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RESIDENTIAL OWNERSHIP FOR FOREIGN EMPLOYEES DOMICILED IN INDONESIA

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Abstract

The aims of this research is to examine and analyze: the reasons for justifying the policies issued by the government on residential ownership for foreign employees domiciled in Indonesia, the regulation of residential ownership for foreign employees domiciled in Indonesia, and the procedures of residential ownership for foreign employees domiciled in Indonesia. The method used is legal normative with a statute approach and conceptual approach. Sources and types of legal materials, primary, secondary and tertiary legal materials. The technique of collecting legal materials is done through literature research. The process and analysis of legal materials is carried out in a coherent, and systematic manner, by carrying out classification techniques. As the result, a principle of benefit is the reason for government to issue the policies in which the presence of Foreign employees in Indonesia must beneficial to the national development and not harmful to discipline and security of the Unitary State of the Republic of Indonesia. The regulation started from Indonesian constitution of 1945, Law. No.5 of 1960 concerning Agraria, Law No. 20 of 2011 concerning Flats, Government Regulation No.103 of 2015 concerning Residence Ownership or Occupancy by Foreigners domiciled in Indonesia, Law No.6 of 2011 concerning Immigration and Government Regulation No.26 of 2016 concerning Regulation of Government Regulation No.31 of 2013 concerning Implementation Regulations of Law No. 6 of 2011. The procedures for the ownership of residential houses for Foreign employees domiciled in Indonesia must meet the requirements as stipulated in Government Regulation No.103 of 2015.

Keywords: Domiciled in Indonesia; Foreign Employee; Residential Ownership

1. INTRODUCTION

In order to support the development that is exceptionally increasing along with the corporation of Indonesia with other countries, and increasing number of Foreigners who employ and run their business in Indonesia, effecting the demand for residential or occupancy for foreigners are increasing, therefore policies need to be made that provide legal certainty as well as ease in providing services and permission to obtain land rights for residential or residential houses for foreigners. The convenience provided is carried out while holding the principles of land, including the principle of

rationality, that only Indonesian citizens are able to have ownership rights, while foreigners only given land rights in the form of use and rental rights.

As the description of the number of foreign employee in 2016, there were 74,183 foreign employee working in Indonesia. The details are 21,271 foreign employee from China, 12,490 foreign employee from Japan, 8,424 foreign employee from South Korea, and 5,059 foreign employee from India. Then 4,138 foreign employee from Malaysia, 2,812 foreign employee from the United States, 2,394 foreign employee from Thailand. As many as 2,483 foreign employee from

Australia, 3,428 foreign employee from the Philippines, 2,252 foreign employee from the UK, 1,748 foreign employee from Singapore, and 7,684 foreign employee from other countries (Aziza, 2017).

Based on Article 1 of Government Regulation No.103 of 2015 concerning with Residential Ownership or occupancy by Foreigners domiciled in Indonesia, foreigners who have right to obtain residential ownership are: foreigners who are not Indonesian citizens. Furthermore the ownership of residential for foreigners is set in the Minister of Agrarian and Spatial Planning/Head of the National Land Agency (ATR/BPN) No. 29 of 2016 concerning with the procedures for Granting, Releasing, or Transferring the Right of residential ownership or occupancy by Foreigners who are domicile in Indonesia is a great news for foreign employee in Indonesia, because foreigners who are allowed to have a residence or occupancy are people whose existence provides benefits, conducts business, works or invests in Indonesia.

The research objectives to be achieved in this research are to study and analyze: The reasons for justifying the policies issued by the government on residential ownership by Foreign employee domiciled in Indonesia, the regulation of residential ownership for Foreign employee domiciled in Indonesia, and the procedures of residential ownership for Foreign employee domiciled in Indonesia.

2. METHOD

The type of research and approach is a legal normative types of research or doctrinal research (Aziza, 2017) by using 2 (two) approaches, namely: statute approach and conceptual approach. The sources and types of legal materials are primary, secondary and tertiary legal materials. The technique of collecting legal materials is carried out through literature study. Processing and analysis of legal materials is carried out in a coherent, systematic manner, therefore it will be easy for researchers to carry out the

analysis. The processing of legal materials through classification techniques. The analysis of legal materials is an activity in research in the form of conducting a study or review of the results of processing legal materials that are assisted with theories that have been obtained previously.

