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*Hague Convention Division*

*Consular Affairs Bureau*

*Ministry of Foreign Affairs of Japan*

2017 (Kyo) No. 9 Case of Appeal with Permission against Modification Order  
of Final Order

December 21, 2017, 1<sup>st</sup> Petty Bench Order

#### The Main Text

##### Dismissal of Appeal

The costs of the appeal shall be borne by the appellant.

##### The Grounds

I. Grounds for Appeal asserted by Counsels for the Appellant, Ai Kuroda, Yusuke Kono, Masami Kittaka No. 1 to 4

1 According to the records the sequence of events in this case was as follows.

(1) The Appellant, the Respondent and their 4 children (“the Children”) were living together in the United States of America (“the U.S.”) when in July 2014 the Respondent, after promising the Appellant to return to the U.S. in August of the same year, went to Japan where she lives with her two parents in their home, with the children. At the time of arrival in Japan as mentioned above, the Children were the elder twins, the first and second sons aged 11 years and 7 months, and the younger twins, the first daughter and the third son aged 6 years and 5 months.

(2) The Respondent, being told by the Appellant to stay for a while in Japan after September 2014, enrolled all the Children in the same international school with the Appellant’s agreement. However, later there was a disagreement between the Appellant and the Respondent about the return of the Children to the U.S. In August

2015 the Appellant made a petition for the return of the Children (“the Petition”) under the terms of Article 26 of the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (“Implementation Act”).

(3) During the process of dealing with this Petition the Family Court Investigating Officer was told by the first and second sons that they strongly objected to being returned to the U.S. and the daughter and the third son also expressed negative views about being returned to the U.S. Further, the Children said they did not want to be separated from each other. In addition, the Appellant has recently lacked a financial basis that would be suitable for parenting and care of the Children and has no perspective of receiving ongoing support from relatives for such parenting and care.

(4) In January 2017 the Osaka High Court acknowledged that in regard to the first and second sons there was a ground for refusal under Article 28, paragraph (1), item (v) of the Implementation Act, but concluded nevertheless that it would serve the interests of the child to return to the U.S., and that it was appropriate to apply the terms of the proviso to Paragraph (1); and that in regard to the daughter and the third son, as they had not reached a degree of maturity where their opinion should be considered, no ground for refusal could be found under item (v) of the same paragraph; and, since there was no grave risk of placing the Children in an intolerable situation by a return order, no ground for refusal could be found under item (iv) of the same paragraph. Accordingly an order was issued to return all the children to the U.S. (“Original Order”). The Original Order became final and binding in the same month.

(5) In February 2016 the Appellant’s house in the U.S. where he had lived with the Respondent and the Children was put to auction, and in August of that year the Appellant vacated the house and began living in a room at an acquaintance’s home.

(6) Based on the Original Order the Appellant petitioned for execution by substitute of the return order. On September 13, 2016 a Court Execution Officer attempted to persuade the Respondent and the Children and tried to set up a meeting between the Appellant and the Children, but the Children refused to be returned to the U.S. and would not meet with the Appellant. On the 15<sup>th</sup> of that month, the Court Execution

Officer brought about a meeting between the two elder sons and the Appellant. There was, however, no change in the stance of the two sons. Thus, the Court Execution Officer came to recognize as to the above-mentioned execution by substitute that, in particular, there existed a risk of causing physical or psychological harm to the two elder sons by continuing carrying out the execution, so the purpose of the execution could no longer be achieved. The Court Execution Officer eventually closed the case for failure to achieve the purpose of the Release (Article 89, item (ii) of Rules of Procedures for Case relating to Return of Child under the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction).

2 This is a case where the Respondent claimed that it became inappropriate to proceed with the Original Order due to change in circumstances which took place after the order became final and binding and that, based on Article 117, paragraph (1) of the Implementation Act, the Original Order should be altered and the Petition be dismissed.

3 According to the circumstances recorded above, the Appellant lacks the financial basis to provide appropriate care for the children and has no expectation of receiving ongoing support from family members in parenting and care, and since the Original Order became final and binding the Appellant vacated his dwelling and subsequently could not ensure a stable accommodation for the children. As a result, the circumstances under which the Appellant could provide parenting and care if the children were to be returned to the U.S. have deteriorated to a degree that cannot be ignored, and so it must be said that there has been a change in circumstances. Accordingly, in relation to the first and second sons who have consistently refused to return to the U.S., it can no longer be found that it is in the interests of the children to be returned to the U.S. despite the existence of a ground for refusal under Article 28, paragraph (1), item (v) of the Implementation Act, and so it is not possible to order their return under the proviso of the said Article 28, paragraph (1). In addition, in regards the daughter and the third son, if consideration is given to all the circumstances appearing in this case, including the separation of the Children, who

have a close connection as siblings, between Japan and the U.S., which will occur if only two are returned to the U.S., it must be said there is a grave risk of placing the Children in an intolerable situation by returning them to the U.S., so it is appropriate to find a ground for refusal under the same Article 28, paragraph (1), item (iv).

Accordingly, finding that it is no longer appropriate to maintain the Original Order due to change in circumstances since it became final and binding, it is reasonable to alter the Original Order under the terms of Article 117, paragraph (1) of the Implementation Act, and dismiss the Petition. The decision of the court in the prior instance to the same effect can be upheld in its result. The arguments of the Appellant's Counsels cannot be adopted.

## II. Grounds for Appeal No. 5

According to the records in this case, there is nothing illegal in the measures taken by the court in the prior instance, contrary to the allegations of the Appellant's Counsels. The arguments of the Appellant's Counsels cannot be adopted.

Accordingly, the Justices unanimously decide as in the main text. There is a supplementary opinion by Justice Hiroshi Koike.

Justice Hiroshi Koike's supplementary opinion is as follows.

I agree with the opinion of the court but wish to offer a further supplementary opinion.

1 The Convention on the Civil Aspects of International Child Abduction ("the Convention") aims to ensure, among others, the prompt return of a wrongfully removed child, considering that the interests of the child are of paramount importance in matters relating to the custody of the child, and that it is desirable for the child's interests to settle disputes relating to custody in the child's state of habitual residence. Based on the Convention, Article 27 of the Implementation Act establishes the principle that the return of the child must be ordered when the grounds for return as listed in the same Article are fulfilled, and the court must show strong respect for this principle and decide promptly, with a view to realizing the child's interests. In addition,

Article 28 of the Implementation Act, establishes grounds for refusal of a return order in accordance with that principle, and these exceptional grounds are established with the objective of seeking the child's interests by considering, among others, the effect of the return on the child and the child's autonomous views.

2 The first and second sons consistently refused to return to the U.S., so a ground for refusal existed under Article 28, paragraph (1), item (v) of the Implementation Act. From the viewpoint of the children's interests, avoiding the separation of the children from each other is important. However, in light of the Appellant's unpreparedness for providing parenting and care for the children, the Original Order ordering a return based on the proviso of the said paragraph, in which it was treated as in the "interests" of the children to return to the U.S. together, despite it going against wishes of the first and second sons, can be characterized as a discretionary decision in a marginal case which might divide opinion, even seeing as it reached a different conclusion from the first trial. The fact that after the Original Order became final and binding, the Appellant vacated his house and was unable to ensure stable accommodation, together with the existing financial situation that was the cause of it, represented the occurrence of events that had a great influence on his preparedness for providing parenting and care and can be said to have caused change in circumstances that needed to be taken into account when deciding whether a return to the U.S. of the first and second sons would contribute to the "interests" of the children. Then considering that there has been such a change in circumstances, and regarding the first and second sons who have both consistently refused to return, an order for return to the U.S. despite the presence of the grounds for refusal in the same item, could no longer be acknowledged as contributing to the "interests" of the children. There must be real caution in applying Article 117 of the Implementation Act and altering a final order that has become final and binding, but in the light of the above mentioned altered circumstances, it must be considered that this is a case for application of the said Article.

As shown above, the first and second sons should not be returned to America, and

in regard to the daughter and the third son who have a close connection to the other two, separating them from their siblings by returning them to the U.S. might invite forcing the two into an intolerable living environment, and considering all the other circumstances appearing in this case it would clearly be contrary to the interests of the children; and so it can be seen that a ground for refusal set out in Article 28, paragraph (1), item (iv) the Application Law is present.

3 The underlying case was presumably a difficult case that required a decision in accordance with the objectives of the Convention, while taking various circumstances into consideration, particularly those of the objection of the children to being returned, the evaluation of, and changes to, the preparedness for providing parenting and care, and the appropriateness of separating siblings. Thus, different instances rendered a different decision. While precedents are gradually accruing relating to this Convention, courts will be required to make efforts to promptly render an appropriate decision by noting the nature of non-contentious matters where the court fulfills a supervisory function with reasonable discretion, by duly considering the objectives of the Convention as well as the objectives and structure of the provisions of the Implementation Act, and by seeking to apply the law adapted to the case at hand and to devise a method of investigating the facts.

(Presiding Judge, Justice Atsushi Yamaguchi, Justices Masayuki Ikegami, Naoto Otani, Hiroshi Koike, and Katsuyuki Kizawa)