

2015 (Ra) No.491 Appeal case against an order of the return of children (Court of prior instance: Tokyo Family Court 2014 (le-nu) No.2, 3, 4, 5)

Decision

Appellant (Respondent of the prior instance): A

Appellant's attorneys:	xxxx
Same as above:	xxxx
Same as above:	xxxx
Same as above:	xxxx
Same as above:	xxxx

Appellant B

Appellant's attorneys:	xxxx
Same as above:	xxxx

Respondent (Petitioner of the prior instance) C

Respondent's attorneys:	xxxx
Same as above:	xxxx

Child:	B
	Born <i>mm dd</i> , 2003
Child:	D
	Born <i>mm dd</i> , 2006
Child:	E
	Born <i>mm dd</i> , 2008
Child:	F
	Born <i>mm dd</i> , 2010

Main Text

Each of the appeals in each case by the appellants against the respondent is dismissed.

The costs of appeal shall be borne by the appellants.

Reasons

I. The object of and reasons for the appeal

1 The decision of prior instance is revoked.

2 The respondent's petition in this case is dismissed.

II. Summary of the case

1 (1) The appellant A (Born *mm dd*, 1974) and the respondent (Born *mm dd*, 1975) got married on *mm dd*, 2001 in the United State of America (hereinafter referred to as "the U.S.") according to the laws of the State of XXXX. During their married life in that State, the five children, G (Born *mm dd*, 2001), B (Born *mm dd*, 2003), D (Born *mm dd*, 2006), E (Born *mm dd*, 2008) and F (Born *mm dd*, 2010) were born (The four children except for G can be referred to as "the Children").

(2) After 2009 the respondent filed petitions for restraining orders against A on multiple occasions and they got separated in *mm* 2011. On *mm dd*, 2012, the respondent filed a petition to the XXXX County Circuit Court in State of XXXX (hereinafter referred to as "the Court") for a third restraining order against A. The Court issued a restraining order (hereinafter referred to as "the Restraining order") which included granting the respondent temporary custody over G and the Children.

The details of the temporary custody order in the Restraining order contained that except for A's parenting time, the respondent takes care of G and the Children and the A's parenting time was granted the supervised parenting time. Later, on *mm dd*, 2013, the Court modified the order and granted the appellant the parenting time with G and the Children from after school to 8 pm on every

Wednesday and the Court granted the parenting time for the four children except for F from the end of school on Friday to 8 pm on Sunday including overnight stay.

- (3) The respondent agreed that A visits and stays overnight with G and the Children as to A's parenting time starting on *mm dd*, 2014 (Friday). G did not go to this visitation, but the Children went. Although A had to return the Children to the respondent on *dd* of the same month (Monday) after the weekend at 2 pm, A did not show up at the designated place at the set time. About that time, A entered Japan through Canada with the Children (hereinafter referred to as "the Removal") and has been living in Japan with the Children until now.
- (4) Before the Removal on *mm dd*, 2014, in the course of divorce trial proceedings which the respondent filed, A and the respondent agreed to get divorced and granted the sole custody over the Children for the respondent in the settlement. However, after the Removal on *mm dd*, 2014, the Court ordered a divorce by decree, the Court granted the sole custody over the Children for the respondent in the decree.
- (5) On *mm dd*, 2014, the respondent filed a petition against A for seeking the return of the Children to the U.S. based on the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as "the Act").
- (6) On *mm dd*, 2015, the court of prior instance granted the respondent's said petition and rendered a decision ordering A to return the Children to the U.S., but A and B were dissatisfied with the decision and filed an appeal.

2 A's claim

- (1) Regarding the children's objection

Article 28 (1) (v) of the Act prescribes that: "The child objects to being returned, in a case where it is appropriate to take account of the child's views in the light of his/her age and degree of development" as a ground for refusing to order to return. In the light of the following points and according to the abovementioned prescription, the court should not recognize the return of the Children.

A. Regarding B

According to the interview by the family court investigating officer, the reason for B's not wanting to return to the U.S. is that B will quarrel with G. From this statement by B, the court should not interpret that B simply does not want to be with G, and that B does not necessarily refuse to return to the U.S. It is impossible to dissociate the contents of the child's objections completely from the situation in which those objections arose and domestic violence in the state of habitual residence. Even if the main content of the child's objection relates to the situation and domestic violence occurred in the state of habitual residence, if the degree of the objection is strong, it should be considered a refusal to return to the state of habitual residence. Considering the investigation (scaling question) by the family court investigating officer, B gave ten points to the present situation and one point to the situation before coming to Japan. In the light of the result, since it can be seen that B's objection is reasonable and strong, the court should recognize that B objects to be returned to the U.S. itself.

B. Regarding D

In the interview by the family court investigating officer, D said, "Deciding whether to return to the U.S. Umm, I don't know anything anymore." It is possible for even adults that they don't understand more than that the proceeding is about deciding whether to return to the U.S. Moreover, in the interview by the family court investigating officer, D answered the question about the purpose of visiting the court accurately. Therefore, it would be very rash and dangerous to conclude that D does not understand the proceeding only based on the childish expression. And it seems that D is old enough and mature enough to have his opinion taken into consideration. According to the investigation by the family court investigating officer, regarding returning to the U.S., D clearly said, "I don't want to go" and "Mama tells lies." D showed great concern about being returned to the U.S. In regard to the strength of D's objection, in the scaling question, D assessed returning to the U.S. under any condition as zero point and this should be seen as an objection against being returned to the U.S. at all.

