a laissez passer or a travel document to return to Indonesia and proceed the correct data in Indonesia. This has been regulated by Indonesian government to reduce the undocumented Indonesian people abroad and forced them to return and to process their departure and immigration status legally. However in the practice, it costs a lot for migrant workers and they are threatened to be banned and cannot be returned to the destination country. That is what happened in the Netherlands.

The Case in the Netherlands

Not all workers have intention to go to Europe. Some of them had intention only to go abroad to work. They registered and delivered some amount of money to the employment agency. However the call to leave the country was not coming. The employment agencies promise to place them in formal country of destination of migrant workers. When it comes unsuccessfully, they offer to send the workers to Europe with more requirements of money. Some workers pay up to 80-100 million Rupiah (about 6000 – 8000 Euro). They are willing to make loan or sell all their belongings to pay the cost with consideration to get return shortly after their arrival in the Netherlands. However, the reality is much different than the promises made by the agency. Some of the workers must be ended up staying working in the Netherlands even though as an undocumented, without proper stay permit and work permit, to pay the debt. Some are returned back to Indonesia with burden of debt.

The process done by the employment agency is a same explanation as above. The employment agency, in this matter, provides a passport with false data in order to send the workers quickly and get a lot of profits. Some people use this kind of passport and since this has been happened for so many years, some people have passport with some different names. In 2017, SIMKIM is applied in the Netherlands. The problem of passport began. For those who use passport with different names, they cannot return the data to the original ones and instead of getting passport for their renewal passport, the embassy can only provide laissez passer to return them home.

For many years, there have been existed a lot of Indonesian migrant workers without having proper documents required by the immigration department in the Netherlands such as work permits and stay permits. The Indonesian embassy in the Netherlands also was not taking any measures to protect their citizens in the Netherlands, when these migrant workers' passports expired. Until 2014, the undocumented Indonesian migrant workers had no rights to renew their Indonesian passport. Instead of giving passport, Indonesian embassy in The Hague provided travel documents with the purpose of sending them back to Indonesia. Meanwhile, a

lot of Indonesian workers (including the undocumented workers based on their Dutch immigration status) still have the intention to stay and work in the Netherlands, because of the debts they had incurred to pay the employment agencies which had promised to arrange jobs and stay permits but who in the end deserted them upon arrival.

For those who stay, they end up having no valid identity card, their ID-less situation bring more vulnerability to the undocumented Indonesian migrant workers. Particularly in the case of illness, they cannot show any identity document to the hospital, and when they need to send money back to their country of origin, they face difficulties to work through the regular money transfer mechanism. Under the government regulation of the Netherlands, there is a huge different between citizenship and residential status. In the Netherlands, rights to residence became the critical issue in determining access to a basket of other rights and privilege. Therefore it is not easy to get residence permit from the Netherlands. Meanwhile, citizenship status in this case the Indonesian citizenship of these migrants, ensures certain rights and privileges. For many migrant workers, having had their passports expire without it being renewed weakened their positions even more, since they were not acknowledged by both the Indonesian and the Dutch government.

Therefore, after a long struggle of campaign and lobby conducted by Indonesian migrant workers in the Netherlands, in early 2014, a circular letter of directorate general of immigration in Indonesia was issued and stated that the undocumented have the rights to renew their Indonesian passport (No. IMI-0120-GR-01-10 dated 10 January 2014). However, since SIMKIM is applied and the circular letter of Immigration Directorate General has been issued in 2016, some of workers cannot get any passport and offered to have laissez passer to return to Indonesia. The embassy argued in this matter that when the workers return to Indonesia, they could process the new passport with the correct original data. However, since the immigration status of the workers in the Netherlands is undocumented, they are threatened to be banned by the Netherlands or Schengen countries and cannot return to the Netherlands, meanwhile, some of workers have family in the Netherlands and can be forced to be separated from their family.

In 2016, eight of employment agencies were arrested for sending Indonesian migrant workers illegally to the Netherlands. However, the problem of deception by employment agencies remains in the community particularly considering that the wave of migration of Indonesian workers to the Netherlands is quite high. There are still a lot of Indonesian migrant workers coming to Europe/ the Netherlands.

2 Research Method

This research uses secondary data. Secondary data will be obtained by the various case studies dealt with in academic books, published articles in journals, and also from documents regarding state regulations.

3 Results and Discussion

As mentioned above, the circular letter of directorate general of immigration in Indonesia was issued and it stated that the undocumented have the rights to renew their Indonesian passport (No. IMI-0120-GR-01-10 dated 10 January 2014). This regulation was amending the

Letter of Immigration general to Indonesian ambassador in the kingdom of the Netherlands No. IMI-UM 01.01-2579 dated on 18 may 2012 which stated to give laissez passer for the undocumented Indonesian migrants in the Netherlands. However, the regulation stated that the undocumented cannot renew a passport, has reapplied again with the circular letter No. IMI-UM 01.01.2413 July 2016. Only this time, the circular letter is based on the issuance of SIMKIM. The embassy can only give laissez passer or travel document for those who have no proper stay and work permit in the destination country.

