DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Elhadi Almahadi
v
Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of the Kingdom of Saudi Arabia, Cultural Mission
(C2024/2960)

VICE PRESIDENT ASBURY
VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT DOBSON

SYDNEY, 5 MARCH 2026

Appeal against decision [2024] FWC 1211 and order PR774674 of Deputy President Easton made at Sydney on 9 May 2024 – Application of s 12 of the Foreign States Immunities Act 1985 (Cth) – Whether applicant was a permanent resident for the purposes of the Foreign States Immunities Act 1985 (Cth) at the time his contract of employment was made – Adequacy of material at first instance – Whether further evidence should be admitted on appeal – Appeal allowed.

Introduction

[1] Elhadi Almahadi worked at the Royal Embassy of Saudi Arabia (the **Embassy**) in Canberra from 10 December 2012 until his employment was terminated on 30 March 2022. Following the termination of his employment, Mr Almahadi applied to the Fair Work Commission under s 394 of the *Fair Work Act* 2009 (Cth) (the **FW Act**) for an unfair dismissal remedy. Mr Almahadi's application was dismissed on the grounds he had not provided sufficient material to establish that he was a permanent resident of Australia at the time he made an employment contract with the Embassy in 2012.

[2] Mr Almahadi has sought permission to appeal and to appeal from the decision to dismiss his unfair dismissal application. Permission to appeal has already been granted by another Full Bench of the Commission. For the reasons which follow, the appeal should be allowed and the decision at first instance quashed. Mr Almahadi's application will be referred to a member of the Commission to be determined in due course.

Procedural background

[3] Mr Almahadi's application was, initially at least, dealt with together with unfair dismissal applications made by 17 other employees of the Embassy who were dismissed around the same time. The applications were dealt with by Deputy President Easton. The Embassy objected to each of the applications, including on grounds that it has immunity from the

jurisdiction of the Commission because it is a sovereign foreign state, and it is immune from jurisdiction by virtue of the provisions of the *Foreign States Immunities Act 1985* (Cth) (the **FSI Act**) and other statutes and conventions.

[4] The Deputy President handed down his decision with respect to the jurisdictional objections made by the Embassy on 2 May 2024. The Deputy President dismissed two of the applications on grounds that the two individuals were not permanent residents of Australia at the time their employment contracts with the Embassy were made for the purposes of s 12(6) and (7) of the FSI Act. The Deputy President otherwise rejected the objections made by the Embassy and found that it was not immune from the jurisdiction of the Commission to determine the unfair dismissal applications.[1] The Deputy President found that three individuals, Mr Namaoui, Mr Belkamel and Mr Abdul-Hwas, who were New Zealand citizens at the time their contracts of employment were made, were permanent residents.

[5] An appeal was brought from that decision to the Full Bench of the Commission. In a decision handed down on 16 September 2024, the Full Bench (Asbury VP, Gibian VP and Dobson DP) granted permission to appeal but dismissed the appeal other than to dismiss the applications of two further individuals on the grounds they were not permanent residents of Australia at the time their contracts of employment with the Embassy were made. The Full Bench rejected the contentions advanced by the Embassy to the effect that it is immune from unfair dismissal proceedings under Part 3-2 of the FW Act.[2]

[6] Relevantly for present purposes, by reason of s 12(6), s 12(1) lifts the immunity of a foreign state with respect to a member of the administrative and technical staff of a mission only if the employee was, at the time the contract of employment was made, a permanent resident of Australia. For that purpose, a "permanent resident of Australia" is defined in s 12(7) as an Australian citizen or a person resident in Australia 'whose continued presence in Australia is not subject to a limitation as to time imposed by or under a law of Australia'. In upholding the decision of the Deputy President, the Full Bench found that three individuals who were New Zealand citizens at the time their contracts of employment were made were 'permanent residents' for the purposes of s 12(6) and (7) of the FSI Act because they held a subclass 444 visa at the time. In that respect, the Full Bench concluded (at [146]):

> On the information available to the Full Bench, in 2011 a subclass 444 visa permitted a person to remain in Australia for so long as the holder remained a New Zealand citizen. Although the visa is referred to as a temporary visa, we are unable to accept that this requirement represents a limitation as to time. The status of being a New Zealand citizen is something that is held indefinitely. The Deputy President was correct to find that Mr Namaoui, Mr Belkamel and Mr Abdul-Hwas were permanent residents as defined in s 12(7) of the FSI Act at the relevant time.