C. Regarding E and F

It is not appropriate to not siblings separated. Therefore, return of E and F to

It is not appropriate to get siblings separated. Therefore, return of E and F to the U.S. should not be permitted so long as the return of B and D to the U.S. is not permitted.

(2) Grave risk

Article 28 (1) (iv) of the Act prescribes, "There exists a grave risk that his/her return to the state of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." as a ground of refusing to order return. In the light of the following points, the abovementioned "grave risk" exists for the Children.

A. The respondent is appealing against the dismissal of the visa's application but the chance of being granted a U visa is low. If the respondent cannot obtain the U visa, she will not be able to work nor get a driving license. If the Children are returned to the U.S., there would be a high possibility that they will become the destitute. Since the respondent is not a legal resident of the U.S., she cannot receive the necessary welfare support from the State of XXXX for the Children.

B. If the Children are returned to the U.S., there would be the possibility of receiving violence from G. If "undertaking" is adopted, it could require that the Children do not live with G as a condition. However, since Japan does not adopt "undertaking", the court should recognize that the "grave risk" will exist for the Children if the Children are returned to the U.S.

C. The Children have a strong wish to live with A, but if the Children are returned to the U.S., they will be separated from A and they will be exposed to psychological harm.

III. Decision of the court

1 The court also decides that A should return the Children to the U.S. The reasons are, besides adding a decision relating to A's claim in this court as in 2 below, the same as that recorded in the "III Judgement on the point at issue" in the "reasons" of the decision of prior instance. This is quoted.

2 Regarding the decision relating to A's claim

(1) The children's objection

A. A claims that it is also appropriate for not only B but also D to respect the opinion in the light of their age and degree of development. It is also difficult to understand the contents of the child's objections completely separated from the situation and the domestic violence occurred in the state of habitual residence. Even if the main contents of the children's objection relate to the situation and the domestic violence occurred in the state of habitual residence, the court should recognize as a refusal to return to the state of habitual residence in a case where there is a strong objection.

B. However, a basic concept of the Convention on the Civil Aspects of International Child Abduction is interpreted that when there is a wrongful removal or retention of a child beyond a national border, basically, it benefits for the interests of children to return the child to the state of habitual residence. The reasons for considering like that are when a child is wrongfully removed or retained beyond a national border for the convenience of one parent, it is considered that the child is subjected to the harmful influences such as being forced to live in a different language or an alien culture; and moreover, a dispute over the child custody is desirable to be resolved in the state of habitual residence where the child is accustomed to live. In the light of the spirit of the Convention and the Act, the decision as to whether or not to order a return to the state of habitual residence is a question as to which is more suitable for child's residence the state of habitual residence or the state to which the child has been removed. Accordingly, "the child's views" which have to be considered in Article 28 (1) (v) of the Act is not a view about specific, individual conditions such as various circumstances or domestic violence occurred in the state of habitual residence, but such "child's view" should be interpreted to take into account in connection with whether or not "the child is refusing to be returned to the state of habitual residence."

So, the fact that it cannot be said that B expresses an objection against returning itself to the U.S. as the state of habitual residence is as explained in the decision "III Judgement on the point at issue" 2 (3) of the decision in prior instance according to the citation.

C. Also, according to the record, in the interview by the family court investigating officer, when D was asked the reason for his visiting the court, he answered "To stay in Japan" but when the family court investigating officer

answered, "to stay in Japan", but when the family court investigating officer encouraged D to explain more, it can be seen that D said, "Umm, I don't know". Then, the subsequent details of the family court investigating officer's interview is found in the decision about "III Judgement on the point at issue" 2 (2) b of the decision of prior instance according to the citation. Like this, although D seems to clearly give the reason for visiting the court, in the light of the situation in the subsequent interview by the family court investigating officer, it is questionable whether D really understands the reason for visiting. In addition, D's statement, "deciding whether to return to the U.S. Umm, I don't know anything anymore," cannot be considered a statement which D made in full recognition of the scope of D's own understanding. It has to be said that it is still doubtful that if D is old enough and mature enough to have D's opinion taken into consideration and whether the view is based on D's own memory and idea. The fact that it cannot be said that D is objecting against being returned itself to the U.S. as the state of habitual residence, is as explained in the decision about "III Judgement on the point at issue" 2 (4) of the decision of prior instance according to the citation.

D. In the case of B, in the light of B's age and degree of development, since it is appropriate to take B's views into account, but even if it can be understood that B is actually refusing to be returned to the U.S. per se, only B would stay in Japan among the siblings. However, if B only stays in Japan separated from his siblings, there would be a risk that this would have a negative influence on B. As explained below in (2) (C), even though G uses violence against B, it does not go beyond quarrels between siblings and in the state of XXXX, through the involvement of DHS or other organizations related to the court, there are expectation to protect B in terms of the relationship with the respondent and G. In the light of this situation, it can be admitted that returning B to the U.S. serves B's interest.

E. Accordingly, A's above claims cannot be adopted.

(2) Grave Risk

A. The appellant, in the light of II 2 (2) (A) to (C) above, claims that there is a "grave risk" under Article 28 (1) (iv) of the Act. However, in the light of B to D below, the appellant's above claim cannot be adopted.

