

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, GLEESON AND JAGOT JJ

BARNETT

APPELLANT

AND

SECRETARY, DEPARTMENT OF COMMUNITIES
AND JUSTICE

RESPONDENT

Barnett v Secretary, Department of Communities and Justice
[2023] HCA 7

Date of Hearing: 10 February 2023

Date of Order: 10 February 2023

Date of Publication of Reasons: 15 March 2023

S142/2022

ORDER

The grant of special leave in this matter be revoked.

On appeal from the Federal Circuit and Family Court of Australia
(Division 1)

Representation

B R Kremer with A T-H Lim for the appellant (instructed by Hague
Convention Legal Practice)

M A Gillies SC with M R M Barnett SC for the respondent (instructed by
DCJ Legal)

Notice: This copy of the Court's Reasons for Judgment is subject to
formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

Barnett v Secretary, Department of Communities and Justice

Family law – Children – International child abduction – Where child removed from Ireland to Australia by appellant mother without consent of father – Where father granted declaration of guardianship in Ireland – Where respondent sought orders in Australia for return of child to Ireland under *Family Law (Child Abduction Convention) Regulations 1986* (Cth) – Where no transcript or reasons for making Irish declaration provided to Australian courts – Whether bare declaration created issue estoppel preventing mother from submitting father did not have rights of custody under Regulations at date of child's removal from Ireland.

High Court – Special leave to appeal – Where special leave granted in respect of finding of issue estoppel based on bare declaration by Irish court, absent transcript or reasons for decision – Where transcript belatedly provided to High Court prior to appeal hearing – Where factual foundation for grant of special leave removed – Whether continuation of appeal contrary to interests of administration of justice – Whether special leave should be revoked.

Words and phrases – "bare declaration", "issue estoppel", "privity", "revocation of special leave to appeal", "rights of custody", "special leave to appeal".

Convention on the Civil Aspects of International Child Abduction [1987] ATS 2.
Family Law (Child Abduction Convention) Regulations 1986 (Cth), regs 2(1), 4, 13, 14, 15, 16, 29.

Guardianship of Infants Act 1964 (Ir), s 6F.

- 1 KIEFEL CJ, GAGELER, GORDON, GLEESON AND JAGOT JJ. On 10 February 2023 we unanimously revoked the grant of special leave to appeal in this matter. These are our reasons for the revocation of that grant.

Procedural history

- 2 The appellant is the mother of a child born in the Republic of Ireland on 19 May 2019. On 30 August 2020, the mother removed the child from Ireland to Australia without the consent of the child's father. The respondent is the Central Authority of the State of New South Wales for the purposes of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth)¹ ("the Regulations"). At the father's request², the respondent applied to the Family Court of Australia (as it was then known) pursuant to reg 14 of the Regulations for orders seeking the return of the child to Ireland and ancillary orders. The Regulations give effect to Australia's obligations under the Convention on the Civil Aspects of International Child Abduction (1980)³. The Convention, to which both Australia and Ireland are signatories, provides a framework for the prompt return of a child where there has been a wrongful removal of the child from her or his country of habitual residence.

- 3 After a contested hearing, on 25 June 2021, being satisfied that the removal of the child from Ireland was wrongful in accordance with the relevant provision⁴, the Family Court was required to, and made, orders for the child's return to Ireland⁵.

- 4 The mother appealed against the orders of the Family Court. On 18 February 2022, the Full Court of the Federal Circuit and Family Court of

1 Made under *Family Law Act 1975* (Cth), s 111B.

2 See Regulations, regs 9 and 13. As a result of the father's request, the respondent was the responsible Central Authority for the purposes of reg 14: see reg 2(1), definition of "responsible Central Authority".

3 [1987] ATS 2.

4 Regulations, reg 16(1)(c) and (1A).

5 *Secretary, NSW Department of Communities and Justice & Barnett* [2021] FamCA 439.

Kiefel CJ
Gageler J
Gordon J
Gleeson J
Jagot J

2.

Australia (Division 1) dismissed the mother's appeal⁶. The Full Court rejected the mother's argument that the father did not have, or had not been proved to have, rights of custody⁷ at the date of the child's removal from Ireland. The Full Court relied on a declaration made by the District Court of the Dublin Metropolitan District ("the Irish court") on 12 April 2021 that the father was a guardian of the child within the meaning of s 6F of the *Guardianship of Infants Act 1964* (Ir) ("the Declaration"). As the Declaration must have been based on the cohabitation of the mother and father, which ceased on 30 August 2020 when the mother returned to Australia with the child, the Full Court considered the primary judge was correct to conclude that it followed from the Declaration that the father had rights of custody in respect of the child before 30 August 2020, and that the mother (as a party to the proceeding in the Irish court) was therefore estopped from asserting to the contrary.

