3. Family Law

X v. Y
Supreme Court 1st P.B., March 15, 2018
Case No. (*Ju*) 2015 of 2017
1696 Saibansyo Jiho 1; 72 (1) Minshu 17;
2377 Hanrei Jiho 47; 1450 Hanrei Taimuzu 35

Summary:

1. In a case of request for habeas corpus relief seeking the release of a child taken away across borders to Japan, care for the child with mental capacity is held to fall under "restraint" referred to in Art. 2 (1) of the Habeas Corpus Act, and Arts. 3 and 5 of the Habeas Corpus Rules.

2. In a case of request for habeas corpus relief seeking the release of a child taken away across borders to Japan, restraint of the child by the restraining person has conspicuous illegality referred to in Art. 2 (1) of the Habeas Corpus Act and Art. 4 of the Habeas Corpus Rules, if the person keeps restraining the child by caring for the child without following a final and binding order for returning the child to the country of habitual residence based on the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as the "Implementation Act"), unless there are exceptional circumstances.

Reference:

Habeas Corpus Act, Art. 2 (1); Habeas Corpus Rules, Arts. 3, 4 and 5

Facts:

The appellant (X) and the appellee (Y: X's wife), who both have Japanese nationality, got married in Japan in 1994, and had a son (born in 1996) and a daughter (born in 1998), and then the four family members emigrated together to the United States in around 2002. The restrained person (A) was born in the United States in 2004, and he has dual United

States and Japanese nationality. The relationship between X and Y deteriorated from around 2008, and in January 2016, without obtaining X's consent, Y entered Japan, bringing A (11 years and three months of age at that time) with her, and since then until now, she has lived with him and cared for him.

In July 2016, X filed a petition to the Tokyo Family Court based on Art. 26 of the Implementation Act, seeking an order to Y to return A to the United States. In September 2016, the Tokyo Family Court rendered a final order ordering Y to return A to the United States (hereinafter referred to as the "Return Order"), and then the Return Order became final and binding. Based on the Return Order, X filed a petition for the execution by substitute of the return of the child (Art. 137 of the Implementation Act) to the Tokyo Family Court and obtained an order to have a third party implement the return of the child (Arts. 134 (1) and 138 of the Implementation Act).

In May 2017, court execution officers attempted to carry out an act necessary for releasing A from Y's care as prescribed in Art. 140 (1) of the Implementation Act (the act, hereinafter referred to as the "Release Implementation"). In the Release Implementation, regardless of repeated requests from the court execution officers, Y refused to open the front door, and then they entered the residence by opening up a second-floor window. Even after that, Y kept resisting the Release Implementation fiercely by getting into one bed with A and holding tightly to him. The court execution officers tried to persuade A to return to the United States, but he also refused the persuasion, stating that he wanted to stay in Japan and did not want to go back to the United States.

The court execution officers closed the case involving the Release Implementation on the ground that it was impossible to release A from Y's care (Art. 89, Item (ii) of the Rules of Procedures for Case relating to Return of Child under the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction). X requested A's release based on the Habeas Corpus Act, alleging that Y is restraining the physical freedom of A, not by due procedure under law.

In addition, X filed an action to a superior court of California in the United States, seeking a divorce from Y and also an order regarding custody with respect to A. By August 15, 2017, the court issued an order to

the effect that X was granted sole custody of A.

In September and October 2017, A had interviews with his attorney, and told him that he was deeply frustrated with the manifestation of his intention to stay in Japan being accepted as being the result of Y's pressure, and that he wanted to strongly declare that he desired to live in Japan of his own free will. As reasons for the above-mentioned desire, A stated that since he had just managed to get accustomed to life in Japan, it would be difficult to return to and live in the United States, and that since X sometimes verbally abused and acted violently to A when X was drunk, even though not to the extent of injuring him, he in one sense felt relieved at being separated from X by coming to Japan.

In light of the above-mentioned facts, the prior instance (Nagoya High Court, November 7, 2017) dismissed X's request for A's release based on the Habeas Corpus Act with prejudice on the merits by determining as follows (1) and (2): (1) A has now got accustomed to the living environment in Japan, and he seems to be emotionally stable and is growing up soundly, developing appropriately for his age. In addition, there appears to be no circumstance showing that he lacks the capacity to make decisions. It should be said that A manifested the intention to stay in Japan by his free will. Therefore, Y's care for A cannot be found to fall under the "restraint" referred to in the Habeas Corpus Act and the Habeas Corpus Rules. (2) Even if Y's care for A falls under the "restraint" referred to in the Habeas Corpus Act and the Habeas Corpus Rules, its illegality cannot be construed to be conspicuous, and the fact that the Return Order became final and binding does not affect the result of this case.

Opinions:

The judgment in the prior instance shall be quashed and the case shall be remanded to the court of prior instance.