B. The respondent is applying for the U visa and it cannot be said that she has no chance to obtain it. Although the application of a travel visa was denied, the U visa is different from the travel visa in the decision as explained under "III Judgement on the point at issue" 1 (1) (C) and 1(2) (C) of the decision of prior instance according to the citation.

C. In around *mm* of 2014, G bruised B's foot during a quarrel (as indicated under "III Judgement on the point at issue" 1 (2) B (A) of the decision of prior instance according to the citation), but except for this, there is no sufficient evidence to recognize that G has caused injury to B. B, in an interview with the family court investigating officer, said that "when B willfully touched G's possession, G got very angry and broke out a quarrel. G pulled and punched B." On the other hand, in the light of that B stated, "I forgot." about the last fight and the biggest fight, the court cannot recognize that G continuously used violence against B. Even though G has used violence against B, it could not be beyond the scope of quarrels between siblings.

D There is no sufficient evidence to find a danger of the Children being subjected to psychological risk if they are returned to the U.S.

3 Conclusion

For the above reason, A should return the Children to the U.S. and the decision of prior instance which has the same idea is appropriate.

Accordingly, the appeal is dismissed because it is groundless and the decision is made as in the main text.

March 31, 2015

Presiding Judge	HAMA Hideki
Judge	MIYANAGA Tadaaki
Judge	KITA Nobuhiro

Respondent	A
Respondent's attorney	xxxx
Same as above	xxxx
Address	
Child	B Born <i>mm dd</i> , 2003
Child	D Born <i>mm dd</i> , 2006
Child	E Born <i>mm dd</i> , 2008
Child	F Born <i>mm dd</i> , 2010

Main Text of the decision

- 1 The respondent shall return the children B, D, E, and F to the United States of America.
- 2 Each party shall bear its own court costs.

Reasons

- I. The object of the petition
Same as the first item of the Main Text
 - II. Outline of the case.
 - 1 This is a case where the petitioner who is the mother of the four children B, D, E, and F (hereinafter collectively referred to as "the Children"), seeks an order for their return to the United States of America against the respondent who is their father based on the Act for Implementation of the Convention on the Civil Aspect of International Child Abduction (hereinafter referred to as "the Act").
 - 2 Factual backgrounds
According to the records of the case, the following facts have been found. (In the following citation of materials, it includes sub-numbers if sub-numbers are given)
- (1) Parties etc.
Both the petitioner and the respondent have Japanese nationality and got married in *mm dd*, 2001 in the United State of America according to the laws of the state of XXXX. During their married life in that state, the five children, G (Born *mm dd*, 2001) who is not the party of this case, B (Born *mm dd*, 2003), D (Born, *mm dd*, 2006), E (Born *mm dd*, 2008), F (Born *mm dd*, 2010) were born.
After the marriage, the petitioner, the respondent, G, and the Children lived in the state of XXXX until the end of *mm* in 2014. At that time, B, D, and E were enrolled in an elementary school and F was enrolled in a preschool in that state.
 - (2) The background leading to the removal of the Children etc.
 - A After 2009, the petitioner filed restraining orders against the respondent for multiple times and the petitioner and the respondent ended up to be separated in *mm* 2011.
On *mm dd*, 2012, the petitioner filed with the xxxx County Circuit Court (hereinafter referred to as "the Court") of xxxx state the third restraining order against the respondent, and the court issued a restraining order (hereinafter referred to as "the Restraining order") which granted the temporary custody over G and the Children for the petitioner (Ko 7).
In addition, the details of the temporary custody order contained in the Restraining order were, except for the respondent's parenting time, that the petitioner should have custody over G and the Children. Regarding the respondent's parenting time, the court granted the supervised parenting time for the first time, but later, the court modified the order on *mm dd*, 2013 and granted the parenting time of G and the Children from their after school to 8 pm on every Wednesday and the parenting time of the four children except for F from their afterschool on Friday to 8 pm on Sunday including overnight stay. (Ko 8)
 - B Regarding the respondent's parenting time which starts from *mm dd*, 2014 (Friday), the petitioner agreed that the respondent had the visitation including overnight stay. Accordingly, the respondent started the visitation including overnight with the Children at the parenting time (but G did not go to the visitation on this occasion)

the violation on this occasion.

It was decided that the respondent would return the Children to the petitioner on *dd* of the beginning of the week (Monday) at 2pm, but when the time came, the respondent did not show up to the designated meeting place. At that time, the respondent entered Japan with the Children through Canada (hereinafter referred to as “the Removal”) and has been living in Japan with the Children until now.

At the time of the Removal, the United States of America was a contracting state of the Convention on the Civil Aspects of International Child Abduction.

- C On *mm dd*, 2014, which is before the Removal, in the proceeding of divorce trial at the court which the petitioner was filing, settlement which the petitioner and the respondent got divorced on the condition that the petitioner was granted sole custody over the Children was settled. However, on *mm dd*, 2014, which is after the Removal, the court issued a divorce judgement and granted the sole custody over the Children to the petitioner.

3 Point at issue

According to the above outline of the facts, it is recognized that there are grounds for return of the Children as established in Article 27 of the Act: the state of habitual residence of the Children (all under the age of 16) is the United States of America; the Removal breaches the petitioner’s rights of custody according to that country’s laws; and the Children are located in Japan.

The point at issue is whether there are grounds for refusing to order return of a child under Article 28 of the Act as follows.