Theoretical Basis

The theory used to analyze is the theory of legal objectives proposed by Gustav Radbruch, a legal philosopher and a legal scholar from German who teaches the concept of three basic legal elements. He stated these three basic concepts' during the II World War. The legal objectives stated by Gustav Radbruch by various experts are also identified as legal objectives. The three of the legal objectives are: justice, certainty and expediency (Sova, 2013).

Conceptual Framework

Residential Ownership

Etymologically, the ownership (al-milk) comes from Arabic of the root word "malaka" which means mastery of something. The ownership or al-milk is also called proprietary or ownership. The fiqh experts define proprietary (al-milk) as "the specificity of a person to a property that is recognized by the syari'ah, so that it makes him or her has special power on that property, either utilizing and/or distributing" (Gustani, 2017). A residential is a building that is inseparable from human life because it is a primary need for humans as a place for refuge from the outside of threat. The residential also has functions as a place to live, to occupy, and to survive (Haryanto, 2016).

Foreign Employee

Foreign Employees are any person who are not an Indonesian citizen who are able to do work, both inside and outside of the employment relationship, to produce services or commodity to fulfil the needs of the community. The definition of foreign Employee in terms of law (Authentic Understanding), in Article 1 number 13 of

Law No. 13 of 2013 about employment, explained that: "Foreign Employee are foreign nationals holding visa with the intention of working in the territory of Indonesia" (suduthukum.com, 2016).

Domiciled in Indonesia

Domiciled in Indonesia means work and do some activities in Indonesia (understanding from researchers).

3. RESULT AND DISCUSSION

The reasons for Justification of Policies Issued by the Government on Residential Ownership by Foreign Employee who domiciled in Indonesia

The existence of globalization encourages movements related to investment to various parts of the world, including the occurrence of population migration or movement of employee between countries. The existence of Foreign employee or *Tenaga Kerja Asing* (abbreviated as TKA) in a certain country definitely will influence the world economic sector which forces to begin a new era, which started to the era of free trade which provides broad opportunities for economic actors to strive and compete fairly without protection (Suryandono, 2018).

Indonesia as one of the countries participating in the economic globalization, also related to the trade in commodity and services, then bound in service regulation in the General Agreement on Tariffs and Trade agreed upon in the United Nations Conference on Trade and Employment on 30 October 1947. The consequences with signed this agreement is to implement the agreed of commitments.

International agreements at the global level ratified by Indonesia are the Agreement Establishing the World Trade Organization which was ratified based on Law No.7 of 1994 concerning with the Ratification of the Agreement Establishing the World Trade Organization. At the regional level, Indonesia and ASEAN countries have agreed on the ASEAN Free

Trade Area that applies in January 2016, and the agreement on liberalization cooperation in ASEAN services trade (ASEAN Framework Agreement on Service) as outlined in Mutual Recognition Arrangement. The ASEAN Economic Community requires the circulation or distribution of commodity, services, capital and investment move freely across the borders of member countries of the ASEAN Economic Community including employee, namely; engineering techniques, nursing, architects, surveys, medicine, dentistry , tourism and accounting professions.

The various agreements signed by Indonesia have resulted in the globalization of the employee which opens opportunities for foreign employee to easily enter and employ in Indonesia. Indonesia still needs foreign investors, the presence of foreign employee is still needed. Likewise with the influence of globalization of civilization where Indonesia as a member of the WTO must open opportunities for the entry of foreign employee. To anticipate this, it is expected that there will be a complete of regulations governing that set the requirements of foreign employee, as well as securing the use of foreign employee.

