

2019 (Kyo) 14 - Case of appeal with permission against the order of the court of appeal to dismiss an appeal against an order to dismiss a petition for modification of a final order.

Decision (judgement) of the First Petty Bench on April 16, 2020

Main Text

The decision of prior instance is quashed.

This case is remanded to the Tokyo High Court.

Reasons

Concerning Reason 1 for appeal stated by the counsels for appeal, ONUKI Kensuke, TAKAGI Yumiko, and YAMAMOTO Nao:

1. According to the case records, the background of the case are as follows.

(1) The appellant, the respondent, and their child (hereinafter referred to as the "Child") lived together in Russia. The Child (aged nine at the time) entered Japan in May 2016, followed by the appellant in August of the same year.

(2) In November 2016, the respondent filed a petition for the return of the Child pursuant to the provisions of Article 26 of the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as the "Implementation Act"). The case based on this petition was referred to conciliation of domestic relations, and in January 2017, the appellant and the respondent reached an agreement that the appellant would return the Child to Russia by February 12, 2017, and another agreement on child support expenses, visitation or other contact with the Child, and other matters. These agreements were entered in the record (hereinafter the conciliation thus reached is referred to as the "Conciliation" and the clause in the terms of the Conciliation to the effect that the Child is to be returned is referred to as the "Return Clause").

(3) The Child has remained in Japan even after February 12, 2017.

2. In this case, the appellant seeks a modification to the Return Clause pursuant to the provisions of Article 117, paragraph (1) of the Implementation Act, alleging that, it is no longer appropriate to maintain the Return Clause due to a change in circumstances after the Conciliation was reached.

3. The court of prior instance dismissed the appellant's petition for modification, determining as follows:

When a final order to order the return of a child becomes final and binding, the return of the child should be carried out promptly. However, Article 117, paragraph (1) of the Implementation Act provides that this final order may be modified from the perspective of the welfare of the child in exceptional cases when there has been a change in circumstances, thus, limiting the scope of subjects of modification to such final order. Furthermore, in proceedings for conciliation of domestic relations regarding a case seeking the return of a child, when an agreement on the return of the child is reached, another agreement may also be reached after coordinating various interests, and in such case, it is usually inappropriate to modify only the clause to the effect that the child is to be returned (hereinafter referred to as the "clause on the return of the child") which is included in the terms of conciliation for domestic relations regarding the case seeking the return of the child. Therefore, the clause on the return of the child cannot be modified pursuant to the provisions of that paragraph.

4. However, the determination of the court of prior instance mentioned above cannot be upheld, for the following reasons.

Article 117, paragraph (1) of the Implementation Act provides that: "After a final order to order the return of a child has become final and binding, when the court which made the final order to order the return of a child [...] finds that it is no longer appropriate to maintain the order due to change in circumstances, the court, upon petition of a party, may modify the relevant order [...]; provided, however, that this does not apply after the child has been returned to the State of habitual residence." Thus, it is considered that the provisions of this paragraph cannot be directly applied to the clause on the return of the child.

However, the provisions of Article 117, paragraph (1) of the Implementation Act can be interpreted as allowing modification of a final order to order the return of a child in consideration of serious consequences such final order could have on the child. For while the return of the child should be carried out promptly when such final order becomes final and binding, there may be cases where it is no longer appropriate from the perspective of the welfare of the child to maintain such final order due to a change in circumstances that arises before the child is returned. The clause on the return of the child has the same effect as a final and binding order to order the return of a child (Article 145, paragraph (3) of the Implementation Act). Even if conciliation is reached to the effect that the child is to be returned, there may be cases where is no longer appropriate from the perspective of the welfare of the child to maintain the clause on the return of the child, in which case it is necessary to modify said clause just as in the above-mentioned case where the final order to order the return of the child becomes final and binding.

Furthermore, in proceedings for conciliation of domestic relations regarding a case seeking the return of a child, when an agreement on the return of the child is reached, another agreement may also be reached with regard to child support expenses, visitation or other contact with the child, and other matters, and there may be cases where the clause on the return of the child is later modified and it also becomes necessary to modify other clauses in the terms of conciliation. In such cases, it may be possible to modify these other clauses separately by initiating the procedures for modification, etc. under the Domestic Relations Case Procedure Act, and hence, the possibility of such case cannot be regarded as posing an obstacle to considering that the clause on the return of the child can be modified.

For the reasons stated above, it is reasonable to consider that, in proceedings for conciliation of domestic relations regarding a case seeking the return of a child, if the court finds, after conciliation is reached to the effect that the child is to be returned, that it is no longer appropriate to maintain the clause on the return of the child due to change in circumstances, the court may modify the clause on the return of the child, upon a petition of a party, by analogically applying the provisions of Article 117, paragraph (1) of the Implementation Act.

5. Contrary to the above, the court of prior instance determined that the clause of the return of a child cannot be modified pursuant to the provisions of Article 117, paragraph (1) of the Implementation Act, and dismissed the appellant's petition for modification. This determination contains a violation of laws and regulations that obviously affect the judicial decision. The counsel's arguments are well-grounded, and the decision of prior instance should inevitably be quashed. The Court remands the case to the court of prior instance for further examination.

Accordingly, the Court unanimously decides as set forth in the main text of the decision.

Presiding justice: IKEGAMI Masayuki

Justice: KOIKE Hiroshi

Justice: KIZAWA Katsuyuki

Justice: YAMAGUCHI Atsushi

Justice: MIYAMA Takuya