2015 (Ra) No. 708 Appeal case against an order for the return of a child (Judgment of prior instance: Osaka Family Court 2015 (Ie-nu) No. 5)

Decision

Registered domicile:

Address:

Appellant (Respondent of the prior instance) A

Appellant's attorney

Registered domicile:

Address:

Respondent (Petitioner of the prior instance) B

Respondent's attorney

Same as above

Registered domicile:

Address:

Child C

Born *mm dd*, 2010

Main Text of the decision

1. The appeal is dismissed.
2. The cost of appeal shall be borne by the appellant.

Reasons

I The object of the appeal

1. The decision of prior instance is revoked.
2. The petition is dismissed.

II Outline of the case (hereafter, abbreviations are as per the notation of the original decision)

1. Summary of the case

In this case, the respondent who is the child's father alleged that the appellant who is the child's mother and taking care of the child had infringed on the respondent's rights of custody for the child by retention of the child in Japan. Based on the Act for Implementation of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as "the Act"; the Hague Convention on the Civil Aspects of International Child Abduction is hereinafter referred to as "the Convention"), the respondent requested that the appellant shall return the child to Canada which is the child's state of habitual residence (Article 2(v) of the Act) (This point is disputed as described later.)

On May 22, 2015, the court of prior instance ordered the appellant to return the child to Canada. The appellant filed an immediate appeal against the order.

2. Summary of the reasons for this appeal

(1) The child's state of habitual residence

At the time of the return to Japan (July *dd*, 2013), the child was three years and xxxx months old; at present, the child is five years old. The child was born and spent time in Canada during infancy, but since the child reached the age of discretion, the child has lived in Japan; therefore, the child has no memory of the life in Canada. In the light of the fact that a requirement of "one year" is set in grounds for refusing to order the return of a child (Article 28(1)(I) of the Act), the country in which the child lived prior to the move should not simply be considered as the place of habitual residence if more than one year has passed since the child returned to Japan. In this case, Canada cannot be considered as the child's state of habitual residence.

(2) Timing of the commencement of retention

The respondent clearly consented that the child would stay in Japan with the appellant until January *dd*, 2014. The appellant continued to stay in Japan against the consent; therefore, the commencement of the period of "the retention" should be regarded as January *dd*, 2014 and according to Article 2 of the supplementary provisions of the Act, the Act does not apply.

(3) Consent to or subsequent approval of the retention

A. The appellant wrote an email dated June *dd*, 2014: "I have not been feeling well since the end of May, so I think it is better not to return to Canada… Unfortunately, as I have not received a good response about living as a family of the three in Canada, I am going to cancel the plane tickets." The respondent replied to the email on the same day: "I understand about the flight to Canada. It is pity but I understand it in the light of your health and the current situation. I am just sad that I have no time with C." The respondent clearly gave a "consent" to the cancellation of the plane tickets. Thus, since the respondent and the appellant explicitly agreed that the child would stay with the appellant in Japan for a while, the retention was not wrongful.

B. In the decision of prior instance, the court found that the respondent's answer described in A "merely accepted the postponement of the appellant and the child's

return to Canada and constituted neither consent nor subsequent approval", but this is inappropriate. Even if the findings of fact from the decision of prior instance are accepted, it should be recognized that the respondent gave a "consent" to the child's staying with the appellant in Japan for "the extended period": in other words, for a while from June *dd*, 2014.

C. In the decision of prior instance, the court found that the respondent neither consented nor subsequently approved by citing the fact that on July *dd*, 2014, the respondent "told that he had had thoughts of divorcing the appellant and the appellant was designated as the person who has parental authority over the child". However, as instructed by the decision of prior instance, even though it is accepted that "it was just one of the options which the respondent was considering" to get divorced from the appellant and designate the parental authority over the child to the appellant, it should be recognized that at the point of the same day, the respondent at least not only gave a "consent" to the child's staying in Japan for a while but also conveyed his intention to "consent" that the appellant and the child would not go back to Canada.

D. In the decision of prior instance, the court found that "the respondent consistently requested the return of the child to Canada and negotiated the timing and other details of the return"; however, such fact cannot be found after June *dd*, 2014. The respondent submitted an application for assistance for the return to foreign state on October *dd* of the same year, but there is no fact that the respondent requested the appellant to return the child at that point in time. Furthermore, the respondent did not inform the appellant of the fact that he had submitted the application for assistance. In addition, on December *dd* of the same year, the respondent sent the child who did not know about the dispute between the parents an email said, "[the respondent] is waiting for the child's return to Canada.", but such an email does not constitute a request of the return. At the hearing of the court of prior instance, the respondent stated, "I have never explicitly requested to return the child to Canada… …it is not as though I requested the return of the child at or after the end of April, 2014;" therefore, the finding in the decision of prior instance that "the respondent consistently requested the return of the child to Canada" is also inconsistent with the respondent's claims.

E. In the decision of prior instance, the court found that "the respondent did not express objection to the care of the child by the appellant in Japan." However, in the reasons for the decision, it is described that "it could be interpreted that the respondent merely permitted that the appellant would take care of the child until the child returned to Canada (or until the divorce between the appellant and the respondent was finalized)"; therefore, "the court does not recognize that the respondent consented to or subsequently approved of the retention of the child."

