

2021 (Kyo) No. 8 Case of Appeal with Permission against the Order of the Court of Appeal to Revoke an Indirect Compulsory Execution Order
June 21, 2022, Order of the Third Petty Bench

Main Text

The appeal is hereby dismissed with prejudice on the merits.
The costs of the appeal shall be borne by the appellant.

Reasons

1. This is a case where the appellant filed a petition against the appellee who is the appellant's husband for compulsory enforcement of the return of children through the method of indirect compulsory enforcement by using a final order that orders the return of the parties' children to France (hereinafter referred to as the "Return Order") as a title of obligation pursuant to Article 134 of the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as the "Implemented Domestic Law of the Hague Convention").
2. Upon sua sponte examination, based on the record of this case, the Court finds that, after the petition in this case had been filed, the children were returned to France through the method of enforcement by substitute of the return of the children, a petition for which had been filed by the appellant by using the Return Order as a title of obligation pursuant to Article 134 of the Implemented Domestic Law of the Hague Convention, and accordingly, it is obvious that the purpose of the compulsory enforcement pertaining to the Return Order has been achieved. As a consequence, the Court has no other option but to hold that the petition in this case has become unlawful. Thus, the order in the prior instance, which dismissed the petition in this case, can be upheld as regards its conclusion without any need for further determination as to other issues.

Accordingly, the Court unanimously decides as set forth in the main text of the decision. There is a concurring opinion from Justice Yasumasa Nagamine and Justice Eriko Watanabe. The concurring opinion of Justice Yasumasa Nagamine and Justice Eriko Watanabe is as follows:

Although we agree with the court's opinion, we would like to express our opinion on the reasons for the order in the prior instance.

The order in the prior instance held that, on the grounds that the Return Order conflicts with a judicial decision relating to custody of the children (the Judgment on the Merits) rendered by a court of the first instance in France, which is the state of the children's habitual residence, the petition in this case should not be permitted while the Judgment on the Merits is provisionally enforceable because such petition constitutes an abuse of the right. However, we are of the opinion that a court's holding that compulsory enforcement of return of

children is impermissible only on the grounds that a judicial decision relating to custody of the children (which has not even become final and binding) which has been rendered in a foreign country threatens to conflict with the purpose of the Convention on the Civil Aspects of International Child Abduction (the “Hague Convention”), and the intent of Article 17 of the Hague Convention and Article 28, paragraph (3) of the Implemented Domestic Law of the Hague Convention, which was established responding thereto even if, as indicated by the order in the prior instance, the proceedings leading to such judicial decision were held under due process procedures.

(Presiding Justice: Saburo Tokura; Justice: Katsuya Uga; Justice: Michiharu Hayashi; Justice: Yasumasa Nagamine; and Justice: Eriko Watanabe)