The use of Foreign employee is regulated in Law No. 13 of 2003 concerning with employment, in Chapter VIII starting from Article 42 to Article 49. In hiring foreign employee in Indonesia it must be carried out through strict mechanisms and procedures, starting from selection and licensing procedures to supervision (Khakim, 2009). Philosophically, the use of foreign employee in Indonesia, are:

Benefit principles in the form of expanding employment opportunities;

Security aspects in the form of mechanisms for controlling foreign employee (including clearance houses), and;

Legality aspects in the form of entry of foreign employee must get permission from the Minister (working permit).

Supervision of foreigners in Indonesia is carried out by Immigration with selective policies (Dirjen Imigrasi Kemenkumham, 2015). The existence of foreigners in Indonesia does not merely bring benefits, but more than concerning about consideration of security.

Further related to selective policy in the supervision of foreigners, there are 2 (two) principles, namely (Dirjen Imigrasi Kemenkumham, 2015):

Prosperity principle or welfare principle, where arrivals and departures of foreigners in Indonesia must be beneficial for development in Indonesia, for example bringing in foreign exchange, expert assistance, technology transfer, foreign investment, etc.

Security principle, where the arrival and departure of foreigners in Indonesia must not endanger for peace and order community, for example: narcotics smuggling, cultural influences, infectious diseases, subversion, international theorists, human trafficking, and other violations.

Thus, foreigners who allowed coming and staying in Indonesia are those who given the benefit for national development and are not dangerous to the orderliness and security of the Unitary State of the Republic of Indonesia.

Therefore, consideration of Foreign employee is able to have Residential in Indonesia relating to the principle of benefit where the existence of TKA in Indonesia must be beneficial for national development and not harmful to orderliness and security of the Unitary State of the Republic of Indonesia, with the aim of doing business, work or investment.

The Regulation of Residential Ownership for Foreign Employee domiciled in Indonesia

Foreign employee or Tenaga Kerja Asing (TKA) is an important part of one of the production processes. The need for foreign employee. TKA employed by the

employer must fulfill the requirements, which include having education in accordance with the qualifications of the position that will be occupied by TKA and possessing competency certificates or having work experience of at least 5 (five) years in accordance with the position qualifications to be occupied by TKA. In principle, if the foreign employee does not fulfill the requirements as have been set out in the laws and regulations, then the foreign employee cannot be employed by the employer. This is because in order to be able to hire foreign employee, companies or employers must have written permission from the Minister of Employment or designated officials. The permit intended is the permission to employ foreign employee in the form of ratification of the Plan for the Use of Foreign employee or Rencana Penggunaan Tenaga Kerja Asing (RPTKA). The report referred to in the Employment Law and its implementing regulations is reporting using the number of foreign employee and local laborers that employers must do. The foreign employer is required to report the use of TKA to the Director General of Employment Placement Development and Expansion of Employment Opportunities at the Ministry of Employment. In the placement of foreign employee also brings consequences, namely the need for residential. The construction of flats and consumers who will buy and occupy, it is need to pay attention to the importance of the status of the rights to the land where the flats are built, whether they are in accordance with the prevailing laws and regulations, so that they will not cause problems for both apartment investors and interests of consumers of flats. The construction of flats is intended to provide adequate occupancy for people and legal entities. Therefore, the residential must meet the requirements, both from the health, comfort and beauty of the residential (Supriadi, 2012). The regulation of residential ownership for foreign employee can be seen as follows:

Constitution of 1945

One of the objectives of the State of Indonesia is to advance public welfare, this is regulated in the opening of the 1945 Constitution of the Republic of Indonesia. In connection with residential ownership for foreigners, it cannot be separated from Article 33 paragraph (3) of the 1945 Constitution of NRI: "Earth and water and natural wealth contained in it is controlled by the state and used for the greatest prosperity of the people". The meaning of being controlled by the state in the formulation of these norms means that the state regulates the designation of the earth, water, and natural resources in Indonesia for the prosperity of the people.

¹¹ Law No. 5 of 1960 concerning Basic Principles of Agrarian Principles.

The legal basis for the formation of national agrarian law is the 1945 Constitution of the Republic of Indonesia which is stated in Article 33 paragraph (3) above. In the law of Agrarian Principle it is regulated regarding land ownership and the prohibition on ownership of land owned by foreigners. The prohibition is regulated in Article 21 of the Law of Agrarian Principle. In accordance with the principle of nationalism, namely "Only Indonesian Citizens who have ownership rights on the land or her/him who has a relationship with the earth and space without distinguishing between men and women and fellow Indonesian citizens both native and descendants".