5 On 21 October 2022, the mother was granted special leave to appeal to this Court from the judgment of the Full Court. The application for special leave to appeal involved a single ground alleging error by the Full Court in holding that the Declaration gave rise to the issue estoppel. The mother alleged that it did not follow from the bare terms of the Declaration, either as a matter of fact or by the operation of Irish law, that the father had rights of custody as at 30 August 2020. Consistently with this, the mother's written submissions in support of the application for special leave to appeal said that there were "no reasons of the [Irish court] that allowed" a conclusion to be drawn about the father's status as at 30 August 2020.

6 The key consideration underlying the grant of special leave was the issue estoppel based on the bare Declaration, in circumstances where the Irish court's reasons for making the Declaration were neither available nor admitted into evidence before the courts below.

Revocation of the grant of special leave

7 On 20 January 2023, the respondent filed an application for revocation of the grant of special leave. The transcript of the Irish court's reasons for judgment in respect of the making of the Declaration was admitted into evidence at the

6 *Barnett & Secretary, Department of Communities and Justice* [2022] FedCFamC1A 20.

7 Regulations, reg 4.

3.

hearing of the revocation application⁸. The transcript was annexed to an affidavit, relied upon by the respondent, which explained that: (a) the respondent was informed of the Declaration on 15 April 2021 and received a copy of the order making the Declaration on 30 April 2021; (b) on 6 May 2021, an officer of the respondent asked the Commonwealth Central Authority for a copy of any written judgment or transcript of oral reasons given by the Irish court for the Declaration; (c) the respondent was informed that oral reasons were given and that it would be necessary to apply to the Irish court for a copy of the transcript; (d) for reasons which are not apparent to this Court, any such application was left to the father's lawyers to pursue, without success; and (e) in the meantime, the hearings before the Family Court and the Full Court were completed, without the benefit of the reasons for judgment of the Irish court. The unsatisfactory nature of this state of affairs need hardly be explained. The (belated) further efforts of the respondent to obtain the reasons for judgment after this Court granted special leave resulted in the respondent receiving a transcript of the oral reasons for judgment of the Irish court on 11 January 2023.

8 The transcript shows that, on 12 April 2021, the Irish court made findings that the father and mother:

"cohabited from the 23rd of May 2019 until the 23rd of May 2020 at the very least and that they lived together during that period in an intimate and a committed relationship. Accordingly ... [the father] has satisfied the criteria for a declaration that he is, by operation of law, a guardian of [the child] from the 23rd of May 2020, the time when guardianship commenced".

9 The transcript also discloses that the mother and her Irish legal representatives were in attendance when the oral reasons for judgment were given and the Declaration made⁹.

10 Given these reasons for the Declaration, the foundation for the grant of special leave has been removed. The transcript discloses that the Irish court found, as an essential element of its reasoning, that the father's guardianship commenced

8 Reg 29(6) of the Regulations provides for the admissibility of an order or a decision of a competent authority in relation to the custody of a child.

9 The hearing for the delivery of the reasons for judgment and the making of the Declaration occurred online.

Kiefel CJ
Gageler J
Gordon J
Gleeson J
Jagot J

4.

from 23 May 2020. From that, it necessarily follows that the father had "rights of custody" in respect of the child at 30 August 2020.

11 The submission made on behalf of the mother, that objection could be taken to the admissibility of the transcript if sought to be adduced on the substantive appeal to this Court¹⁰, misses the point. So, too, do the mother's attempts to argue that the conclusion by the courts below that the father had rights of custody in respect of the child was wrong on other bases (such as the absence of privity, or on procedural grounds), as those submissions wrongly assume that the grant of special leave was based on something more than the fact of the finding of the issue estoppel from the bare terms of the Declaration.

12 It would have been contrary to the interests of the administration of justice to permit the appeal to proceed on the false premise of the unavailability of the Irish court's reasons, when those reasons validate the inferences drawn by both courts below from the terms of the Declaration. That approach would have exacerbated the substantive and procedural anomalies below in which the hearings proceeded without: (a) the respondent, as the moving party, ensuring the reasons for judgment of the Irish court were in evidence; and (b) the mother, as a party present when the Irish court gave its reasons for judgment and made the Declaration, having made the courts below aware of the true position.