However, if the respondent "permitted that the appellant would take care of the child until the divorce was finalized," it is reasonable to determine that "the respondent permitted that the appellant took care of the child at the point of having filed the case," because it is also natural to interpret "express no objection" as "consent or subsequent approval." The determination in the decision of prior instance is unreasonable. In

addition, the respondent stated during the hearing that “he has never explicitly requested the appellant to return the child to Canada,” so it is inappropriate to rephrase it simply as “the respondent did not express objection.”

F. In the light of the above, according to the outline of the finding facts in the decision of prior instance, “consent or subsequent approval” can be found clearly. Therefore, the petition for this case should be dismissed.

(4) Abuse of rights

A. On June *dd*, 2014, the appellant requested the respondent to cancel the return plane ticket and the respondent agreed to do so while understanding that this cancellation would make it impossible for the appellant and the child to return to Canada for a while. In other words, the respondent subsequently approved of the child’s staying in Japan from January *dd* of the same year until that time, as well as the child’s staying in Japan for a while from that time. In addition, on July *dd* of the same year, in response to the appellant’s email, the appellant wrote, “I can agree to file for divorce if you designate me as the person who has parental authority over the child,” The respondent replied that he would entrust the parental authority of the child to the appellant. Since then, what the respondent consistently requested was divorce; the respondent never requested the return of the child.

B. The reason why the respondent filed the petition was to avoid paying for child support. More specifically, the respondent hired an attorney in September 2014 and filed an application for assistance with the Ministry of Foreign Affairs on October *dd*, 2014. At this point, the respondent made no effort whatsoever to negotiate the return of the child officially, even though he could have done so through his representative or assistance by the Ministry of Foreign Affairs of Japan. On the other hand, the appellant attempted to continue discussing with the respondent during that time and even admitted the respondent’s visitation with the child.

C. As described above, the respondent did not request the return of the child; moreover, from July 2014, he clearly expressed to the appellant that he intended to relinquish the parental authority over the child to the appellant. In fact, he abandoned both his material and psychological responsibility to the child. Under the circumstances, it constitutes abuse of rights and cannot be allowed that the respondent suddenly filed a petition for the return of the child even after one year and ten months passed since the child had returned to Japan. In addition, the respondent deliberately tampered the content of an email addressed to the appellant on June *dd*, 2014: from “Next, I understand about the flight to Canada. Although it is unfortunate” to “Next, regarding the flight to Canada, it is unfortunate” (Ko 11, Otsu 11 and 13) as well as the content of an email addressed to the appellant on June *dd*, 2014: from “I understand about the cancelation of the plane ticket to Canada” to “The cancellation of the plane ticket to Canada, although it is pity that C will not return” (Ko 11, Otsu18-1). Moreover, the respondent did not submit the email which says that he entrusted the parental authority to the appellant and deliberately concealed emails that did not favor his claims. It

should be considered that this behavior supports that the petition constitutes abuse of rights.

III Determination of this court

1. This court also decides that ordering the appellant to return the child to Canada is appropriate, based on the reason as shown in 2 below and also on the same reason as referred to in the decision of prior instance “II Outline of the Case” 1 to 3 (from the third line on Page 2 to the seventh line on Page 10 of the original decision). *(Translator’s note: In this English translation, from the 1st line on Page 11 to the 30th line on Page 16 of the decision of prior instance)* and “III Determination of this court” 1 and 2 (from the ninth line on Page 10 to the end of Page 13 of the decision of prior instance). *(Translator’s note: In this English translation, from the 32nd line of Page 16 to the 17th line of Page 19 of the decision of prior instance)* However, each of following items are corrected: from “January *dd*” on the 10th line of Page 10, the second line of Page 11, and the second line of Page 12 in the decision of prior sentence to “January *dd* “ *(Translator’s note: In this English translation, on the first paragraph of Para III 1(1), the first line of the fourth paragraph of Para III 1(1) and the second paragraph of Para III 2(1) in the decision of prior instance)*; and from “parental authority” on the 16th line of Page 12 to “person who has parental authority over the child.” *(Translator’s note: In this English translation, on Para III 2(2)A in the decision of prior instance)*

2. Determination regarding the reasons for this appeal

(1) The child’s state of habitual residence

The appellant claims that the child has lived in Japan since the child reached the age of discretion in Japan and has no memory of the life in Canada. In the light of the intent that an item of “one year” is set out as a ground for refusal to order the return a child (Article 28 (1) (i) of the Act), and although more than one year has passed since the child de facto came to Japan, the appellant believes that the country in which the child lived before the move should not easily be considered the place of habitual residence and that Canada cannot be said to be the child’s state of habitual residence in this case.

A child’s state of habitual residence is defined as “the state where a child held his/her habitual residence immediately before the commencement of his/her retention” (Article 2 (v) of the Act), and “habitual residence” is interpreted as the place in which a person resides continuously and for a considerably long period of time. In that light, when a child is a toddler as in this case, it is reasonable to hold that the intent of both parents to settle in a new residence after abandoning a previous habitual residence is required for that child to acquire a habitual residence.