1. Even if a restrained person (child) taken away by a restraining person (mother) across borders to Japan is now 13 years of age and with mental capacity and is manifesting the intention to stay with the restraining person, under the circumstances held in the judgment, such as the following (1) and (2), it can be said that the restrained person is in a situation where it is difficult for the restrained person to sufficiently obtain the multifaceted and objective information necessary to make a decision

regarding whether the restrained person is going to stay with the restraining person, and that the restraining person unduly influences the restrained person's emotions in making such decision. Therefore, there are exceptional circumstances where the restrained person cannot be said to be staying with the restraining person by the restrained person's free will, and care for the restrained person by the restraining person falls under the "restraint" referred to in the Habeas Corpus Act and the Habeas Corpus Rules.

(1) The restrained person (A) had lived in the United States since his birth until he was brought to Japan and had no living basis in Japan. In such a situation, A was brought to Japan when he was 11 years and three months of age due to the above-mentioned taking away, and since then, it cannot be found that he has had sufficient opportunities to communicate with the requester (X), who has his residence in the United States, and he has been in a situation where he is compelled to live heavily dependent on the restraining person (Y) since he came to Japan.

(2) Even though a final order ordering Y to return A to the United States became final and binding based on the Implementation Act, She showed an attitude that she would not return him to the United States, and also in the attempted execution by substitute of the return of the child, she resisted the execution fiercely in front of him.

2. In the case of a request for habeas corpus relief seeking release of a child taken away across borders to Japan, if the restraining person keeps restraining the child by caring for the child without following a final order ordering the restraining person to return the child to the country where the child has habitual residence based on the Implementation Act even though the order became final and binding, unless there are exceptional circumstances where release of the child from the care is found to be extremely unjust, the restraint of the child by the restraining person has conspicuous illegality.

Editorial Note:

The Implementation Act was enacted on June 19, 2013 as domestic law, when Japan ratified the Hague Convention on the Civil Aspects of International Child Abduction on January 24, 2014. In the case of a parental

dispute over a child across the border, so far, there had been six cases ordered to have a third party implement the return of child based on a final and binding Return Order, however, the release of a child from the care of a non-custody parent had never been realized in all matters. For this reason, it was gathering attention whether a request for habeas corpus relief seeking release of a child could be permitted as a resort or not. The judgment of the Supreme Court in this case has decided that first and is thought to have significance in practice. The details of the position of the judgement in this case are commented on from the following three points of view: legal requirements of request for habeas corpus relief, judgement standards of judicial precedents on seeking release of a child, and finally, questions of the judgement in this case and future agenda.

Firstly, request for habeas corpus relief aims at the prompt release of a person whose physical freedom is restrained, and not by due procedure under law (Art. 1 of the Habeas Corpus Act). To request habeas corpus relief, three legal requirements shall be satisfied as follows (Art. 2 (1) of the Habeas Corpus Act, and Arts. 3 and 4 of the Habeas Corpus Rules): (a) a person is physically restrained, (b) the restraint has conspicuous illegality, and (c) there is not an alternative means that is appropriate for providing relief. Among these, (a) and (b) were major points at issue in this case.

Secondly, in regards to each of the legal requirements (a) and (b), the judgement standard of judicial precedents on request for habeas corpus relief seeking release of a child are described below.

To begin with the requirement (a), Art 3 of the Habeas Corpus Rules provides that the term "restraint" means deprivation or restriction of someone's physical freedom, such as arrest, internment, and detention. In addition, Art 5 of the Habeas Corpus Rules prescribed that request for habeas corpus relief may not be made contrary to the intent manifested freely by the restrained person. In precedents, request for habeas corpus relief shall be possible to solve parental dispute over a child (see the Supreme Court, G. B., judgement of May 28, 1958. Minshu Vol. 12, No. 8, at 1224), and even the care for child by parent who has child custody can fall under "restraint" (see the Supreme Court, 1st P. B., judgement of July 4, 1968. Minshu Vol. 22, No. 7, at 1441), furthermore, the will of the child shall be respected if the child is around ten years of age.

From the above, focused on this case, the judgement of whether the care for a child by a mother come under "restraint" depends on considering whether the intention of the child, who is 13 years of age and stating his wish to stay with mother, is his free will. And the judgment of the Supreme Court denied the free will of the child with mental capacity and concluded that the care for a child by a mother fell under "restraint" because there are "exceptional circumstances." Concerning the existence of "exceptional circumstances," the judgement in 1986 (see the Supreme Court, 2nd P. B., judgement of July 18, 1986. MINSHU Vol. 40, No. 5, at 991) had brought up a standard, and the judgment of the Supreme Court in this case quoted it: the above-mentioned Opinions 1 (starting with "it can be said....." until "referred to in the Habeas Corpus Act and the Habeas Corpus Rules") corresponds to the standard shown by the judgement in 1986. This case is thought to follow from this standard and affirm the existence of "exceptional circumstances" based on the situations such as the above Opinions 1 (1) and (2).

