

КОНСТИТУЦІЙНЕ ПРАВО

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SOME PROBLEMS WITH ISSUING RESIDENCE PERMITS IN AZERBAIJAN

This article examines the rules for issuing a residence permit in Azerbaijan and the necessary changes. A study was conducted on the basis of migration legislation of advanced European countries to develop new proposals on the regulation of the rules for issuing residence permits in the Republic of Azerbaijan. The response to the survey showed us the need to make certain changes not only to the Migration Code, but also to other normative legal acts..

Key words: migration, foreigner, ministry, code, fake marriage.

Алієв Е. Е. Деякі проблеми з оформленням посвідки на проживання в Азербайджані

Розглядаються правила видачі посвідки на проживання в Азербайджані та необхідні зміни. На основі міграційного законодавства передових європейських країн розроблено нові пропозиції щодо регулювання правил видачі посвідки на проживання в Азербайджанській Республіці. Доведено необхідність внесення певних змін не лише до Міграційного кодексу, а й до інших нормативно-правових актів.

Key words: міграція, іноземець, міністерство, кодекс, фальшивий шлюб.

Undoubtedly, one of the most important issues in the study of the administrative and legal regulation of migration processes is the provisions of the legislation on the issuance of temporary and permanent

residence permits. In the doctrine of European law, this issue has become a topic of widespread debate, especially in the second decade of the XXI century. The right of man and citizen to freedom of movement and the protection of the security of states are at stake. In the Republic of Azerbaijan (AR), this problem has been discussed more in recent years, and now it is necessary to make some improvements in this area. It is known that the administrative-legal regulation of migration processes in our country is implemented through the Migration Code dated July 2, 2013. Here it is necessary to carefully consider the conditions for obtaining a temporary residence permit.

The issues of temporary residence permit are set out in Chapter 7 of the Code [1], according to Article 45, if a foreigner or stateless person is in a close relationship with a citizen of the Republic of Azerbaijan; when investing at least 500,000 manats in the country's economy; if he has real estate worth at least 100,000 manat in the territory of the Republic of Azerbaijan; when depositing money in banks in the amount of at least 100,000 manats on the basis of a fixed-term deposit agreement; if he / she is a high-level specialist in foreign economy, industry, military, science, culture, sports and other fields; if there are family members temporarily or permanently residing in the country; when engaged in entrepreneurial activity; if a foreigner obtains a work permit in accordance with this Code to engage in paid employment; when studying in full-time in higher and secondary special education institutions, as well as in vocational and general education institutions; engaging in professional religious activities in state-registered religious organizations; when he / she is considered a victim of human trafficking; may obtain a temporary residence permit if it assists the criminal prosecution authorities and if there are grounds provided for in international agreements to which the Republic of Azerbaijan is a party [1]. A temporary residence permit in the territory of Azerbaijan is issued for a period specified in the applicant's application, but not more than 1 year, except for investments in the country's economy in the amount of at least 500,000 manat and may be extended for a period not exceeding 2 years each. In this case, the temporary residence permit is issued for the period specified in the applicant's application, but not more than 3 years, and can be extended for a period not exceeding 3 years each time, if there are appropriate grounds [1].

Some provisions in this section should be clarified and specified on certain issues. First of all, we can consider the condition of being in close kinship with a citizen of the AR. According to Article 3.0.12 of the Code, the concept of close relative includes father, mother, husband (wife), children, brothers, sisters and their children, grandfather, grandmother, grandfather's (grandmother's) father and mother, grandson, father-in-law, mother-in-law, brother-in-law, sister-in-law. It can be said that the basis of close kinship is based on marriage, and the provisions on the validity of marriage are reflected in the Family Code of the AR [2]. It is known that the tendency of foreigners to obtain a residence permit in the relevant country through a fake marriage is widespread throughout the world. For this reason, it is vital to officially determine the validity of a marriage concluded by a foreigner applying for a residence permit on the basis of a marriage with a citizen of the AR. According to Article 25.1 of the Family Code, if one of the parties has not reached the age of marriage, the terms of the marriage mentioned in Article 11 have been violated, if there are one or more obstacles to the marriage, one of the parties to the marriage has a skin disease or human immunodeficiency virus and if it conceals the existence of the disease from the other, as well as if one or both parties do not intend to marry, a marriage (fake marriage) is considered invalid. It is clear that the basis for the invalidity of a marriage contract for a residence permit is the fact that one or both parties (usually) do not intend to get married. Article 25.2 of the Family Code establishes the procedure for invalidating a marriage by a court in the AR [2]. In this regard, the substantiation part of the decision of the Sumgayit City Court on the claim for "invalidation of marriage" dated April 3, 2019 emphasizes that the explanation of the parties shows that the defendant did not intend to marry and agreed to marry at the insistence of his parents, but it was determined that the family was not established. «As evidenced by the above, the marriage was formally registered between the parties, no marriage was established, and this marriage registration did not create any rights or obligations» [3]. As it seems, the family law of the AR, based on the application of one of the parties and their explanation, determines the procedure for invalidating a marriage concluded by one or both parties without the intention of marriage. Article 26 of the Family Code defines the parties or their guardians, other persons whose rights have been violated as a result of a marriage concluded in