According to the outline of the fact of the decision of prior instance, cited for this case, the appellant and respondent got married in Canada in November 2009, had the child in May *dd* 2010, and lived together in xxxx Province, Canada. The appellant felt unwell and returned to Japan with the child on July *dd*, 2013 to convalesce. It is clear that the child’s habitual residence was Canada (xxxx Province) until its return to Japan. In addition, as of June *dd*, 2014, when the appellant’s retention of the child commenced (see description in (2) below),

there exists no sufficient materials for the court to recognize to form a mutual intent between the appellant and the respondent to abandon the child's previous habitual residence and have the appellant and the child settle in Japan. It cannot be said that the child lost its habitual residence in Canada at the point in time when its retention commenced as described above, and it also cannot be said that the child acquired a habitual residence in Japan. Therefore, the court cannot accept the appellant's claim.

(2) Timing of the commencement of retention

The appellant claims that although the respondent clearly agreed that the child would stay in Japan with the appellant until January *dd*, 2014, the appellant continued to stay in Japan in breach of the agreement. So, the appellant claims that the commencement of the "retention" should be regarded as the *dd* of that month and pursuant to Article 2 of the supplementary provisions of the Act, the Act does not apply. However, as described in the outline of the fact in the decision of prior instance, as cited for this case, in November 2013, the appellant asked the respondent to postpone the timing of the return to Canada, which was scheduled for January *dd*, 2014, and on December *dd*, 2013, the respondent agreed in reply that the appellant could postpone the return until the end of April, 2014. On April *dd*, 2014, the appellant asked the respondent whether or not the child would be able to attend a kindergarten in Canada and on June *dd* of that year, and she told the respondent that unless the appellant and respondent discussed and decided quickly whether or not the appellant and the child would return to Canada, there would not be enough time to prepare for the appellant's resignation, the child's withdrawal from the kindergarten, and issuance of a passport. Thus, it cannot be said that the appellant refused to return the child to Canada after April *dd* of that year. In the light of that fact, the court does not recognize that the appellant expressed the intent to refuse to return the child to Canada after January *dd*, 2014. On June *dd*, 2014, the appellant canceled the reservation for the return portion of the round-trip plane tickets (hereinafter referred to as "the Plane Tickets") which she purchased when she came back to Japan, made the Plane Tickets invalid, and expressed to the respondent that the appellant and the child would not return to Canada. In the light of this fact, that date can be regarded as the day on which the appellant expressed the intent to refuse to return the child to Canada. Therefore, the court cannot accept the appellant's claim.

(3) Consent to or subsequent approval of the retention

A. The appellant claims that by an email dated on June *dd*, 2014 from the respondent to the appellant, the respondent replied, "I understand about the flight to Canada. It is pity, but I understand it in the light of your health and the current situation. I am just sad that I have no time with C." And the appellant claims that the retention is not wrongful, since there was an explicit agreement between the appellant and respondent for the child to stay with the appellant in Japan for a while. However, in order to recognize a consent to or subsequent approval of the retention, it should be interpreted that the court needs to find that the petitioner for the return of the child approved the child would settle down in a new place of residence and waived the right to request the return of the child by objective evidence. The court finds it difficult to recognize that the aforementioned email shows such approval and waiver. According to the outline of the fact of the decision of prior instance which is cited for

this case, after sending the aforementioned email to the appellant, the respondent sent an email to the appellant to ask to discuss and resolve the issues of divorce and parental authority of the child quickly, and he told the child in an email that he was awaiting the child's return to Canada. In the light of the fact, the court should state that it does not recognize that the respondent agreed or consented to the retention of the child in the email dated on June *dd*, 2014.

B. The appellant claims that it should be recognized that the respondent "consented" that the appellant and the child stayed in Japan for "the period of postponement", in other words, for a while from June *dd*, 2014, even if the court of prior instance recognized, regarding the respondent's reply in above described A, that "the respondent merely subsequently approved of postponing the appellant and the child's return to Canada," and such finding is premised. However, it is clear from the explanation in A that the fact that the respondent agreed that the appellant and the child would stay in Japan during "the period of postponement" does not mean that the respondent consented to or subsequently approved of the retention of the child; therefore, the court cannot accept the appellant's claim.

C. The appellant claims that the fact that the respondent told the appellant on July *dd*, 2014 that "the respondent had had thoughts of divorcing the appellant and the appellant was designated as the person who has parental authority over the child." should be recognized that the respondent expressed at least, at that point of the same day, not only that he "consented" that the child would stay in Japan for a while but also that he conveyed his intent to "consent" that the appellant and the child would not return to Canada. However, as explained in the decision of prior instance which is cited for this case, the fact of getting divorced from the appellant once the appellant was designated as a person who has parental authority over the child was nothing more than one of the options which the respondent was considering at the time and it is unreasonable to recognize the respondent's consent on the basis of this aforementioned email alone; therefore, the court cannot accept the appellant's claim.