13 Another factor which we considered in revoking the grant of special leave to appeal is that the mother has appealed against the Declaration made by the Irish court. The only matter preventing that appeal from being heard, apparently, was the mother's unresolved appeal to this Court. We considered that all issues concerning the jurisdiction of the Irish court and the operation of Irish law are best resolved as part of the appeal in Ireland.

14 We should also record that, at the hearing of the application for the revocation of special leave, the mother sought to tender an expert opinion from an Irish lawyer. The narrow basis on which special leave was granted explains why we refused to admit that evidence as evidence in response to the application for revocation. The expert opinion was directed to matters of Irish law and could not

10 *Mickelberg v The Queen* (1989) 167 CLR 259 at 266, 271; *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [16]-[17], 26 [78], 34-35 [108]-[111], 63 [190], 76 [232], 96-97 [290].

5.

alter the removal of the factual foundation for the grant of special leave. Accordingly, the evidence was inadmissible¹¹.

Some further matters

15 Regrettably, this is not the first time that courts below have been left without critical material in matters arising under the Regulations. We reiterate what was identified by this Court in *MW v Director-General, Department of Community Services*¹², namely, that the speedy disposition of applications under the Convention is not to be achieved "upon a patently imperfect record" or at the expense of other incidents of the due administration of justice, including the identification of the issues truly open to dispute between the parties through the making of proper and reasonable inquiries and the gathering of evidence¹³. As in *MW*, the courts below in this matter were left without evidence on a question of fact that was apparently known to both the mother and the father and should have been ascertained by the respondent, namely, the facts found by the Irish court which were essential to the making of the Declaration.

16 In that regard, the respondent's evidence on the revocation application should have explained why it did not take more active steps to ensure that the transcript was available in the courts below to narrow the issues between the parties. It is unsatisfactory that counsel for the respondent was unable to assist this Court with an answer to that question. Regulation 29(2) of the Regulations makes provision for the admissibility as evidence of any document given in support of an application for a return order for a child made under, relevantly, reg 14.

17 There are many avenues that the respondent could have explored to obtain the transcript of the Irish court's oral reasons for judgment once it was known that the mother disputed the father's rights of custody as at 30 August 2020. The respondent could have ascertained whether the Irish Central Authority could obtain the transcript or whether the respondent or the Commonwealth Central Authority could obtain a copy of the transcript from the Irish court without the father's assistance. The respondent could have asked for any notes of the oral reasons made by the father's Irish lawyers, the mother's Irish lawyers or by either the mother or

11 *Evidence Act 1995* (Cth), s 56(2).

12 (2008) 82 ALJR 629 at 632-633 [3], 639-640 [48]-[50]; 244 ALR 205 at 207, 217-218.

13 Regulations, reg 15(2).

Kiefel CJ
Gageler J
Gordon J
Gleeson J
Jagot J

6.

the father. The respondent could have ascertained whether the father or one of his Irish lawyers was able to give evidence about the oral reasons. The respondent could also have made inquiries about the materials on which the mother's appeal in Ireland against the making of the Declaration is to be argued and, specifically, whether they include any evidence of the content of the oral reasons which might have been provided earlier to the Australian courts.

18 This also suggests that good practice warrants consideration by the respondent of the joinder of the requesting parent as a proper party to proceedings seeking the return of a child to a foreign jurisdiction¹⁴. The failure to do so in the present case meant that: (a) the father had weak grounds on which to seek a copy of the transcript of the oral reasons for judgment from the Irish court; and (b) the mother could seek to press in this Court, without having done so on the special leave application, that the respondent and father were not privies, so that the respondent could not rely on the issue estoppel against the mother. If the respondent had joined the father below, the mother could not have sought to include the privy argument as part of the appeal.

Order

19 It is for these reasons that, on 10 February 2023, we ordered that the grant of special leave in this matter be revoked.

14 Even if not a "necessary party" under r 3.01 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) ("the 2021 Rules") (or r 6.02 of the *Family Law Rules 2004* (Cth) ("the 2004 Rules"), in force before the primary judge), the father had a sufficient interest to justify joinder under r 3.03 of the 2021 Rules (or rr 6.03 or 6.05 of the 2004 Rules); cf *Family Procedure Rules 2010* (UK), r 12.3.