(1) Grave risk (Article 28(1)(iv) of the Act)

(The respondent’s Claim)

A Until the Removal occurred, (1) The petitioner used violence against the Children; (2) G used violence against the Children but the petitioner did not address it appropriately; (3) The petitioner does not allow the Children to speak Japanese, forces them to tell lies, and psychologically abused by saying that the respondent is an abuser; (4) she neglects the Children, because she fails to give treatment to F and B’s skin affection and she leaves the Children in the car during her shopping ; and (5) the petitioner drives dangerously, threatens G and B, and fails to address the situation where her housemates and friends used violence against the Children. In the light of these circumstances, there is a risk of the Children being subject to the words and deeds, such as physical violence, which would cause physical or psychological harm by the petitioner, in the state of habitual residence (Article 28(2) (i) of the Act).

B The petitioner does not have a valid visa to stay in the United States of America and it is doubtful that she will be able to get the one. Accordingly, as there are fears that the petitioner cannot stay in the United States of America, the court can state that there are circumstances that make it difficult for the petitioner to exercise custody the Children in the state of habitual residence. (Article 28 (2) (iii) of the Act)

C Taking these into consideration, there is a grave risk that the Children’s return would expose them to physical or psychological harm or otherwise place the Children in an intolerable situation. (Article 28 (1) (iv) of the Act)

(The petitioners’ Claim)

A It is not true that the petitioner used the physical violence or abused the children. Most cases were caused by daily squabbles among siblings and the petitioner appropriately addresses the children’s quarrels and skin affections, etc. In addition, DHS investigated the children’s living conditions but it did not find the abuse by the petitioner. (The Department of Human Services [DHS] is an agency of the state of XXXX. When it receives reports of domestic violence or abuse, the DHS’s caseworker in cooperation with the court and other agencies investigates the family’s living situation, assesses it, and addresses the abuse and other similar issues and reports the to the related agencies.).

In addition, after the Children are returned to the United States of America, the United States of America has a system of ensuring to protect the Children by intervention of the DHS, police, court, and so on involved.

B The petitioner is currently applying for a U visa (a visa issued for people who cooperate in investigation and prosecution and for their families, related to crime victims of domestic violence, etc. in the United States of America (Otsu 15, 16)) and this will be expected to be granted. Also, until getting the result of the U visa application, the petitioner will not be expelled from the United States of America.

C Accordingly, the court cannot find grounds for refusing to order return of the children under Article 28(1)(iv) of the Act.

- (2) The children's objection (Article 28 (1) (v) of the Act) and the discretion to order return of a child (Proviso Article 28 (1) to the Act)
(The respondent's Claim)

Since the Children all refuse to be returned to the state of habitual residence, there is the ground for refusing to order return of the children in Article 28 (1) (v) of the Act. In addition, regarding E and F, even if their view is not given weight because of their age and degree of development, the separation of the siblings falls under the Article 28 (1)(iv) of the Act.

(The petitioner's Claim)

At least, regarding E and F, they are not at the degree of maturity as their views should be considered. Concerning B and D, in the light of the fact that the respondent refuses all contact between the petitioner and the Children after the Removal, their views are unilaterally influenced by the respondent and should not be taken into consideration.

Even though regarding B and D, the ground for refusing to order return of the children under Article 28 (1) (v) of the Act can be found, in the light of the fact that the respondent used violence against and abused the petitioner and the Children and that now, the petitioner is designated as a solo custodian over the Children, it can be considered that returning B and D to the United States of America would contribute the interest of the children and they should be returned to the country by the court's discretion.

III. Judgement on the point at issue

1 Grave risk

- (1) According to the records of this case and the above findings, the following facts can be recognized.

A Background of the removal of the Children

- (A) The petitioner filed a restraining order against the respondent by reasons of abuse from the respondent and other similar reasons around *mm* in 2009 and she obtained it (Ko 28, 48).

A restraining order in the state of xxxx is an order of the court forbidding the respondent to have contact with the petitioner. It is a requirement of issuing the order that the court can find the fact of the respondent's abuse and or other similar incidents by the application submitted by the petitioner and question for the petitioner by the judge. Furthermore, if the respondent objects to the order, the respondent can request a hearing process for the court and if the hearing is requested, the judge will listen to both the petitioner's and the respondent's allegation and then, the judge will decide whether the case meets the requirement of issuing the restraining order (Ko 28).

Around *mm*, 2009, the petitioner withdrew the petition for the restraining order against the respondent.

- (B) Around the middle of *mm* in 2011, since the petitioner reported physical abuse by the respondent, the DHS began to investigate the petitioner's living situation.

At about this point, because of the DHS's protection measures, the respondent left his home and separated from the petitioner and the children.

In addition, in the DHS's report of the investigation at about this point (Ko 24), there are records of the details of the facts and opinions relating to the situation of taking care of the children that the case worker heard from the petitioner, respondent, and the children. Based on the investigation, the fact of physical abuse and domestic violence against the petitioner and the children by the respondent was recognized.

Moreover, in the same month, the petitioner filed a petition for a restraining order with the court (the second time) and obtained the order (Ko 28).

Around *mm*, 2012, the DHS filed a petition with the court for transferring the children's custody to the court on the basis that the actual taking care of the children was not appropriate (Ko 15). After this petition was filed, the DHS was commissioned by the court to carry out an investigation of the living conditions of the petitioner and the children and started to report the result to the court of the Juvenile Department. (Ko 15, 47). Besides, the court of the Juvenile Department's involvement was continued until around *mm*, 2013 (Otsu 48).