D. Regarding the fact that, in the decision of prior instance, the court found that "the respondent consistently requested the return of the child to Canada and negotiated the timing and other details of the return", the appellant claims that there is no such fact after June *dd*, 2014. However, as the outline of the fact of the decision of prior instance which is cited for this case, on May *dd*, 2014, the respondent checked the appellant if it is acceptable to apply for the child's entry into a kindergarten in Canada in September of that year; on June *dd* of that year, the respondent told the appellant that he could pick up the appellant and the child at the airport if they were to return to Canada on the *dd* of that month; and on the *dd* of that month, the respondent expressed to the appellant that he strongly desired that the child would return to Canada in the near future. The court cannot find any fact that was contrary to this respondent's behavior after the *dd* of that month. Furthermore, the court recognizes that on October *dd* of that year, the respondent filed an application for assistance for the return of the child to foreign state with the Ministry of Foreign Affairs pursuant to Article 4 (1) of the Act and on December *dd* of that year, the respondent told the child that he was awaiting the child's return to Canada in the email to the appellant. In the light of these facts, it can be said that the respondent consistently requested the child's return to Canada and negotiated the timing and

other details of the return. The appellant claims that the aforementioned email which was addressed to the child cannot be construed as a request to the appellant for the return of the child, but since the email was sent to the appellant, the appellant's claim is unjustifiable. In addition, statement by the respondent at the hearing of the court of prior instance that "It is not as though I requested the return of the child at or after the end of April 2014," (the respondent's record of hearing at paragraph 10) does not change the finding above. Therefore, the court does not accept the appellant's claim.

E. In the decision of prior instance, the court found that "the respondent expressed no opposition to the appellant's taking care of the child in Japan." In the reason for the decision, the court indicated that "the respondent merely admitted that the appellant would take care of the child until the child returned to Canada (or until the divorce between the appellant and the respondent was finalized)." Therefore, "the court does not recognize that the respondent consented to or subsequently approved of the retention of the child." Regarding this part of the decision of prior instance, the appellant claims that if the respondent "admitted that the appellant would take care of the child until the divorce was finalized," it should be recognized that "the respondent admitted that the appellant took care of the child at the point in time when this case was filed" since the divorce was not finalized yet. However, as described in (3) A above, in order to recognize a consent to or subsequent approval of the retention, it should be interpreted that the court needs to find that the petitioner for the return of the child approved of the child's settling down in a new place of residence and waived the right to request the return of the child by objective evidence. Thus, even though the respondent admitted that the appellant would take care of the child until the divorce was finalized, it does not constitute such an approval or waiver by itself and there exists no sufficient material for the court to find it; therefore, the court does not accept the appellant's claim.

(4) Abuse of rights

As described in II 2(4), the appellant claims that the respondent's filing of the petition in this case constitutes an abuse of rights. However, the court could find that the respondent consistently requested the return of the child to Canada as described in (3) D above. In addition, the appellant claims that the respondent replied that he entrusted the parental authority of the child to the appellant in the response of the appellant's email on July *dd*, 2014 which she wrote, "I can file for divorce if you designate me as the person who has parental authority over the child, I could submit the divorce registration." However, as described in (3) C above, the court found that it was nothing more than one option which the respondent was considering at that time to get divorced from the appellant and the appellant was designated as the person with parental authority over the child. Thus, the court does not recognize that the respondent definitively replied that he would entrust the parental authority over the child to the appellant. Moreover, there exist no other sufficient materials for the court to recognize thereof. There also exist no sufficient materials for the court to recognize that the respondent filed the petition in this case to avoid paying for the child support. Although the appellant also claims that it supports for the argument of the abuse of rights that the respondent deliberately tampered the content of the email and concealed the emails which did not favor his claim. However, in the light of the content of this claim, the court does not find that the filing of the

petition in this case constitutes the abuse of rights. In the light of the above, the court cannot accept the appellant’s claim that the filing of the petition in this case constitutes the abuse of rights.

3. Conclusion

For the above reasons, this court finds that the decision of the prior instance is appropriate and the appeal of this case is groundless. Accordingly, the appeal is dismissed and the court held the decision per the main text.

August 17, 2015

Osaka High Court the Tenth Civil Division

Presiding Judge Takahiro Sumi

Judge Mitsunobu Sakakura

Judge Kunihiko Yokomizo

2015 (Ie-nu) No 5, Case of a petition for the return of a child

Decision

Registered domicile

Address

Petitioner B

Petitioner's attorney:

Same as above

Registered domicile

Address

Respondent A

Respondent's attorney:

Registered domicile

Address

Child C

Born *mm dd*, 2010

Main Text of the decision

1. The respondent shall return the child to Canada.
2. Each party shall bear its own court costs.

Reasons

I Petition

Same as content of the first item of the Main Text

II Outline of the case

In this case, the petitioner, who is the child's father, alleges that the respondent, who is the child's mother and is taking care of the child, has infringed on the petitioner's rights of custody over the child by retaining the child in Japan and requests for the return of the child to Canada which is the child's state of habitual residence (Article 2(v) of the Act (as defined below)) pursuant to the Act for the Implementation of the Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as "the Act").

1. Findings of fact

The court recognizes the following facts according to the record of this case.