In the practice, the application of the last circular letter is different in the countries. In Hong Kong, only those who has proper permit, can extend their passport and return the data to the original ones. The undocumented ones must return to Indonesia to change their data. In the Netherlands, the undocumented who have passport with original data can renew their passport. But for those who have passport with false data, cannot renew their passport and must return to Indonesia for the data correction. The extension or renewal of passport is the form of the protection of Indonesian state to its citizens. This obligation of the state or state responsibility has been regulated on article 35 Government regulation No.31 year of 2013 (PP 31/2013) stated that the state gives identity document for its citizens abroad. However, because of SIMKIM, the issuance of passport for Indonesian people became strict and rigid and has impact to the migrant workers.

In the Netherlands, the immigration attaché has done some interviews to the undocumented migrants in regards to the requirements to get passport. It might be happened since in 2017 there was a circular letter of immigration general No IMI-0277.GR.02.06 on the prevention of the undocumented workers. Based on this law juncto (jo) article 179 (1) PP 31/2013, the immigration officer could give immigration supervision to the peopled based on article 66 Law No. 6/2011 jo PP 31 year of 2013 article 172 (3). The implementation is in regards of article 67 Law No. 6/2011 (1) a and c jo. article 172 (3) PP No. 31/2013 jo. article 176 (1) PP 31/2013. The interview is purposed to give protection to undocumented workers from human trafficking.

Even though after a strict process, some of undocumented can get the passport, the other cannot get passport because of double data or the false data. The integrated system of SIMKIM cannot accept their data, at the end they must make a correction in Indonesia and offered only to have a lassies passer and return to Indonesia. Not only that they can be deported, these migrant workers are threatened also to be criminalized by Indonesian government. Based on article 126 Law 6 year of 2011, people who use the fake passport is threatened to be jailed for five years. It can be applied to the migrant workers even though the process of the passport was done by the employment agency and the workers have nothing to do with it. The workers are victim of the employment agency. They have no option but to receive this passport and use it to work abroad. If they are criminalized by Indonesian government then the law is rigidly implemented. The one who should be criminalized is the agency in this matter, not the workers.

Unlike in Hong Kong, most of migrant workers in the Netherlands are undocumented. The data correction will not give impact for them to be criminalized by Dutch government. If they keep using the passport with false data, then they can be threatened by Dutch Government to use fake passport. By correcting the data into the good one, the embassy gives a protection to their citizens. The providing of lassies passer is not appropriate because lassies passer is used only for travel document and not for identity document. This is based on law No. 6 year of 2011 article 1 (17) jo article 27 (1) PP 31 year of 2013 jo article 54 PP 31 year of 2013 jo article 26 PP No.36 year of 1994.

The implementation guidelines of Directorate of immigration No. F-1037.IZ.03.10 year of 1994 point III.A (1.b & 1.C) jo Regulation of Ministry of law and human rights No. 8 year of 2014 article 44 stated also that laissez passer is given for those who has no passport. However almost all of the migrant workers in Hong Kong and the Netherlands, they have passport. What they do not have is proper stay permit and work permit. Therefore, the providing of passport will be an appropriate way in this matter. The correction is also allowed to be done in the destination country based on article 24 Regulation of Ministry of law and human rights No. 8 year of 2014.

Laissez passer is not the solution. In fact, it will not only give negative impact to the workers but also to the state. The workers cannot do remittance with laissez passer. They need passport to send money to Indonesia. Therefore, the providing of laissez passer will give also impact to the amount of remittance received by Indonesia. Indonesia could also be considered to support illegal remittance in this matter since the workers cannot send money via legal ways because of the providing of laissez passer and not passport.

Further, a lot of workers will not take the option to use laissez passer because they do not want to return before they are enough earning money. At the end, they live remain without document and threatened to be stateless. Without document of identity or passport, the workers found also difficulties to access the health care. Some institutions in the Netherlands recognize no laissez passer as identity document. So, it brings difficulties for the workers on the field.

4 Conclusion and Recommendation

The immigration status has a significant role to the migrant workers, not only giving rights and identity but also to give protection to migrant workers. By giving passport with correct data, the state gives protection to the workers. However, in Hong Kong, Indonesian government need to do more lobby to the destination state so the workers will not be threatened as criminal and be jailed only because of the correction data. The employment agency should in this regards be chased and arrested in regards to the fake data, and not the workers. The main problem happens in the sending country, Indonesia. With the application of SIMKIM, they real problem should also be solved. It is not only about system problem but the whole problems should be understood.

The application of SIMKIM should also be reviewed. Because even though it is for good purpose, but the impact could be negative for the workers. When it threatened the workers, Indonesia should give opportunity for the workers in Hong Kong who have valid stay and working permit to finish their contract first and correct the data when they return to Indonesia. In other hand, for the undocumented workers, the writer cannot see the reasons why they may not allowed to do data correction and have an original passport since it will not be a problem for the destination country and it will give protection in their vulnerable position. The providing of laissez passer will only breaching the regulations in Indonesia and will not give any benefit for the workers themselves and the state. Therefore, they should be better to be given a passport with original data.

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