Around *mm* of 2012, the DHS summarized the result of the investigation that

there was the fact that the respondent abused and a risk that he would abuse the petitioner and the children and reported it to the petitioner. (Ko 16)

Around *mm* of the same year, the petitioner withdrew the petition for issuing the restraining order against the respondent (second time) (Ko 47).

- (C) Around *mm* of the same year, the petitioner and the respondent got into a squabble in their house and the police and the DHS had to intervene. Given this situation, on *mm* of the same month, the petitioner applied for a restraining order and the said order was issued.

The respondent requested a court hearing process about the restraining order and gave his opinion to the judge. At about this point, the respondent also filed a petition for issuing the restraining order against the petitioner and claimed that the petitioner was violent against the children, but the petition was rejected by the court. (Ko 28, 47).

Later, the respondent basically followed the parenting time which was set by the court and kept having access to the children. Besides, by around *mm* of 2013 at the latest, G stopped visiting the respondent and after that, the respondent almost never contacted G (Ko 19, stated by the respondent himself).

- (D) Around *mm* in the same year, the petitioner filed a petition for a divorce from the respondent with the court.

During the proceeding of the divorce trial, the petitioner and the respondent's attorneys discussed based on the materials which were collected in the proceeding of the court of Juvenile Department were disclosed.

At the beginning of the proceeding of the divorce trial, the respondent intended to claim the custody over the children, but also because the advice by his attorney H, the respondent agreed to designate the petitioner as the custodian and chose to enrich the visitation with the children. Then, the petitioner and the respondent, on *mm dd*, 2014, in the said divorce proceeding entered the settlement that the petitioner was designated as custodian of the children and they would get divorced on the condition that the respondent would be able to have access with the children including overnight stay.

Furthermore, after the settlement, the petitioner and the respondent's attorneys continued to discuss the details of parenting time and conditions of the divorce relating to financial matters (Otsu 49).

- (E) a After around *mm*, 2014, the respondent complained against DHS that DHS did not address the abuse against the children appropriately and that their support was discriminative. The respondent also stated that DHS should investigate the petitioner's residential status and demanded interpretation for the DHS's contacts with him and investigation. (Ko 50)

In response to the respondent's request, DHS set up interviews, etc. with the petitioner, the respondent, and the children to check their living situation and had an interpreter attending for the interviews etc. with the respondent (Ko 50).

Around *mm dd* of the same year, the respondent also raised multiple issues to the person in charge of DHS including that G abused the Children and that the petitioner neglected G, and he sent emails seeking investigations into the problems regarding the situation of the Children's custody (Otsu 53). Then, without getting a reply, the respondent did the Removal. Meanwhile, he did not remind DHS to reply nor did he make any inquiry about the situation of the investigation (stated by the respondent himself).

- b Around *mm* 2014, the respondent began to think that he wants to obtain the rights of custody over G and the Children in a divorce trial and asked the abovementioned lawyer H to check the petitioner's residential qualifications and to request the lawyer H for taking steps to obtain the custody for him in a divorce trial. The lawyer H gave an advice to the respondent that he should refrain from taking such procedure because it would be difficult to get information about the petitioner's residential status and a restraining order had been issued (Otsu 50, 54).

After that, the relationship between the respondent and the lawyer H gradually deteriorated and the respondent sometimes communicated directly with the court without communicating with the lawyer H (Otsu 51).

- c On *mm dd*, 2014, the court, based on the abovementioned (D) settlement, recognized the divorce of the petitioner and the respondent and granted sole custody of the children to the petitioner (Ko 9). Regarding the children's parenting plan, this judgment gave parenting time with the children including overnight stay to the respondent and settled the various rules about the parenting time and the respondent's and the petitioner's rights regarding custody over the children.
- (F) The petitioner filed this petition on *mm dd*, 2014.
- After filing this petition, the petitioner requested for the meeting with the Children through Skype and discussed with the respondent through her deputy, but the respondent did not accept because he said that it was against the Children's will. As a result, from after the Removal to the present, there has been no contact between the petitioner and the Children.
- B A situation of taking care of the children, etc.
- (A) The petitioner's situation of taking care of the children, etc.
- a In *mm* of 2012, the petitioner left D and E in the house and she drove the car to pick up the other children at the bus stop. This incident was reported to the DHS by the petitioner's lawyer and the DHS evaluated it as petitioner's neglect.
- On the basis of such situation, in *mm* of the same year, DHS submitted the modified pleading which was added the petitioner's neglect in the proceeding of the court of the Juvenile Department (Ko 47) and wrote that there was a risk that the petitioner neglected the children in the report dated in *mm* of the same year (Otsu 43).
- b In *mm* 2012, when the petitioner was parking her car, she had a contact accident with other car but she immediately left the scene (Ko 47). This accident was later dealt with through a civil process.
- c In *mm* 2012, Mr./Ms. I was living with the petitioner at that time pinched G's neck when the petitioner was not at home and left a fingertip-sized wound on G's neck (Otsu 36,37). When the respondent saw this wound, he reported it to DHS. The petitioner became to know the situation by pointing out from DHS and she had Mr./Ms. I sent away from the house (Ko 42, 47).
- (B) According to photos taken around from *mm* to *mm* of 2012, it can be found that a part of the skin was discolored on G's foot (Otsu 17), E's forehead (Otsu 18), and F's forehead (Otsu 19, 20, 21). There is also a bruise like mark appearing on F's back (Otsu 23).
- The respondent reported the children's condition which can be seen in these photos to DHS and the DHS investigated it but the cause was not revealed (stated by the respondent himself) and it cannot be recognized that the abovementioned wounds were caused by the petitioner's action as the respondent claimed even from the all materials.
- (C) According to photos taken in around *mm* of 2012 (Otsu 29), there was rough skin on the back of F's knees. According to photos taken from *mm* to *mm* of 2014 (Otsu 33, 34, 35), there was eczema on B's arms and legs and B wrapped his arms and legs up in a close like bandage.
- The petitioner had these skin diseases examined by a doctor and put the prescribed medicine. (Ko 42)
- (D) In *mm* 2013, when the petitioner and F were getting off a bus, F hurt the pinky finger on his left hand (Otsu 30, 31). The petitioner immediately asked a bystander for help, took F to an emergency hospital, and got F suture treatment (Ko 42). Later, the respondent asked the DHS's caseworker questions as to the injury in detail and it is recorded in a report (Ko 42, 47).
- (E) In *mm* 2013, the petitioner attempted to stop a quarrel between G and B. Since she dragged B's body on the floor to get B out of the house, B got injured on his back (Ko 23, Otsu 1, 24, 25). This incident was reported by the respondent to the DHS and the petitioner, G, and B were interviewed, but the DHS did not recognize it as a particular abuse (Ko 23, 34).
- (F) G sometimes quarreled with the Children and in around *mm* of 2014, B got a bruise on B's foot (Otsu 2, Ko 23).
- Then, the respondent claims that, in the same year, from *mm* to around *mm*, G bruised up, scratched, and injured on E's arm and face (Otsu 4, 5, 27), and on F's neck, arm, and face (Otsu 6, 26, 28). However, according to the photos submitted, it cannot be proved whether the injuries mentioned above