(1) Parties

A. The petitioner (born *mm dd*, 1976) and the respondent (born *mm dd*, 1978) got married in Canada on November *dd*, 2009, had the child C (who has dual citizenship in Canada and Japan) on *mm dd*, 2010, and lived in xxxx province in Canada.

B. The petitioner works as a professional ski area patroller, an avalanche forecaster and other roles and also manages a tour guide company in Canada.

(2) The stay of the respondent and the child in Japan

A. In April 2013, while the respondent was playing squash at a language school in Canada, she slipped and suffered a concussion. After that, the respondent became feeling unwell. At the time, the petitioner and the respondent frequently argued about marital problems as well as problems related to renovation of the house which they had purchased in that month. As a result of discussion between the petitioner and the respondent, they decided that the respondent would be temporarily in Japan with the child for her rest at her parents' home in City of xxxx, xxxx prefecture until January *dd*, 2014.

B. On July *dd*, 2013, the respondent and the child came to Japan by using plane tickets for a round trip which is valid for one year between Canada and Japan (hereinafter referred to as "the Plane Tickets"). When the respondent departed Canada, she used the Plane Tickets to reserve a flight for the return trip departing from Japan on January *dd*, 2014. In addition, the petitioner signed a "Written Agreement for a Short-Term Travel with One Parent" (Ko 3, hereinafter referred to as "the Written Agreement." In Canada, when only one parent travels with a minor, that parent is obligated to carry a written agreement signed by the other parent (who is not traveling)). It was written that the respondent and the child would stay in Japan from July *dd*, 2013 to January *dd*, 2014 in the Written Agreement. The passport which the child used to enter Japan and was issued by the Canadian government was valid until February *dd*, 2014.

C. In Japan, the respondent and the child have lived together with the respondent's parents at the house of the respondent's parents in City of xxxx, xxxx prefecture.

(3) Communication between the petitioner and the respondent (The petitioner and the respondent mainly communicated via email. Except for events that occurred in Japan, the dates hereinafter are given according to the local time in xxxx Province.)

A. After their arrival in Japan, the respondent thought that the child should be enrolled in a kindergarten or a nursery school (hereinafter referred to, collectively, as "Kindergarten") because they would continue to stay in Japan for a certain time. On September *dd*, 2013, the respondent asked the petitioner to send documentation of the petitioner's income for the process of enrolling the child in Kindergarten and told the petitioner that they should discuss which country was the best for the child to stay in, Japan or Canada.

On October *dd*, 2013, the petitioner told the respondent that he considered to raise the

child in Canada till the first or the second grade of the elementary school, and to have the child receive education in Japan as much as possible after that.

B. On November *dd*, 2013, the respondent told the petitioner that she could not return to Canada unless their marital problems were resolved, that she thought it was better to postpone the return to Canada from the initially planned date of January *dd*, 2014, and that they needed to discuss the timing of the return to Canada by July of that year when the Plane Tickets were expired, so she wanted the petitioner to come to Japan.

On November *dd*, 2013, the petitioner told the respondent that he was not in a situation that he could come to Japan at that time and that the respondent should return to Canada or at least, had the child return to Canada.

On the *dd* of that month, the respondent told the petitioner the followings: the process for enrolling the child in Kindergarten was already progressed; since she was thinking of sending the child to Kindergarten until the next summer vacation, she wished to postpone her return to Canada with the child until July 2014; she also wished to return to Canada with the petitioner, and the child after the petitioner had come to Japan; and while the petitioner stayed in Japan, she wished to discuss whether or not they got divorced.

On November *dd*, 2013, the respondent asked the petitioner to agree to extend her stay in Japan with the child and told the petitioner that she was thinking of extending the stay until the beginning of July 2014, but she was thinking to shorten the extension if that was inconvenient for the petitioner.

On November *dd*, 2013, the petitioner told the respondent that he opposed having the child receive education or enrolled in Kindergarten in Japan but he agreed to the idea that the child receives education in Japan from the first grade to the third grade of elementary school. Regarding the extension of the respondent and the child's stay in Japan, the petitioner told the respondent that he could consider extending it until April 2014. In addition, on December *dd*, 2013, the petitioner told the respondent that it was possible for him to come to Japan in April 2014, and that he would agree to extend the respondent and the child's stay in Japan until the last day of that month.

C. The respondent began serving as an instructor in the after school care club from January *dd*, 2014. Since she decided not to return to Canada on the *dd* of that month as initially planned, she changed the return flight of the Plane Tickets to June *dd* of that year. She told the petitioner about it on January *dd* of that year.

The child's passport issued by the Canadian government was valid until February *dd* of that year, and when that date passed, it became invalid.

On February *dd* of that year, the respondent told the petitioner that documentation of the petitioner's and the respondent's income was required to prepare to enroll the child in a nursery school which tuition is based on income. (The petitioner sent the payment statement to the respondent later.)

D. On March *dd*, 2014, the respondent told the petitioner that she would continue serving as an instructor in the after school care club after April of that year, that she planned to

resume her job as a tour conductor, from which she was on administrative leave, on weekends, and that she planned to enroll the child in a nursery school starting from April of that year.

