

Supreme Court Order 2017Seu630 Dated April 17, 2018 [Petition for Return of a Child (The Hague Convention on the Civil Aspects of International Child Abduction)]

【Main Issue and Holding】

In a case where a person whose right of custody has been breached as a result of a wrongful removal or retention of a child to or in the Republic of Korea requests to the court for the child's return, whether "a grave risk," prescribed as the grounds for exception to return under [Article 12\(4\)3 of the Act on the Implementation of the Hague Child Abduction Convention](#), includes the following: (i) where a child may be exposed to psychological harm due to frequent violence committed by one parent against the other parent; and (ii) where a child's return to the State of the habitual residence may place the child in severe suffering by depriving him/her of appropriate protection or care (affirmative); and in such cases, factors to be taken account of by the court receiving application for the return of a child

【Summary of Order】

According to the Convention on the Civil Aspects of International Child Abduction (hereafter "Convention") and the Act on the Implementation of the Hague Child Abduction Convention (hereafter "Act"), a person whose right to custody under the Convention has been breached as a result of a wrongful removal or retention of a child to or in the Republic of Korea may file with the court a petition seeking the return of the child ([Article 12\(1\) of the Act](#)), and in such case, the court is obliged to act expeditiously with the welfare of the child as its top priority ([Article 3 of the Act](#)).

In the meantime, the court may dismiss the petition seeking the return of a child even where the right of custody has been breached as a result of a wrongful removal of a child, provided that "there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" ([Article 12\(4\) of the Act](#)).

The grounds for exception to return under [Article 12\(4\)3 of the Act](#) are placed in order to prevent harm, which may arise from violation of the specific and individual welfare of a child, as a result of prompt return of the child. Thus, the construction of the said provision should place priority on the rights and interests of a child before the right to custody of either parent or the promptness of the procedure.

Therefore, a "grave risk" includes not only cases where there is a concern for harmful effects on a child's mind and body because of the petitioner's direct violence or abuse against the child, but also cases where the child is at risk of psychological harm due to frequent violence committed against the other parent, and cases where the child may suffer severely by deprivation of appropriate protection or care upon his/her return to the State of habitual residence.

Along with the aforementioned circumstances, the court receiving the petition for the return of a child must examine comprehensively the entirety of circumstances, including the degree of the harm and whether there are concerns of a recurrence of the harm, the specifics of the environment in which the child is brought up both before and after his/her return, and the psychological and physical impact of the return on the child, and then render judgment on the child's best interests and on whether the return rather poses a grave violation of the welfare of the child after taking into account factors such as the custody right of the petitioner and his/her counterpart.

【Reference Provisions】 Articles 3 and 12 of the Convention on the Civil Aspects of International Child Abduction; Articles 3, 12(1) and 12(4)3 of the Act on the Implementation of the Hague Child Abduction Convention

Article 3 of the Convention on the Civil Aspects of International Child Abduction

The removal or the retention of a child is to be considered wrongful where -

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 12 of the Convention on the Civil Aspects of International Child Abduction

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 3 of the Act on the Implementation of the Hague Child Abduction Convention (Duty of State Agency, Etc. to Act Expeditiously)

The State agency, etc. involved in the proceedings for the return of children under this Act shall act expeditiously, with top priority on the welfare of the children, in any cases involving the return of children and the right of access under the Convention and this Act.

Article 12 of the Act on the Implementation of the Hague Child Abduction Convention (Persons Entitled to File Petitions, Etc.)

(1) A person whose right of custody under the Convention has been breached as a result of a wrongful removal or retention of a child to or in the Republic of Korea may file with the competent court a petition seeking return of the child.

(4) The court may dismiss the petition seeking return of a child under paragraph (1) even where the right of custody under the Convention has been breached as a result of a wrongful removal or retention of a child, if the case falls under any of the following as set forth in the Convention:

3. There is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;

【Petitioner-Re-appellant】 Petitioner (Law Firm Hwang Mock Park P.C., Attorneys Kim Min-jo et al., Counsel for the petitioner-re-appellant)

【Counterparty-Counterclaim Re-appellant】 Counterpart (Law Firm One, Attorney Cho Sook-hyun, Counsel for the counterparty-counterclaim re-appellant)

【Principal of the case】 Principal 1 and one other

【Order of the court below】 Seoul Family Court Order 2017Beu30068 dated October 18, 2017

【Disposition】 The re-appeal is dismissed. The cost of re-appeal is assessed against the petitioner.

【Reasoning】 The grounds of re-appeal are examined (to the extent of supplement in case of supplemental appellate briefs not timely filed).

According to the Convention on the Civil Aspects of International Child Abduction (hereafter “Convention”) and the Act on the Implementation of the Hague Child Abduction Convention (hereafter “Act”), a person whose right to custody under the Convention has been breached as a result of a wrongful removal or retention of a child to or in the Republic of Korea may file with the court a petition seeking the return of the child (Article 12(1) of the Act), and in such case, the court is obliged to act expeditiously with the welfare of the child as its top priority (Article 3 of the Act).

In the meantime, the court may dismiss the petition seeking the return of a child even where the right of custody has been breached as a result of a wrongful removal of a child, provided that “there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation” (Article 12(4) of the Act).

The grounds for exception to return under Article 12(4)3 of the Act are placed in order to prevent harm, which may arise from violation of the specific and individual welfare of a child, as a result of prompt return of the child. Thus, the construction of the said provision should place priority on the rights and interests of a child before the right to custody of either parent or the promptness of the procedure.

Therefore, a “grave risk” includes not only cases where there is a concern for harmful effects on a child’s mind and body because of the petitioner’s direct violence or abuse against the child, but also cases where the child is at risk of psychological harm due to frequent violence committed against the other parent, and cases where the child may suffer severely by deprivation of appropriate protection or care upon his/her return to the State of habitual residence.

Along with the aforementioned circumstances, the court receiving the petition for the return of a child must examine comprehensively the entirety of circumstances, including the degree of the harm and whether there are concerns of a recurrence of the harm, the specifics of the environment in which the child is brought up both before and after his/her return, and the psychological and physical impact of the return on the child, and then render judgment on the child’s best interests and on whether the return rather poses a grave violation of the welfare of the child after taking into account factors such as the custody right of the petitioner and his/her counterpart.

Rendered in accordance with the aforementioned legal principle and evidence duly adopted, the lower court was justifiable to have dismissed the petition by the petitioner. The lower court rendered its judgment in view of the circumstances that (i) the petitioner had verbally and physically abused the counterparty multiple times, which caused the psychological suffering of Principal 1 who witnessed such abuse, and that (ii) in a case where only the principals or only Principal 2 is returned to Japan, there are concerns that such separation is likely to cause psychological suffering on the principals in the instant case. Hence, the lower court did not err and affect the conclusion of

the judgment by misapprehending the legal principle regarding “a grave risk” or by exceeding the bounds of the principle of logic and experience.

Therefore, the re-appeal is dismissed. It is so decided as per Disposition by the assent of all participating Justices.

Justices Cho Jae-youn (Presiding Justice)
 Ko Young-han
 Kim So-young (Justice in charge)
 Kwon Soon-il

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