were caused by other person's action or whether they were self-mutilation (it is recognized that F has atopic dermatitis symptoms (Ko 23)). There is also no sufficient evidence to find that G imposed the injuries mentioned above so that the court cannot adopt the respondent's claims on this point.

(G) From *mm* to around *mm* of 2014, F's toes were partly discolored (Otsu 32). The petitioner sent an email to the respondent that a doctor advised that F should avoid wearing tight shoes (Ko 42, 45).

(H) According to the photos taken in around *mm* 2014, D got injured on D's left arm (Otsu 3). The petitioner had the injury examined by the doctor and reported it to the DHS. The person who was in charge of this case at the DHS interviewed the petitioner, the respondent and D about the situation but the cause was not revealed. As a result, the investigation was stopped by the Removal (Ko 23, 42, 50). Later, the respondent claimed about the abovementioned injury that the petitioner had D spilt hot water and caused a burn, but the diagnostician reported to the DHS that there was no concern that the children had been abused or had been treated inappropriately (Ko 50) and furthermore, there is no exact evidence to support the respondent's claim.

(I) In around *mm* 2014, the petitioner asked an acquaintance J to look after the children when she absent from home. At that time, J who was drunk overlain B's body. The petitioner heard about that from B after her going back to home and afterward she stopped leaving the children with J and started avoiding her meeting with J (Ko 42).

C The petitioner's residential qualifications

At present, the petitioner does not hold a valid visa but has commissioned a lawyer in the state of XXXX and is applying for a U visa. According to the said lawyer, U visa's applicants cannot be expelled from the United States of America during applying for it and the petitioner is expected to be able to obtain the U visa through the screening (Ko29).

(2) Decision

A The grave risk prescribed for in the Act Article 28 (1)(iv) is interpreted as the risk that would place the child in an intolerable situation is grave. The court will discuss whether these conditions can be found below.

B (A) According to the finding facts mentioned above, while the petitioner was living with the children, the Children got injuries consisting of scratches and bruises that remained for a while. Although there are some injuries which causes cannot be determined, at least, as the finding mentioned above, the injury on B's back which he got in around *mm*, 2013 (Otsu 1, 24, 25) was caused by the petitioner's actions. In around *mm* of 2014, as a result of a quarrel with G, B also got bruised on his foot (Otsu 2). Also, the petitioner left young children in the house and went out, and while the petitioner was absent in the house, it can be pointed out that the petitioner's acquaintance acted improperly towards the Children. In the light of these facts, the court cannot say that there was no inadequacy of the petitioner's taking actual care of the children.

(B) However, the injury that the petitioner caused on B's back mentioned above was caused by attempting to stop a quarrel with G. It cannot be found as abuse and the injury which G gave to B is considered the one which can occur in normal daily life and it is difficult to evaluate either injury as serious.

The petitioner provided an appropriate doctor's medical examination to the Children's dermatitis and the injury while getting off the bus. This petitioner's dealing with the Children's injuries and illness was not inappropriate except for the actions which DHS evaluated as neglect. Once the petitioner learned her acquaintance's improper actions, she also properly dealt with it such as she refrained from interacting with the said acquaintance. Furthermore, although there was the situation where the protective measures for the children by DHS, the court of Juvenile Department and other's involvement were undertaken, since it can be seen that these protective measures have seemed to be sufficient to deal with the situation. Therefore it is difficult to say that a grave risk occurred in the situation of the petitioner's taking care of the Children.