E. The child began to attend xxxx nursery school in City of xxxx, xxxx prefecture in April 2014.

On the *dd* of that month, the respondent asked the petitioner whether or not the child could attend a kindergarten in Canada if the child were to return to Canada and whether it was possible to renew the PR (Permanent Resident) card (a card issued to holders of permanent residency in Canada) in Japan.

On May *dd* of the same year, the petitioner checked with the respondent if he may apply for enrolling the child in a kindergarten in Canada in September of that year. He also told the respondent that the Japanese consulate in xxxx had told him that the child should use a passport issued by the Japanese government upon departing Japan to return to Canada.

F. The petitioner temporarily came to Japan on May *dd,* 2014, had a contact with the child, and discussed about divorce with the respondent, but no conclusion was reached. During the discussion, the petitioner gave two copies of the divorce registration with his signature (no seal) to the respondent (Otsu 3-1, 3-2). On one copy of these divorce registration (Otsu 3-1), the space for the person who has parental authority over the child was left blank, and on the other copy (Otsu 3-2), the child's name was written in the space for the child over who the father has parental authority.

G. The petitioner who returned to Canada on June *dd*, 2014, told the respondent on the *dd* of that month, that he could pick her and the child up at the airport in Canada if they were to return to Canada on the *dd* of that month.

On the *dd* of that month, the respondent told the petitioner that unless they discussed and decided quickly whether or not the respondent and the child would return to Canada, there would not be enough time to prepare for the respondent's resignation, the child's withdrawal from the nursery school, and issuance of a passport. The respondent also told the petitioner that she wanted him to think of good condition that would enable her and the child to return to Canada. In addition, on the *dd* of that month, the respondent told the petitioner that she wanted to hear his thoughts on how the petitioner, the respondent, and the child would benefit from her and the child's returning to Canada.

In response, on the *dd* of that month, the petitioner told the respondent that he did not feel that there would be benefit from the petitioner, the respondent and the child living all together as a family in Canada. However, the petitioner conveyed his thought that Canada provided a good environment for the child and that would be beneficial to the child. The petitioner also told the respondent that he hoped the child would graduate from a Canadian university and expressed his strong hope that the child would return to Canada in the near future.

H. On June *dd*, 2014, the respondent told the petitioner that she intended to cancel the Plane Tickets because her condition had not been well. If she returned to Canada and her condition became worse, with the petitioner not taking care of her, it would become a

further big problem when the child's health condition also became worse. For these reasons the respondent told the petitioner that she was thinking that it would be better not to return to Canada.

On the same day, the petitioner told the respondent that he approved of that the petitioner's not returning to Canada. He also conveyed that it was pity but he understood it in the light of her health and the current situation.

On the *dd* of that month, the respondent told the petitioner that she would cancel the Plane Tickets. When she canceled the reservation for the return trip of the Plane Tickets, since there was no seat available until the expiration date, the return trip of the Plane Tickets became expired.

On the *dd* of that month, the petitioner told the respondent that it was pity that the respondent canceled the Plane Tickets and that the child would not return to Canada but he thought there was no other option in the light of the respondent's health condition, etc. The petitioner also told the respondent that he planned to follow the instructions from a third-party organization regarding a living support for the respondent because he had already started divorce proceedings.

On July *dd*, 2014, the petitioner told the respondent that he had started considering that it would be better to proceed with the divorce procedures on the conditions that the person who has parental authority over the child would be the respondent, that the petitioner would pay a child support, and that he had a visitation with the child twice a year.

I. The petitioner decided to get divorced from the respondent and around August *dd*, 2014, he sent one copy of the divorce registration with his signature and seal (Otsu 4-2) by postal mail to the house of the respondent's parents and requested that the respondent return the document by the *dd* of that month. On this copy of the divorce registration, the space for the person who has parental authority over the child was left blank.

The respondent did not intend to get divorced from the petitioner immediately, so she did not submit the divorce registration, which she received by postal mail from the petitioner, to the ward office.

J. The respondent's permanent residency in Canada expired on October *dd*, 2014 because she did not renew it.

K. On October *dd*, 2014, the petitioner told the respondent that he wished to discuss the divorce and the parental authority over the child and resolve them quickly.

On the *dd* of that month, the petitioner filed an application to the Minister for Foreign Affairs for assistance in child's return to foreign state pursuant to Article 4 (1) of the Act.

L. On December *dd*, 2014, the petitioner told the child in an email to the respondent that the petitioner was awaiting the child's return to Canada.

(4) The petition in this case, etc

A. On March *dd*, 2015, the petitioner filed the petition of this case which requested that the respondent shall return the child to Canada.

B. In the hearing in this court, the petitioner stated about the life if the child were to return to Canada, “Presently, it is easy for me to take holidays in Canada so I can live with taking care of the child. I can also get support from neighbors and a local Japanese women’s society.”

C. In the hearing in this court, the respondent stated: “When I canceled the reservation for the return of the Plane Tickets, I definitely had no intent to return to Canada.”

(5) A situation of conclusion of the Convention in Japan and Canada, etc

A. The Convention on the Civil Aspects of International Child Abduction (hereafter referred to as “the Convention”) came into force for Japan on April *dd*, 2014 and the Act was put into effect on that day.