Subsequently, about the requirement (b), it shall demand "evidentness" according to precedents on request for habeas corpus relief seeking the release of a child: in the case of a request for habeas corpus relief seeking the release of an infant subject to parental custody of his/her parents, the judgement in 1993 has clarified that the restraint can be found to be "conspicuously illegal" when the care for the infant by the restraining parent is "evidently" more detrimental to the child's welfare than the care by the requesting parent (referred to the Supreme Court, 3rd P. B., judgement of October 19, 1993. MINSHU Vol. 47, No. 8, at 5099). And then, in the same kinds of case, the judgement in 1994 has indicated two types of cases as the standard of "evidentness" more specifically: cases in which the restraining parent's exercise of parental custody is substantially restricted by a provisional disposition or an adjudication (under Arts. 157 (1), Item (iii) and 154 (3) of the Domestic Relations Case Procedure Act) but the parent's does not obey the said provisional disposition, etc., or, exceptional cases in which the restraining parent treatment of the child cannot be accepted from the perspective of the exercise of parental custody (see the Supreme Court, 3rd P. B., judgement of April 26, 1994. MINSHU Vol. 48, No. 3, at 992). Besides that, in the different kinds of case where the parent entitled to custody of an infant

requests habeas corpus relief of the infant from the non-custody parent, the standard regarding the requirement of "evidentness" has been confirmed: another judgement in 1994 has decided that the restraint of the infant shall be "conspicuously illegal," unless placing the infant in the care of the requesting party is "extremely unreasonable" in terms of the child's welfare compared with placing the infant in the care of the restraining party (see the Supreme Court, 3rd P. B., judgement of November 8, 1994. Minshu Vol. 48, No. 7, at 1337).

As for the decision regarding "conspicuous illegality," in this case, the judgment of the Supreme Court did not mention concrete reasons or a connection with the above-mentioned precedents, nor adopt explicitly the viewpoints of belonging to the parental custody and the child's welfare. However, this case is thought to have affirmed the existence of "conspicuous illegality" unless there are exceptional circumstances, applying the above judgement framework shown in 1994 and 1995 in the case of a request for habeas corpus relief to the Return Order based on the Implementation Act, and therefrom being focused on the care of the child by the restraining person who keeps an "evident illegal act" without just following a final and binding order but also fulfilling the obligation to return the child.

Thirdly, two questions about the judgement of the Supreme Court in this case are introduced as follow. One question is whether dealing with the judgement of releasing the child based on the Habeas Corpus Act in the same place as the order for returning the child to the country of habitual residence based on the Implement Act is appropriate, because the latter is not considered related to belonging to the parental custody (Art. 16 of the Hague Convention on the Civil Aspects of International Child Abduction), nor means returning the child to the requesting person: it greatly differs from the former on these points. As one more question, there is a view which points out that the result of an impossible execution, although the Return Order became final and binding, is caused by an inappropriate method of execution.

Towards these questions, another opinion regards that the request based on the Habeas Corpus Act cannot but be chosen as the complement measure while it is impossible to realize retuning the child expeditiously based on the Implement Act; nevertheless, the problem that the intention

of the child of thirteen willing staying with a non-custody parent and refusing to go back has not been respected as his free will on the grounds of psychological influence and one-sided information from the parent living together, should not be bypassed. In conclusion, it can be said that the judgement has posed future topics of discussion about the necessity of developing the support system which reflects the child's will and feeling, such as utilizing the system of a child's proceedings representative and formulating guidelines about that.

4. Law of Civil Procedure and Bankruptcy

X v. Y
Supreme Court 2nd P.B., April 18, 2018
Case No. (*Kyo*) 13 of 2017
72 (2) Minshu 68

Summary:

In the case where, in the procedure for compulsory execution for shares regarding which certificates are not issued (excluding book-entry transfer shares), after sales of such shares were carried out on a sale order by an execution court, a motion to oppose distribution on execution was filed with regard to the amounts of distribution for obligees stated in the distribution list, and a statutory deposit of money equivalent to the above amounts of distribution was made, if a bankruptcy proceeding has been commenced to the obligor before the grounds for the statutory deposit by the obligor are extinguished and the entrustment of the payment of deposit money is conducted, Article 42, paragraph (2), main clause of the Bankruptcy Act, applies to such a procedure for compulsory execution.

Reference:

Article 42, paragraph (2), main clause of the Bankruptcy Act, Article 91, paragraph (1), item (vii), Article 92, paragraph (1), Article 166, paragraph (1), item (ii) and paragraph (2), and Article 167, paragraph (1) of the Civil Execution Act, Article 61 and Article 145 of the Rules of