The prohibition aims to keep the land as state property or citizenship, because if the land is controlled by a foreign side, the citizen's welfare will be reduced and may cause the foreigners to control some parts of the country.

Thus foreign citizens in this case are foreign employee or foreign business entities do not have ownership rights to the land in Indonesia, but foreign nationals can own land in Indonesia with only the Right to Use or *Hak Pakai* (HP) and the Right to Rent for the buildings. All the rights granted to foreign nationals by the government are declared sufficient to give

roles to foreign citizens to participate in the development in Indonesia. The prohibition, there are exceptions to the land ownership that can be used by foreigners, that is building usufructuary rights regulated in Article 36 of the law of Agrarian Principle, the cultivation Rights contained in Article 30 of the law of Agrarian Principle, and right to use as stated in Article 42.

¹² *The Granting of Building Use Rights or Right to Use on Ownership Rights in Flats After the Implementation of Law No. 20 of 2011 concerning with Flats.*

Based on the Article 17 of Law No. 20 of 2011, flats can be built on the land by owned property, the right to use buildings or use rights to state land and the right to use buildings or use rights over management rights. The strong position of Property Rights can be seen from the ability to be the parent of other land rights. Above the Right of Ownership land, by the right-holders can be granted the Right to Use for Building, Right of Use, or Rental Rights for buildings to others. Subjects who can become holders of Right to Build are Indonesian citizens or legal entities established under Indonesian law and domiciled in Indonesia, which are included in legal entities are all institutions which according to applicable laws and regulations are given the status of legal entities, for example the Company Limited, Cooperative, Association of Owners and Occupants of Flats, and Foundations. Government Regulation of the Republic of Indonesia Number 40 of 1996 concerning Right to Cultivate, Right to Build, and Right to Use on Land, granting the Right to Build Building above Ownership Rights is carried out by an agreement between holders of Property Rights and prospective holders of Building Rights stated in the deed made by PPAT. The period of use of the building rights on land owned by Hak Milik shall be no more than 30 years. The granting of the Right to Use on the land of Ownership Rights must be registered in the land book at the Land Office. The period of granting the Right to Use on Ownership Rights is no

more than 25 years (Sumardjono, 2009).

Law Number 4 of 1992 concerning with Residential and Settlements

In order to provide legal certainty about the ownership of residential or occupancy for foreigners, Government Regulation Number 41 of 1996 concerning with the Residence of Resident or Occupancy by Foreigners domiciled in Indonesia is issued, where in the regulation it contains provisions in Article 1 which describe people foreigners domiciled in Indonesia are able to have a house for residence or occupancy with certain land rights, where the foreigner is a foreigner whose presence in Indonesia provides benefits for national development and is permitted to own a residence and can be independent residential or a unity of flats built on the right of use.

Government Regulation No. 103 of 2015 concerning with Residential Ownership by Foreigners Domiciled in Indonesia.

On December 22 of 2015, President Joko Widodo (Jokowi) signed Government Regulation (PP) No. 103 of 2015 about Residential ownership by Foreigners Domiciled in Indonesia. In the PP mentioned, foreigners who are allowed to have a house or residence are people whose existence provides benefits, conducts business, works or invests in Indonesia. "Foreigners are able to have a house for a place to live or occupy with the right to use," read Article 2 paragraph (1) of this PP as reported by the Cabinet Secretariat's official website. residence permit in Indonesia in accordance with statutory provisions. If the foreigner dies, then the house of residence or occupancy can be inherited.

Law No.6 of 2011 concerning with Immigration and Government Regulation No.26 of 2016 concerning with Amendments to PP No.31 of 2013 concerning with Implementation Regulations of Law No. 6 of 2011.