B. Canada had been a contracting state of the Convention before July *dd*, 2013. According to the laws and regulations of Canada (xxxx Province), both a husband and a wife have the rights of custody over children while being married.

2. Points at issue

(1) Whether the retention of the child by the respondent commenced before the Act was put into effect (Article 2 of the supplementary provisions of the Act)

(2) Whether the petitioner consented to or subsequently approved of the retention of the child by the respondent (Article 28 (1) (iii) of the Act)

(3) Whether the court can recognize that there is a grave risk that the child’s return to the state of habitual residence would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 28 (1) (iv) of the Act)

3. Parties’ claims on the points at issue

(1) Point at Issue 1 (Timing of the commencement of retention)

(Petitioner)

In response to the respondent’s request to extend the stay in Japan, the petitioner consented to the extension of the stay until April *dd*, 2014, but he did not consent to the extension of the stay after the period. Therefore, the timing of the commencement of the wrongful retention of the child by the respondent is on May *dd*, 2014 which is the next day of the end of the period which the petitioner consented to.

(Respondent)

When the respondent and the child departed from Canada, the petitioner only consented to their stay in Japan until January *dd*, 2014; therefore, the wrongful retention of the child by the respondent began the next day which is on January *dd*, 2014.

(2) Point at Issue 2 (Consent to or subsequent approval of the retention)

(Respondent)

The petitioner consented to the child’s stay in Japan until January *dd*, 2014. In addition, in the light of the fact that the petitioner cooperated to enroll the child in the nursery school that the

child started attending in April of that year and did not oppose the respondent's taking care of the child in Japan, the petitioner implicitly consented to the child's stay in Japan after January *dd*, 2014.

(Petitioner)

The petitioner consented to the child's stay in Japan until the last day of April, 2014 but he did not agree to the child's stay in Japan for a longer period than that. The reason why the petitioner did not oppose the respondent's taking care of the child in Japan is not that he consented to the child's stay in Japan but that the petitioner considered that it was impossible to take the child back unilaterally to Canada without the respondent's consent. In addition, the reason why the petitioner cooperated to enroll the child in the nursery school is that he consented to have the child attend the school until the last day of that month and that the petitioner and the respondent planned to have the child attend a kindergarten in Canada from September of that year.

The petitioner believed that the child would return to Canada no later than September 2014; the petitioner did not consent to the child's permanent stay in Japan.

(3) Point at Issue 3 (Grave risk)

(Respondent)

Since the child returned to Japan when he was three years and xxxx months old, for about one year and nine months, he has been living in Japan and never returned to Canada. Therefore, the life in Japan is everything for the child who has no memory of life in Canada and presently cannot even communicate in English. In addition, the child needs to be cared for by close family members who will consistently shower the child with affection.

It is clear that if the child returned to Canada under these circumstances, it would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

(Petitioner)

The child was born and raised in Canada, adapted to the life in Canada through such activities as attending pre-school two or three times per week. He was also looking forward to attending a kindergarten in Canada which was scheduled to start in September 2014.

Canada is the child's home country and the life in Canada would have no possibility of posing a grave risk to the child.

III Determination of this court

1. Grounds for the return of the child

(1) The respondent claims that she began to retain the child on January *dd*, 2014, and since the retention commenced before the Act came into force on April *dd*, 2014, the Act does not apply pursuant to Article 2 of the supplementary provisions of the Act. Therefore, the court will consider this point (Point at Issue 1).

Retention is defined as the situation where a child is prevented from traveling to the state of its habitual residence after said child's departure from said state (Article 2 (iv) of the Act).

Specifically, it can be said that the retention begins when it can be objectively judged that the child's father, mother or other person who is taking care of the child in a country other than the child's state of habitual residence expresses his/her intent to not to return the child to the state of habitual residence.

To apply this concept to this case, the petitioner and the respondent agreed on a temporary stay in Japan for her convalescence from feeling unwell and the respondent came back to Japan with the child in July 2013 based on this agreement. Later, under the assumption that the respondent would return to Canada with the child, the petitioner and the respondent continuously negotiated the timing and conditions of the return, but they never reached an agreement. On June *dd*, 2014, the respondent canceled the reservation for the return trip of the Plane Tickets and made it expired. She also told the petitioner that she would not return to Canada. Given these previously determined progression of facts, it is possible to decide that it was on the same day that the respondent expressed her intent not to return the child to Canada and that the retention commenced on that day.

In response to this, the respondent claims that it was on January *dd*, 2014 that the retention commenced. However, in November 2013, the respondent asked the petitioner to postpone the return to Canada of January *dd*, 2014. On December *dd*, 2013, the petitioner responded that he could agree to postpone it by the end of April 2014. On April *dd*, 2014, the respondent asked the petitioner whether or not the child would be able to attend a kindergarten in Canada and on June *dd* of that year, the respondent told the petitioner that unless they discussed and decided quickly whether or not the respondent and the child would return to Canada, there would not be enough time to prepare for the respondent's resignation, the child's withdrawal from the nursery school, and issuance of a passport. In the light of the fact that the respondent did not refuse to return the child to Canada after April *dd* of that year, the court does not recognize that the respondent expressed her intent not to return the child to Canada at the time when of that the Act was put into effect on April *dd* of that year.