In addition, the respondent who understood the situation of the Children through the visitation reached an agreement that the children's rights of custody were granted to the petitioner through the mediation at the divorce trial on *mm dd*, 2014. In the light of that fact, at that point, even though the

trial on *mm dd*, 2014. In the light of that fact, at that point, even though the respondent felt that the petitioner's actual care of the children was problematic, it seems that he did not think that he could not grant the rights of custody to the petitioner. Moreover, in the time up to around *mm* 2014, in the light of the fact that the respondent was seeking consultation with the petitioner about the custody rights based on the settlement, and the petitioner's perspective, it is presumed that there hadn't been a great change in the problems of the situation of the petitioner's actual taking care of the children and the children themselves from before the settlement to around *mm* 2014 (Otsu 54).

Then, the respondent claims in regard to the settlement mentioned above that because of the discriminative and unfair DHS process, he was placed in a difficult situation to claim his rights of custody in the divorce trial and he agreed on granting the rights of custody to the petitioner in the settlement against his will. However, as recognized above, from the beginning, DHS listened to the respondent's views and after receiving his reports, DHS pointed out problems of actual taking care of the children to the petitioner, and also, having recognized the petitioner's neglect, reported it to the court. In the light of these facts, the court cannot find that the DHS's process was discriminative and unfair.

- (C) In regard to the situation after around *mm* 2014, the respondent claims that he checked the Children's injuries and the Children's pleas that they did not want to go back to the petitioner and G became more compelling, but that he could not expect DHS to deal with the issue and since it did not seem to be able to get the lawyer's support for obtaining the rights of custody at the divorce trial, in order to protect the Children, he had no alternative way except for the Removal.

It is true that in *mm* of the same year, there was a situation where the petitioner's acquaintance behaved inappropriately when the person was drunk. It cannot be denied that there was some concern arose about the situation of the petitioner's actual taking care of the children.

However, in comparison with the previous situation, after around *mm* 2014, it cannot say that the Children have started getting grave injuries and, the situation of the petitioner's actual caring of the children custody has suddenly been deteriorated in this period.

Also, after *mm* of the same year, the respondent raised concerns about the children through meeting and phone calling with the person who was in charge of this case at DHS. Around *mm dd* of the same year, he sent an email raising several issues and requesting an investigation. DHS continuously investigated the children's living situation and DHS also provided an interpreter from the respondent's request. In the light of this situation, as indicated in (D) below, after *mm* of the same year, it can be said that there was a situation where it could be expected DHS or other similar organization get involved the situation to protect the children. It is also can be said that the respondent could still expect the DHS's support. In regards to the divorce trial, if the relationship between the respondent and the lawyer H who was his attorney had been deteriorated, it should have been possible to consider hiring a different lawyer and claiming the rights of custody.

In the light of the degree of the Children's injuries and the situation where the respondent could still expect the support from DHS after *mm* of the same year, even though the court considers the respondent's claims above, it is difficult to recognize that the situation of actual caring the Children by the petitioner became problematic at this time.

- (D) Moreover, to consider the risk of returning the Children to the United States of America, it would be the important factor to examine if protective measures which can reduce the risk for the Children will be implemented in the country.

On this point, in the state of XXXX in the United States of America, there is a system for looking after the protection of children through the intervention of DHS, courts, and other related organizations. In fact, until the Removal, it can be said that this system was functioning effectively in terms of the actual taking care of the Children. In the light of this situation, even if the Children are returned to the United States of America and live together with the petitioner and if there are problems with the petitioner's actual taking care of the children, it could be expected that the abovementioned system could protect the Children as necessary. This situation can be assessed to reduce

some risk relating to taking care of the Children considerably.

(E) Besides, in addition to the facts that have been recognized or pointed, the respondent claims various other issues relating to the petitioner's care. However, regarding those claims, there are insufficient materials to recognize the facts, or otherwise, considering collectively the situations where the protective measures can be used in the United States of America as shown in (D) above, they could not assess as the ground of the grave risk after the Children are returned. Therefore, the respondent's claims could not influence on the judgment of this case.

C Regarding the petitioner's residential status, as the findings facts above, the petitioner is applying for the U visa at present and in the light of the lawyer's opinion relating to the visa application, it cannot be said that there is no chance of obtaining it. At the present moment, the court cannot recognize that there is a risk of being expelled from the United States of America.

Furthermore, the respondent points out that since the petitioner's application a tourist visa was declined (Otsu 49) and there is a low chance that the petitioner's application for the U visa will be approved. However, the tourist visa and the U visa are basically different and it is difficult to say that there is a reasonable ground for the respondent's claim.

D From the above, considering the previous situation of the petitioner's actual taking care of the Children, that it can be expected that the Children will be protected by the court of the Juvenile Department, DHS and other similar institutions, and that, regarding the petitioner's residential qualification, it cannot be said that there is a risk that the petitioner will be expelled from the United States of America immediately, the court cannot find that there is a situation where returning the Children will cause a grave risk that places them in an intolerable situation.

Accordingly, it cannot be said that there is a ground under the Article 28(1) (iv) of the Act for refusing to order return of the children.

2 The children's objection

(1) The Article 28(1)(v) of the Act prescribes as a ground for refusing to order return of a child that "the child objects to being returned, in a case where it is appropriate to take account of its view in the light of his/her age and degree of development it is appropriate to take account of its view" It can be interpreted that (1) the child's age and degree of development are appropriate to take account of their views and (2) the child's view is an objection to being returned to the state of habitual residence, are requirements. These are considered below.

(2) According to the records of this case, on *mm dd*, 2015, the family court investigating officer (hereinafter referred to as "the Investigating Officer") carried out an examination of the Children's view.

The Children's statements are summarized as follows.

A. B (11 years old when examined)

B understood the investigating officer's explanation of the proceedings in general (that were a process to decide whether B will be returned to the previous country of residence and were not a process to decide whom B lives with). Regarding this matter, B said "I want to stay in Japan". B provided the reason "If I go back to the United States of America, I will quarrel with G. (Abbreviated) I will get dragged and punched." "Even if I ask help for my Mom, she would do nothing and if I am about to enter the G's room, she would tell me to get out." B indicated his concerns about B's relationship with G and the petitioner.

B. D (8 years old when examined)

When the investigating officer told that the officer wished to hear what D wanted to say, D said, "Well ... Mom tells lies.", "Well ...When we were in the United States of America, Mom bought a printer, just used the ink, then took it back to the shop, and said it was broken," and so on.

Then, when the investigating officer explained about the procedure, D interrupted the explanation and said, "I want to stay in Japan." The Investigating officer continued to give the same explanation as the above "A" and D asked to repeat the explanation. When the Investigating officer repeated the explanation and checked whether D understood the second explanation, D said, "I will decide whether to return to the United States of America. Umm, I don't know anything anymore."

When the investigating officer asked a question about when D was in the United States of America. D used the word "abuse" to explain what G hit D.

However, when the officer asked what “abuse” meant, D said, “I forgot.” Then, D showed D’s left arm and explained that the petitioner spilt hot water on D, but when the investigating officer questioned further, D explained that, “When I was sleeping at Dada (the respondent)’s house, it was there when I woke up in the morning”.

After these exchanges, D said that D’s wish about this matter was, “I don’t want to go.” The reason was, “I want to be with Dada (the respondent).” When D said what was wrong with the United States of America, D said, “Mama tells lies and the big sister punches and hits and kicks”, and so on.

C. E (6 years old when examined)

The investigating officer explained that E’s mother and father were discussing whether the Children should be returned to the United States of America and the children were brought in to hear since the investigating officer heard that there was anything the children wanted to say about it. When the investigating officer asked whether E could understand the explanation, E said “I don’t know.”

E said, “I don’t want to go back” to the United States of America. For the reason, E said, “I don’t know.”

D. F (4 years old when examined)

The investigating officer tried to get a view from F but the investigating officer and F were not able to make a conversation regarding this subject.

(3) Regarding B’s Opinion

In the light of the above finding facts, B generally understood what the investigating officer’s explanation about the process, mainly showed concern about his relationship with G and the petitioner and stated that B wanted to stay in Japan. In the light of these statements, it can be said that B reaches the age and degree of maturity it is appropriate to take account.

However, the essence of this opinion is just showing concern that if B moves back under the petitioner and G, there would be likely to be quarrels with G and whether the petitioner will deal with it appropriately. B was born and raised in the United States of America and in the light of the fact that there are no objective circumstances suggesting that B refuses to live in the United States of America, it cannot be said that B is opposing against being returned to B’s state of habitual residence, the United States of America and so the requirement (2) of (1) as above is not fulfilled.

(4) Regarding D’s opinion

In the light of the above finding facts, regarding the process of the investigating officer’s explanation, D stated “I don’t know.” and it is skeptical whether D sufficiently understood the meaning of the process.

Further, D expressed the intention to stay in Japan and enumerated the petitioner’s words and actions and G’s violence as a reason, but in the explanation, D used the word “abuse” but did not seem to understand the meaning well and gave unclear explanation. In addition, communication between the petitioner and the Children by Skype or other similar means has been cut after the Removal. D might have been influenced by the respondent and talked on the basis of inaccurate memory and the respondent’s intention.

In the light of such circumstance, it must be said that there is a doubt as to whether D’s age and degree of maturity are appropriate to take into account of its views and whether the view is based on D’s own memory and thoughts. Moreover, if this point is put aside and the D’s opinion is taken into account, the essence of the D’s opinion is just showing a concern over D’s relationship with the petitioner and G as B does. D was born and raised in the United States of America and in the light of the fact that there are no objective circumstances suggesting that D refuses to live in the United States of America, it cannot be said that D is objecting against being returned to his state of habitual residence, the United States of America. As a result, the requirement (2) of (1) above is not met.

(5) Regarding E and F’s opinion

According to the above finding facts, in the investigating officer’s interview, E (6 years old at that time) said E did not want to return to the United States of America but E simply said E didn’t know the reason. With F (4 years old at that time), the investigating officer could not establish a conversation about this case in the first place. In the light of this situation at the investigation, it is clear that E and F do not reach an age and degree of maturity it is appropriate to take into account of their view. Neither meet the requirement (1) of (1) above.

(6) Accordingly, the court cannot find the ground for refusing to order return of the Children under Article 28 (1)(v) of the Act.

IV. Conclusion

For the above reasons, the court can find the ground for ordering return of the Children and cannot recognize that grounds for refusing to order return of the children under the provisions at Article 28. Therefore, the court decides to order the return of the Children. Regarding the court costs, the court applies Article 55 (1) of the Act and decides as the main text of the decision.

(Conclusion of Proceedings: February 17, 2015)

February 27, 2015

Tokyo Family Court Domestic Relations Division 1

Presiding Judge

Judge

Judge