In the explanation of Law No. 6 of

2011, there have been developments in the international world, there have been changes in the country that have changed the paradigm in various aspects of constitutionalism as reforms in all fields are rolling out. The impact of the era of globalization has affected the economic system of the Republic of Indonesia and to anticipate changes in laws and regulations, both in the fields of economy, industry, trade, transportation, employment, and regulations in the field of people and goods traffic. These changes are needed to increase the intensity of relations between the Republic of Indonesia and the international world which has a huge impact on the implementation of Immigration functions and duties.

Simplification of the Immigration procedure for foreign investors who will invest in Indonesia needs to be done, including the ease of providing Permanent Stay Permits for investors who have fulfilled certain requirements. Thus, it is hoped that a favorable investment climate will be created and it will attract more foreign investors to invest in Indonesia.

The relationship between Law No.6 of 2011 and TKA or foreign employee, is that residence permit is a requirement to buy a residential house or property. This is regulated in Article 52 of Law No. 6 of 2011, and PP No. 26 of 2016 concerning Amendments to Government Regulation No.31 of 2013 concerning Implementation Regulations of Law No. 6 of 2011.

Thus, the regulation of residence ownership for foreign employee domiciled in Indonesia is spread in various laws and regulations, starting from the 1945 Constitution of the Republic of Indonesia, the Agrarian Law No.5 of 1960, relating to land ownership rights, Law No.20 In 2011 concerning Flats, and Government Regulation No.103 of 2015 concerning residential ownership of dwelling or occupancy by foreigners domiciled in Indonesia, relating to residential or property houses, Law No.6 of 2011 and Government Regulation No.26 of 2016 concerning Regulations of PP No.31 of

2013 concerning the Implementation Regulations of Law No. 6 of 2011, which relates to residence permits.

The Procedure for Residential Ownership of Foreign Employee Domiciled in Indonesia

Based on the previous discussion based on Government Regulation No.103 of 2015, there are 5 (five) terms that TKA or foreign employee buy a residential house or property:

It is only possible to buy a residential house or property with a certificate of use rights;

Having KITAS;

Only site / apartment;

Prices of residential houses or properties above 5 billion;

Marrying Indonesian people.

Foreign Employee allowed to buy a residential house or property with a certificate of use rights

For foreign employee who want to buy residential or property houses in Indonesia, the government only allows them to buy residential houses or properties with a certificate of use rights, where the use rights certificate can be extended for 30 years, then extended to 20 years, and renewed for 30 years. Thus, the total TKA or foreign employee can live in a residential house or property can reach 80 years. This residential or property can be inherited.

Has KITAS

Based on Article 2 paragraph (2) Government Regulation No. 103 of 2015 regulates, foreign employee who are allowed to give residential or property houses in Indonesia must have a residence and residence permit in Indonesia. KITAS / ITAS is a Limited Stay Permit (Card), whereas, what is meant by KITAP / ITAP is a Permanent Stay Permit (Card) (Limited Stay Permit (KITAS / ITAS), given to (Pasal 52 UU No.6 Tahun 2011 tentang Keimigrasian dan Pasal 141 ayat (1) PP

31/2013 tentang Peraturan Pelaksanaan UU.No. 6 Tahun 2011 tentang Keimigrasian sebagaimana telah diubah dengan PP No. 26 Tahun 2016 tentang Perubahan Atas PP No, 31 Tahun 2013 tentang Peraturan Pelaksanaan UU No. 6 Tahun 2011 tentang Keimigrasian) ;

Foreigners entering the Indonesian territory with a limited residence visa;

Children who at birth in the Territory of Indonesia father and / or their mothers hold the ITAS;

Foreigners who are given the status of a Stay Permit visit;

Skippers, crew members, or foreign experts on ships, floating devices or installations operating in the territorial waters and areas of Indonesian jurisdiction in accordance with the provisions of laws and regulations;

Foreigners who legally marry Indonesian citizens; or

children of Foreigners who legally marry Indonesian citizens.

The granting, extension and cancellation of the ITAS is carried out by the Minister of Law and Human Rights ("Minister") or the appointed Immigration Officer. The procedure for managing ITAS for TKA, as follows:

An application for an ITAS is submitted by a Foreigner or Guarantor to the Head of the Immigration Office or a designated Immigration Officer whose work area covers the place of residence of a Foreigner. So, the place for handling ITAS is at the local Immigration Office where the foreigner in question lives.

For TKA or foreign employee whose purpose is to work as experts in Indonesia, the application is submitted by filling in the data application and attaching the requirements:

guarantee letter from the Guarantor;

Legitimate and still valid National Passport;

certificate of domicile; and

letter of recommendation from relevant

government agencies and / or institutions.

Requests must be submitted within 30 days from the entry date being given. If foreign employees pass this period, they will be charged a fee in accordance with the provisions of the legislation.

Then, the Head of the Immigration Office or the appointed Immigration Officer checks these requirements.

In the event that the requirements inspection has been fulfilled and photo taking has taken place, the Head of the Immigration Office or the appointed Immigration Officer within 4 (four) working days issues the ITAS.

Only Tread Houses and Apartments

TKA or foreign employee only buy residential houses or properties in the form of tread houses and apartments. This is regulated in Article 1 numbers 2 and 3 Government Regulation No.103 of 2015, Article 1 number 2 regulates: "Single houses are houses that have their own plot and one of the walls of the building is not built right at the boundary of the plot", while Article 1 is set 3, as follows: "The apartment unit, hereinafter referred to as Sarusun, is a flats unit whose main purpose is used separately with the main function as a residence and has a means of connecting to public roads.

Property prices above Rp.5 billion

The government gives a price limit for foreign employee who want to buy residential houses or property with a standard price above 5 billion. This is intended to prevent foreign employee from buying residential houses or property at low prices. TKA or residential employee who wants to buy a residential or property house, can contact a local notary. It is the notary who will examine the files or documents owned by the TKA, whether the TKA has the right to buy a residential house or property. From the results of interviews with the Chair of the NTB Notary Association, TKA who wants to buy a residential or property house can contact the Notary. Furthermore the notary will

coordinate with the Land Agency to check related to land rights, and immigration related to residence permit. Thus TKA will obtain legal certainty with residential houses or property purchased in accordance with the applicable laws and regulations.

Married to an Indonesian

Foreign employee who already have residential houses or property and are married to Indonesians, have the opportunity to become Indonesian citizens because of marriage, this is regulated in Law No.12 of 2006 concerning Citizenship of the Republic of Indonesia. With the existence of the marriage, TKA or foreign employee is obliged to list the properties that have been purchased in the Marriage Agreement (Lamudi, 2016).

Thus the procedure for residential ownership for Foreign employee domiciled in Indonesia must fulfill the requirements as regulated in PP No.103 of 2015, namely: Foreign employee only allowed to buy property with a certificate of use rights, having KITAS, only the house and apartment, property prices above 5 billion, and marriage to Indonesians. Purchasing residential or property houses is carried out in Notaries and PPATs, then those who will check the complete requirements submitted by Foreign employee, in coordination with the local National Land Agency relating to land rights, and the Immigration office regarding residence permits.

4. CONCLUSION

The reason for justifying the policy issued by the government on residential ownership by Foreign employee domiciled in Indonesia is the principle of benefit where the existence of Foreign employee in Indonesia must be beneficial for national development and not harmful to orderliness and security of the Unitary State of the Republic of Indonesia, with the purpose of doing business, work or investment. The regulation of residential

ownership of Foreign employee domiciled in Indonesia, spread in various laws and regulations, starting from the 1945 Constitution of the Republic of Indonesia, Law. No.5 of 1960 concerning Agraria, Law No.20 of 2011 concerning Flats, PP No.103 of 2015 concerning Residential Ownership or Occupancy by Foreigners domiciled in Indonesia, Law No. 6 of 2011 concerning Immigration and Government Regulation No. 26 of 2016 concerning Regulation of PP No.31 of 2013 concerning Implementation Regulations of Law No. 6 of 2011. The procedure for the ownership of a residential house for Foreign employee domiciled in Indonesia must complete the requirements as stipulated in Government Regulation No.103 of 2015. Purchases of residential or property houses are carried out in Notaries and PPATs.

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