Therefore, the retention of the child by the respondent commenced after the Act was put into effect and the Act applies to this case.

(2) As for grounds for the return of child, the court recognized each of the followings based on the items of Article 27 of the Act. According to the previously determined facts, the child has not attained the age of 16 (Article 27 (i) of the Act); the child is located in Japan (Article 27 (ii) of the Act); according to the laws and regulations of Canada (xxxx Province), which is the child's state of habitual residence, the petitioner has the rights of custody of the child and the respondent's retention of the child infringes the petitioner's rights of custody of the child (Article 27 (iii) of the Act); and Canada was a contracting state at the time of the commencement of said retention (Article 27 (iv) of the Act).

(3) In the light of the above, the Act applies to this case and the court recognizes the fulfillment of all requirements for grounds for the return of child in Article 27 of the Act.

2. Grounds for refusing to order the return of a child

(1) The grounds for refusing to order the return of a child set force in Article 28 (1) of the Act. The respondent claims the grounds in Article 28 (1) (iii) and (iv) of the Act. Therefore, the court will

consider these points.

Although the respondent claims the grounds in Article 28 (1) (i), because she presumes that the retention of the child commenced on January *dd*, 2014 and more than one year had passed since the commencement of the respondent's retention of the child at the time of the petitioner's filing the petition in this case. However, as described in the previously determined facts, the court can recognize that the respondent commenced the retention of the child on June *dd*, 2014. Thus, it cannot be said that the petition in this case was filed after more than one year passed from the commencement of the retention; therefore, the court does not find the grounds for refusing to order the return of the child in Article 28(1) (i) of the Act.

(2) The court will consider the point of consent to or subsequent approval of retention (Point at Issue 2).

A. According to the facts determined previously, on June *dd*, 2014, the respondent canceled the reservation for the return trip of the Plane Tickets, made it expired, and told the petitioner that she would not return to Canada. In the petitioner's response, he responded that he understood the situation. However, it is possible to see from the content of emails which the petitioner sent to the respondent that the petitioner merely consented to postpone the timing of the respondent and the child's return to Canada. In addition, on July *dd*, 2014, the petitioner told the respondent that he stated considering of getting divorced from the respondent once the respondent was designated as the person who has parental authority over the child, but this was nothing more than one option which the respondent was considering at the time. Therefore, the court does not recognize that the respondent consented to or subsequently approved of the child's not returning to Canada and there exists no sufficient materials for the court to recognize that the petitioner consented to or subsequently approved of the child not returning to Canada.

B. The respondent claims that the fact that the petitioner did not oppose to the respondent's taking care of the child in Japan can be considered as a consent to or subsequent approval of the retention.

However, given the progression of facts determined previously, the court recognizes that the petitioner consistently requested to return the child to Canada and negotiated the timing and other details of the return. The court considers that the petitioner did not oppose to the respondent's taking care of the child in Japan simply because the petitioner only agreed that the respondent would take care of the child until the child returned to Canada (or until the petitioner and the respondent officially got divorced).

Accordingly, the court does not recognize that the petitioner consented to or subsequently approved of the retention of the child based on the fact that the petitioner did not oppose to the respondent's taking care of the child in Japan.

C. Therefore, in this case, the court does not recognize that the petitioner consented to or subsequently approved of the retention of the child and cannot find the ground for refusing to order the return of the child in Article 28(1) (iii) of the Act.

(3) The court will consider the point of grave risk (Point at Issue 3).

The court interprets the meaning of “grave risk” prescribed in Article 28 (1)(iv) of the Act as the fact that the risk caused by putting a child in an intolerable situation is grave. The child lived in Canada until three years and xxxx months old and the court does not find any particular problem with the child’s life during that time. Moreover, when the respondent herself went back to Japan in July 2013, she initially planned to return to Canada within one year. There was no objective fact that showed it was difficult for the respondent to return to Canada, and the petitioner was preparing to take care of the child in Canada. Based on these facts, the court does not recognize that the child’s returning to Canada would cause a grave risk as defined previously.

Therefore, the court does not find the ground for refusing to order the return of the child in Article 28 (1)(iv) of the Act.

(4) In the light of the above, the court does not recognize any grounds for refusing to order the return of the child which were claimed by the respondent (The respondent also claimed that the filing the petition in this case was abuse of rights, but the petitioner filed the petition in this case pursuant to the Convention and the Act. So, the court also does not recognize that the petitioner’s filing the petition in this case is against the spirit of the Convention or the Act. Thus, the court does not accept the respondent’s claim above.).

3. Conclusion

In the light of the above, this court finds the grounds for returning of the child and does not recognize grounds for refusing to return the child; therefore, the court finds that it is appropriate to order the return of the child to Canada.

Therefore, this court decides as set forth in the main text of the decision.

(Conclusion of proceedings: May 14, 2015)

May 22, 2015

Osaka Family Court, the Second Domestic Relations Division

Presiding Judge:

Judge:

Judge: