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Hague Convention Division
Consular Affairs Bureau
Ministry of Foreign Affairs of Japan

2017 (Ju) No. 2015 Case of a request for Habeas Corpus relief
March 15, 2018, Judgment of the First Petty Bench

Main text of the judgment (decision)

The judgment in the prior instance is quashed

This case is remanded to the Nagoya High Court

Reasons

Reasons for the petition for acceptance of final appeal filed by the appeal counsels, IMAZATO Keiko and SANO Miyuki

1. This is a case where the appellant, who lives in the United States of America, claims that his second son born between himself and his wife, who is the appellee and lives in Japan, is having his physical freedom restrained without legitimate procedure and seeks to have the said restrained child released based on the Habeas Corpus Act.
2. The outline of the facts determined by the court of prior instance is as follows.

(1) Both the appellant and the appellee have Japanese nationality. They got married in Japan in 1994. After having their oldest son (born 1996) and their oldest daughter (born 1998), they moved to the United States sometime around 2002 as a family of four.

The child currently under restraint was born in the United States on mm dd, 2004, and by the submission of a notification of the intention to reserve Japanese nationality prescribed in Article 104 (1) of the Family Register Act, he has dual American and Japanese nationality.

(2) The relationship between the appellant and the appellee deteriorated from around 2008. On January 12, 2016, the appellee entered Japan with the restrained child (then eleven years and three months) without obtaining the consent of the appellant.

Since then to the present, the appellee has been living with the child in city “a” and exercising custody over the child.

(3) In July 2016, based on Article 26 of the Act for the Implementation of the Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as “the Implementation Act”), the appellant filed a petition with the Tokyo Family Court to order the appellee to return the restrained child to the United States. In September of the same year, the said court issued a final order ordering the appellee to return the restrained child to the United States (hereinafter referred to as “Return Order”), and later the said Return Order became final and binding.

(4) Based on the said Return Order the appellant filed a petition with the Tokyo Family Court for execution by substitute of the return of the child (Article 137 of the Implementation Act) and obtained an order to implement the return of the child (Article 134 (1) and 138 of the Implementation Act).

On May 8, 2017, a court execution officer took the necessary steps to release the child from the care of the appellee at the appellee’s dwelling (hereinafter referred to as “the Release”) as prescribed in Article 140 (1) of the Implementation Act. At the time of the Release, since the appellee refused to open the door of the house despite persuasions repeatedly attempted by the court execution officer, the court execution officer opened a window on the second floor and entered through it. Even after that, the appellee wrapped herself closely with the restrained child in a single duvet bedcover and strenuously resisted the Release. In addition, when the court execution officer urged the child to return to the United States, he said that he wished to remain in Japan as he was, that he did not want to return to the United States and he refused to be released. The court execution officer ended the said Release on the basis that it was impossible to release the child from the mother’s care (Article 89 (ii) of the Rules of Procedures in Case for Return of Child under the Act for the Implementation of the Convention on the Civil Aspects of International Child Abduction).

(5) The appellant brought an action in a California Superior Court seeking a divorce from the appellee and also sought an order of custody relating to the restrained child, and by August 15, 2017 the said court made an order granting the appellant sole custody of the child.

(6) On September 27, 2017 and October 6, 2017, the restrained child had a meeting with his attorney, and the child stated that he was very dissatisfied that it was considered that he expressed the wish to stay in Japan because of pressure from the appellee. He strongly wanted to allege that he wished to live in Japan by his own decision. Also, as a reason for the above-mentioned wish, he said that he had got accustomed to life in Japan at last and it would be hard to return to live in the United States. He had been subject to abusive language and violence by the drunk appellant although it did not amount to injuries. He felt relief since he came to Japan and was away from the appellant. Besides, although he had partially misunderstood the procedures of the Implementation Act relating to the Return Order and the procedures relating to the rights of custody over himself in the California Superior Court in the United States, he correctly understood those issues through his attorney's explanation.

(7) The appellee works as a pharmacist at present and looks after the restrained child including preparing food.

The restrained child attended an elementary school in city "a" after coming to Japan and in April 2017, he entered junior high school in the same city. He works hard at study and school clubs, has a good relationship with friends and teachers, fits well with the appellee at home, and interacts with his elder brother and sister and other relatives. In addition, he has no problem of communicating in Japanese at present and can make a reasonable conversation at a level appropriate for his age.

3. Based on the facts related to the case described above, the court of prior instance concluded that the Petition should be dismissed, ruling as follows:

(1) At present, the restrained child is accustomed to life in Japan, is building good human relationships and has a fulfilled school life. At home, he fits well with the appellee, is emotionally stable and seems to be growing up healthily at a level appropriate for his age. Moreover, there is no circumstance showing that he lacks the competence to make judgments. Putting these things together, it cannot be seen that the restrained child's expression of a will to stay in Japan is a distortion of his true wish, and it must be said that the said expression of will is based on his free will. Therefore, the appellee's custody over the restrained child cannot be seen as coming under the restraint referred to in the Habeas Corpus Act or its rules. Moreover, the appellant's petition in this case is contrary to the restrained child's freely expressed will.