violation of the requirements of Article 12 or the age of marriage, as well as persons entitled to demand the annulment of the marriage. It should be noted that as a result of our research on the administrative and legal regulation of migration processes, we have determined that the State Migration Service should be reorganized in the form of the Ministry of Migration and Integration. In our opinion, the Ministry of Migration and Integration, which we consider expedient to establish on the basis of the State Migration Service, should also have the right to apply to the court to invalidate the marriage in appropriate cases. Thus, a new paragraph 9 should be added to Part 1 of Article 26 and the text of the paragraph should be worded as follows:

«Relevant executive authority in case of forged marriage with a foreigner in order to violate the rules of admission, stay and residence permit of a foreigner in the country.»

It is necessary to refer to the international experience on the above issue, and at first glance, it seems that the Immigration Office (UMI) under the Ministry of Justice and Social Security issues a residence permit for marriage to a citizen of Norway [4]. From this point of view, it is also the authority of this body to check the validity of a marriage. Interestingly, there are two types of fake marriages in Norway, and they differ from each other in certain characteristics. In the first type (*omgåelsesekteskap*), the main reason for a person to marry is to obtain a residence permit in this country, and such a marriage is formally valid and real [4]. The other type (*proformaekteskap*) is a marriage concluded by a person who intends to obtain a residence permit completely and is far from the truth [4]. However, both types of invalid marriages provide a legal basis for rejecting a person's application for a residence permit. UDI investigates the couple's length of stay, contact, information about each other, age difference, whether the marriage is unusual in the culture of the foreigner's country of origin, and whether they have previously applied for a residence permit in Norway or another country [4]. In the Kingdom of Belgium, the Immigration Office, which is the authority in charge of migration, has the power to verify the fact that a marriage is concluded in order to obtain a residence permit, and is fighting against this [5]. In general, although in most European countries the authority to verify the validity of a marriage is vested in the police and prosecutors [6, p. 28], it is the migration authorities that monitor the fact that a foreigner marries a citizen of the country concerned in order

to obtain a residence permit. When it comes to verifying the validity of a marriage between a foreigner and a citizen, it can be said that a number of criteria are used by different countries. For example, Spanish legislation has identified 118 questions for the interview of partners, which are divided into three main groups [7, p. 26]. The first group of questions is to determine the level of mutual knowledge of personal, family and professional information, the second group to understand the development of relationships from the first acquaintance to the decision to marry or marriage decision, and finally the last group about the daily life of the parties (smoking, hobbies, common language, illnesses, whether a foreigner is aware of the advantages of marrying a Spanish citizen and having a family in that country) [7, p. 26].

Another important issue is the criminal nature of this act in European countries. Thus, according to Article 118, Part 2 of the Swiss Federal Law on Foreign Citizens and Integration, any person who marries a foreign citizen or organizes, promotes or facilitates such a marriage in order to violate the rules of admission and stay of foreign nationals, is sentenced to imprisonment not exceeding three years or a fine. Part 3 of the article establishes aggravating circumstances of this criminal act. Thus, the commission of this crime by a person as a representative of a criminal organization or association, created intentionally or for the purpose of continuing to commit this crime for illegal gain, is punishable by up to 5 years in prison or a fine [8]. The second part of Section 95 of the Law on the Residence, Economic Activity and Integration of Foreigners in the Federal Republic of Germany provides for imprisonment for up to 3 years and a fine for this crime [9]. However, unfortunately, the Criminal Code of the AR does not define a fake marriage without the intention of marriage as a criminal act. In response to our request to provide statistical information to the State Migration Service, it was stated that in accordance with Article 45.1.1 of the Code (in case of close relationship with a citizen of the Republic of Azerbaijan) In 2019, 23 foreigners and in 2020, 18 foreigners and stateless persons were reportedly denied or their previous permits revoked. These figures lead to the inclusion of fake marriages in the Criminal Code as a socially dangerous act. We consider that according to the above-mentioned statistics, the commission of this act is widespread and Article 318-3 should be added to the Crimes against the Rules of Administration

chapter of the Code, and the text of the article should be worded as follows:

318-3.1. Concluding or arranging a fake marriage with a foreigner for the purpose of violating the rules of admission, stay and residence permit of foreigners by a citizen of the Republic of Azerbaijan.

shall be punished by correctional labor for up to 2 years, or restriction of liberty for up to 3 years, or imprisonment for up to 3 years.

318-3.2. Same actions:

318-3.2.1. committed by an organized group;

318-3.2.2. committed by an official using his official position;

318-3.2.3. when committed repeatedly -

shall be punished by imprisonment for a period from three to five years with or without deprivation of the right to hold a certain position or engage in certain activity for up to two years.

On the other hand, entrusting the investigation of this crime to the new Ministry of Migration and Integration is also a great requirement, as this body, which will be established on the basis of the State Migration Service, will specialize in migration and integration of foreigners. The current DMX does not have an investigation department [10], but it is expedient to establish of a new General Investigation Department in the new Ministry and to delegate the preliminary investigation authority of crimes under Article 318-1 (also known as the organization of illegal migration) to the said ministry. At present, according to Article 3 of the Presidential Decree ““On the approval, entry into force and related legal regulation of the Criminal Procedure Code of the Republic of Azerbaijan” and the application of the Criminal Procedure Code of the Republic of Azerbaijan approved by this Law”, this power belongs to the State Border Service [11]. A new provision should be added to this article in the following wording:

«On cases on crimes provided for in Articles 318-1 and 318-3 of the Criminal Code of the Republic of Azerbaijan – the Ministry of Migration and Integration of the Republic of Azerbaijan.»

In addition, the above stipulates the amendment to the text of Article 215.3.1 of the Criminal Procedure Code of the AR. Thus, according to this article, preliminary investigations into crimes under Articles 100-113, 120-125, 126.3, 135-138, 145, 146, 148-1, 149, 154-162, 162-1 (when a criminal case is initiated by the prosecutor’s office), 163, 164, 165.2, 165-2, 165-3, 166.2, 169-1, 179, 189-1, 190, 191, 192-2, 193-1

(when the criminal case is initiated by the prosecutor's office), 195, 195-1, 195-2, 202-203-1, 208, 210-212, 222, 223, 262, 268, 286-288, 290-302, 304, 307-315, 316-2.1, 317, 317-1.2, 318-1, 321 and 323 of the Criminal Code of the AR, are conducted by the prosecutor's office. It is expedient to remove Article 318-1 from here, as it was proposed that the preliminary investigation under this article be conducted by the new Ministry of Migration and Integration.

Interestingly, Article 3 of the Migration Code does not define the concept of a high-level specialist, which can lead to certain difficulties in the implementation of the legislation. When referring to international experience, for example, the dictionary of the International Organization for Migration (IOM) defines the terms highly skilled migrant worker and qualified local. A highly skilled migrant worker is a migrant worker who has a high level of education or professional experience, and generally has the skills or quality necessary for a highly skilled profession [12, p. 91]. The term specialized local refers to an emigrant with special professional skills required in the country of origin in the context of migration [12, p. 165]. However, in each case in the national legislation, individual states may set different criteria for highly qualified migrants. Education, occupation, income level or a combination of these are used to determine a migrant's skills. There are two separate systems in the world for the classification of both professional and educational criteria [12, p. 91-92]. One of them is called the International Standard Vocational Classification 08 (ISCO-08). In this Classification, the professions included in the 3rd and 4th Skill Levels are considered highly qualified [13, p. 13]. Examples include managers, specialists, technicians and assistant specialists [13, p. 14].

The other system is called the International Standard Classification of Education, and the knowledge and skills required to operate in the above-mentioned Skills Level occupations are mainly Level 5 (short-term higher education), Level 6 (bachelor's or equivalent level), Level 7 (Master's or equivalent) or Level 8 (Doctoral or equivalent level) is obtained as a result of education [12, p. 92]. Thus, based on the above, it is expedient to include the notion of a highly qualified specialist to Article 3 of the Code as having the necessary skills and qualifications for a highly qualified profession with a high level of education (5, 6, 7 or 8 levels of education in accordance with the International Standard Classification of Education) and earning an income with a quality level

(included in Skills Levels 3 and 4 in accordance with the International Standard Classification of Occupations).

Thus, in the current situation, there is a need to make some changes to the Migration Code and other normative legal acts, which is due to the adaptation of administrative and legal regulation of migration processes to modern requirements and the use of advanced European countries in this field.

In addition, we believe that the new Ministry of Migration and Integration, which we propose to establish on the basis of the DMX, should also have the right to apply to the court to invalidate the marriage in appropriate cases. For this purpose, we propose to add a new paragraph 9 to Part 1 of Article 26 of the Family Code of the AR and provide the text of the paragraph in the following wording:

«Relevant executive authority in case of forged marriage with a foreigner in order to violate the rules of admission, stay and residence permit of a foreigner in the country.»

One of the important innovations in the legislation related to the problem of fake marriages is the issue of obtaining a residence permit by a foreigner and, in this context, the criminal prosecution of citizens of the AR who enter into fake marriages for other purposes. In our opinion, the statistics provided to us by the State Migration Service (identification of 23 such fake marriages in 2019 and 18 in 2020) determine the inclusion of this act in the Criminal Code of the AR as a public danger. Thus, Article 318-3 should be added to the chapter on crimes against the Rules of Administration of the Code and the text of the article should be worded as follows:

318-3.1. Concluding or arranging a fake marriage with a foreigner for the purpose of violating the rules of admission, stay and residence permit of foreigners by a citizen of the Republic of Azerbaijan.

shall be punished by correctional labor for up to 2 years, or restriction of liberty for up to 3 years, or imprisonment for up to 3 years.

318-3.2. Same actions:

318-3.2.1. committed by an organized group;

318-3.2.2. committed by an official using his official position;

318-3.2.3. when committed repeatedly -

shall be punished by imprisonment for a period from three to five years with or without deprivation of the right to hold a certain position or engage in certain activity for up to two years.

We also consider it expedient to have a General Directorate of Investigation and Investigation in the structure of the new Ministry of Migration and Integration, which will be established to conduct a preliminary investigation of this crime and criminal cases under Article 318-1. For this purpose, a new provision should be added to Article 3 of the Presidential Decree “On the approval, entry into force and related legal regulation of the Criminal Procedure Code of the Republic of Azerbaijan” and the application of the Criminal Procedure Code of the Republic of Azerbaijan approved by this Law” in the following wording:

«On cases on crimes provided for in Articles 318-1 and 318-3 of the Criminal Code of the Republic of Azerbaijan - the Ministry of Migration and Integration of the Republic of Azerbaijan.»

The text of Article 215.3.1 of the Criminal Procedure Code of the AR must be worded as follows:

On the crimes under Articles 100-113, 120-125, 126.3, 135-138, 145, 146, 148-1, 149, 154-162, 162-1 (when a criminal case is initiated by the prosecutor’s office), 163, 164, 165.2, 165-2, 165-3, 166.2, 169-1, 179, 189-1, 190, 191, 192-2, 193-1 (when the criminal case is initiated by the prosecutor’s office), 195, 195-1, 195-2, 202-203-1, 208, 210-212, 222, 223, 262, 268, 286-288, 290-302, 304, 307-315, 316-2.1, 317, 317-1.2, 318-1, 321 and 323 of the Criminal Code of the AR;

One of the innovations to be introduced in the Migration Code is the inclusion of the concept of highly qualified specialists in Article 3, called Basic Concepts. In accordance with the relevant international standards in this field, the concept should be in the form of a foreigner having the necessary skills and qualifications for a highly qualified profession with a high level of education (5, 6, 7 or 8 levels of education in accordance with the International Standard Classification of Education) and earning an income with a quality level (included in Skills Levels 3 and 4 in accordance with the International Standard Classification of Occupations).

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