



## HIGH COURT OF AUSTRALIA

15 March 2023

BARNETT v SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE  
[2023] HCA 7

Today, the High Court published its reasons for revoking special leave to appeal from a judgment of the Full Court of the Federal Circuit and Family Court of Australia (Division 1).

The appellant is the mother of a child born in the Republic of Ireland in 2019. On 30 August 2020, the mother removed the child from Ireland to Australia without the consent of the child's father. At the father's request, the respondent applied to the then Family Court of Australia under the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) for orders seeking the return of the child to Ireland and ancillary orders. The primary judge made orders for the child's return to Ireland.

The Full Court dismissed the mother's appeal. In doing so, the Full Court relied on a declaration made in April 2021 by the District Court of the Dublin Metropolitan District ("the Irish court") that the father was a guardian of the child under Irish law (the "Declaration"). As the Declaration must have been based on the cohabitation of the mother and father, which ceased on 30 August 2020, the Full Court considered the primary judge was correct to infer 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.

The mother was granted special leave to appeal to the High Court. The key consideration underlying the grant of special leave was the Full Court's finding of an issue estoppel based on the bare Declaration, without the Irish court's reasons for making the Declaration having been available to the courts below. However, in January 2023, the respondent filed an application for revocation of special leave, after it belatedly obtained the transcript of the Irish court's reasons for making the Declaration.

The High Court unanimously revoked special leave to appeal. Given the Irish court's reasons for the Declaration, the foundation for the grant of special leave was removed. The transcript disclosed that the Irish court found, as an essential element of its reasoning, that the father's guardianship commenced from 23 May 2020, and it necessarily followed that the father had rights of custody under the Regulations at 30 August 2020. It would have been contrary to the interests of the administration of justice to permit the appeal to proceed on the false premise that the Irish court's reasons were unavailable, when those reasons validated the inferences drawn by the courts below. The mother's other arguments about a lack of privity between the father and the respondent and procedural unfairness by the primary judge wrongly assumed that the grant of special leave was based on something more than the finding of the issue estoppel from the bare Declaration. Issues concerning the jurisdiction of the Irish court and the operation of Irish law were best resolved as part of the mother's extant appeal against the Declaration in Ireland.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*