(2) Taking into consideration the situation of the appellee's custody over the restrained child, his age and his intention, even though the appellee's custody of the restrained child comes under the meaning of the restraint referred to in the Habeas Corpus Act and its rules, the illegality of the restraint is not conspicuous and the above-mentioned Return Order becoming final and binding has no influence on the outcome of this case.

4. However, the conclusion of the court of prior instance described above is not acceptable, for the following reasons.

(1) Whether or not the custody of the appellee over the restrained child corresponds to the restraint referred to in the Habeas Corpus Act and its rules.

In the case of the custody of a child who has mental capacity, if there are special circumstances in which the child cannot be seen as staying with the custodian based on the child's free will, the said custodian's custody over the child should be seen to correspond to the restraint referred to in the Habeas Corpus Act and its rules (Refer to 1986 (O) No. 644, judgment of the second petty bench of the Supreme Court of July 1986, Minshu Vol. 40, No. 5, at 991). As seen in this case, if one of the two parents having custody of a child crossed a national border and removed the child

to Japan and the child was asked to decide whether he or she wished to stay living with the taking parent, the decision would relate to which country the child would live in as his or her base in the future. Moreover, for a child with dual nationality, it might involve a question as to which nationality to choose in the future. In the light of these points, it should be seen as a significant and difficult decision to make for the child. Moreover, in the case of a removal like the one described above, it can be expected that in general there will be a serious emotional confrontation between the mother and the father, and it will be very difficult for the child to have contact with a parent living in a different country. Also, the child will inevitably live with a different language and in a different cultural environment from those he or she had before the removal. As a result, it should be assumed that the child would often be in a difficult position to obtain unbiased information which is necessary to make the above-mentioned decision. Taking these points into account, when deciding whether or not the child's decisions are based on his or her free will, basically, it is necessary to carefully consider whether the child has adequately obtained varied and objective information which is necessary to make the above-mentioned decision in the light of its importance and difficulty, and whether the taking parent exerts an undue psychological influence on the child.

In this case, the restrained child who is now thirteen years old can be seen as having mental capacity. However, from his birth to coming to Japan, he lived in the United States and he had no foundations for living in Japan. He came to Japan at a time when he was eleven years and three months old and certainly did not have the adequate mental competence to make the type of decisions mentioned above. Later, it seems that he did not have adequate chance to communicate with the appellant. Since he came to Japan, it can be recognized that he has had no option but to depend on the appellee to live. Further, despite the Return Order involved in this case becoming final and binding, the appellee in the situation described above showed an attitude of refusing to return him to the United States. At the time of the execution by substitute of the return of the child based on the Return Order, the

appellee strenuously resisted the Release in front of the restrained child. Considering these circumstances, it has to be said that the child under restraint was put in a difficult situation to adequately obtain varied and objective information necessary for him to decide whether or not he remains with the appellee. Such varied and objective information includes the meaning of the Return Order and the execution by substitute of the return of the child based on it, and the information about his own life after returning to the United States according to the Return Order in this case. It also must be said that the appellee exercised an undue psychological influence over the restrained child at the time of his decision-making.

Based on the above, it must be said that there are special circumstances in which the restrained child cannot be seen as staying with the appellee based on his free will. It should be concluded that the appellee's care of the child corresponds to the restraint referred to in the Habeas Corpus Act and its rules. Also, in the light of the above explanation, it cannot be recognized that the petition in this case is contrary to the freely expressed will of the restrained child (Article 5 of the Habeas Corpus Rules).

(2) Whether or not the restraint by the appellee is conspicuously illegal (Article 2, Paragraph (1) of the Habeas Corpus Act, Article 4 of the Habeas Corpus Rules).

In cases of Habeas Corpus claims for seeking the Release of a child who was removed to Japan over national borders, if the restraining party does not comply with the decision ordering the restraining party to return the child to his or her State of habitual residence based on the Implementation Act, but rather continues the restraint by exercising custody of the child, it must be said that there is conspicuous illegality in the restraint of the child by the restraining party unless there are special circumstances under which it is recognized as extremely inappropriate to release the child.

In this case, it is clear that the appellee resisted the execution by substitute of return of the child based on the Return Order when it was carried out and is continuing to exercise custody over the restrained child and not complying with the

said Return Order. On the other hand, there are no circumstances that would suggest that it is extremely inappropriate to release the child from the care of the appellee in order to return him to the United States. Therefore, there is conspicuous illegality in the constraint of the restrained child by the appellee.

5. The ruling of the court of prior instance, which is different from the above discussion, contains a violation of law that obviously affects its judgment. The appellant's reasons for the petition are well-founded, and the decision of prior instance should inevitably be quashed. In addition, as long as the above-mentioned facts are premised, the appellant's reasons for the petition should be accepted. In this case, it is necessary to ensure that the restrained child appears in court. The court takes this point into consideration and recognized that it is appropriate to have the court of prior instance proceed with the case and renew the judgment. The court holds to remand the case.

Accordingly, the court unanimously decides as set forth in the main text. (Presiding Justice YAMAGUCHI Atsushi, Justice IKEGAMI Masayuki, Justice KOIKE Hiroshi, Justice KIZAWA Katsuyuki, and Justice MIYAMA Takuya)