[7] The Embassy sought judicial review of the decision of the Full Bench. On 15 December 2025, the Full Court of the Federal Court (Rangiah, Lee and Raper JJ) dismissed the application for judicial review.[3] In short, the Full Court concluded that the exception to immunity in s 12(1) of the FSI Act extends to unfair dismissal proceedings, a foreign state is a national system employer in s 14(1)(f) of the FW Act and that, to the extent there was a dispute about it, the applicants were each permanent residents at the time their contracts of employment were made for the purposes of the FSI Act.

[8] In relation to applicants who were New Zealand citizens at the time their employment contracts were made, the Full Court agreed with the decision of the Full Bench that those persons were permanent residents for the purposes of the FSI Act. Raper J (with whom Rangiah and Lee JJ agreed) said (at [118]):

> A person who has been granted a 444 visa is not the subject of a limitation as to the time he or she can continue to be present in Australia. Rather, the grant permits indefinite residence in Australia so long as the person remains a New Zealand citizen and does not leave Australia. The Migration Regulations, as they existed in 2011, provided that the only criteria for the grant of a 444 visa were those set out in s 32(2)(a) of the Migration Act 1958, as it then existed, and in reg 5.15A. The visa conditions required that the visa applicant was a New Zealand citizen; that he or she held, and had presented to an officer or an authorised system, a New Zealand passport that was in force; and that the applicant was neither a behaviour concern non-citizen nor a health concern non-citizen: s 32(2)(a). The 444 visa was described as a temporary visa permitting the holder to remain in Australia while they were a New Zealand citizen: cl 444.5 of Sch 2 of the Migration Regulations. Therefore, the visa did not have a temporal but a status limit.

[9] On 12 January 2026, the Embassy applied for special leave to appeal to the High Court of Australia with respect to the decision of the Full Court. The application for special leave does not seek to challenge the findings of the Full Court with respect to whether a New Zealand citizen who holds a subclass 444 visa is a 'permanent resident' for the purposes of s 12(6) and (7) of the FSI Act. The Embassy accepts that we are bound by the decision of the Full Court in relation to that matter. We would, in any event, adhere to our own conclusion about that question.

[10] Mr Almahadi's case took a different procedural course. The Deputy President inadvertently failed to address Mr Almahadi's application in his decision dealing with the remaining 17 unfair dismissal applications. Mr Almahadi brought that matter to the attention of the chambers of the Deputy President. The Deputy President subsequently issued a separate decision in relation to Mr Almahadi's application on 9 May 2024.[4] The Deputy President dismissed the application on the basis that Mr Almahadi had not established that he was a permanent resident at the relevant time. The Deputy President's reasons were as follows:

> **[8]** Mr Almahadi signed the standard contract on 10 December 2012. The crucial question for his application is whether he was a permanent resident as defined on that day.
>
> **[9]** In the proceedings I gave Mr Almahadi a fair opportunity to provide evidence to establish that he was a permanent resident in 2012 but he did not do so.
>
> **[10]** Mr Almahadi filed a copy of a New Zealand passport that was issued to him in 2011. He did not provide any other evidence, such as a Special Category Visa (Subclass 444), that established that his presence in Australia was not subject to a limitation as to time imposed by or under a law of Australia in 2012.
>
> **[11]** As such I cannot be satisfied that Mr Almahadi was a permanent resident at the time he made an employment contract with the Respondent in 2012.

[11] Mr Almahadi filed a notice of appeal on the same day. It was necessary for him to obtain a grant of permission to appeal under s 604(1) of the Act and, for the purposes of s 400(1), the Commission was required to be satisfied that it was in the public interest to grant permission to appeal. A Full Bench of the Commission was convened to address the question of permission to

appeal. On 24 October 2024, it was communicated to the parties that the Full Bench was satisfied, for the purposes of s 400(1) of the Act, that it is in the public interest to grant permission to appeal in respect of the application and permission to appeal was granted.

[12] The appeal was allocated to the current Full Bench. It was subsequently stood over pending the outcome of the Embassy's judicial review application to the Federal Court. Following the decision of the Full Court, the appeal was listed for a case management hearing on 15 January 2026. The Full Bench subsequently declined to stand the appeal over again pending the outcome of the Embassy's application for special leave to appeal to the High Court. Directions were issued on 15 January 2026 for further material and submissions to be filed. A short hearing was conducted on 25 February 2026.

Material provided by Mr Almahadi at first instance

[13] Having regard to the decision of the Deputy President, it is necessary to reflect upon the material relied upon by Mr Almahadi in the proceedings before the Deputy President. On the information available to the Full Bench, the material relied upon by Mr Almahadi at first instance can be described as follows.

[14] On 5 March 2024, Mr Almahadi provided a written submission by email addressing the operation of the FSI Act. This submission did not address Mr Almahadi's visa status at the time he signed his employment contract on 10 December 2012. A combined hearing was then conducted on 14 March 2024 in relation to all of the 18 applications. It appears from the transcript of the hearing that Mr Almahadi joined the remote hearing part way through. Mr Almahadi did not give evidence or make any oral submissions during the hearing.

[15] On 15 March 2025, the Deputy President issued further directions permitting some of the individual applicants, including Mr Almahadi, to file further evidence by 21 March 2024 to address the following matter:

> 2. The Applicants listed above may only file and serve further evidence in relation to whether or not they were, on the date listed next to their name, "a person resident in Australia whose continued presence in Australia [was] not subject to a limitation as to time imposed by or under a law of Australia" (for the purposes of section 12(6) of the *Foreign States Immunities Act 1985*).

[16] On 19 March 2025, Mr Almahadi sent an email to the chambers of the Deputy President which read as follows:

> I am Elhadi Almahadi
> I have arrived in Australia on 1st December 2012 holding a New Zealand passport (attached)
> I have signed the employment agreement on 10 December 2012.
> Thank you,
> Elhadi Almahadi

[17] Attached to that email was a photocopy of Mr Almahadi's New Zealand passport which was issued on 14 September 2011.

[18] As we have observed, the Deputy President handed down his decision in relation to the applicants other than Mr Almahadi on 2 May 2024. After receiving a copy of that decision, Mr Almahadi sent an email to the chambers of the Deputy President as follows:

> Dear Chamber.
> I have received an email regarding my application to your owner.
> I have attached my first passport from New Zealand when requested.
> I am not found my name in the decision sent to me today.
> Kindly i would like to know the decision about myself.
> Kindly find the attached the old and new passport.
> Thank you.
> Elhadi Almahadi

[19] Attached to the email were photocopies of Mr Almahadi's New Zealand passport issued in 2011 and a later passport issued in 2016. The chambers of the Deputy President responded on 8 May 2024 in an email in which it apologised for the oversight and said that the Deputy President would issue a supplementary decision in due course. The email also indicated:

> You have not been granted leave to file any further evidence and you have not copied in the other parties to your correspondence. The Deputy President will not be considering the materials that you have attached to this email if it is not already in the evidence provided at the hearing.

[20] The Deputy President handed down his decision in relation to Mr Almahadi's application on the morning of 9 May 2024. Later that day, Mr Almahadi sent a further email to the chambers of the Deputy President as follows:

> Dear Chamber.
> Wish this email find you well.
> With the respectful to the decision up off.
> When I signed the contract with Saudi Arabia cultural mission and Embassy. I have only one New Zealand Passport and carrying visa subclass # 444.
> I have attached the copy of the New zealand passport at the time requesting of the hearing.
> Kindly find the previous attached.
> Thank you
> Elhadi Almahadi

[21] The Deputy President's chambers responded on the same day and stated that Mr Almahadi had not been granted leave to file any further evidence and that the Deputy President had not considered any of the new materials attached to his email. Information was provided to Mr Almahadi in relation to the availability of an appeal from the decision.

Further evidence on appeal

[22] In support of his application for permission to appeal, Mr Almahadi provided an email dated 21 September 2024 setting out a submission and attached a series of documents. The email stated:

> Dear Chamber.

> According to the below email.
> to send my written submissions before Wednesday 2nd October 2024 .
> Kindly could you please find attached.
> The passport which i enter to Australia on 01 December 2012 and the visa class subclass 444.
> The second passport after got renewal and the visa class subclass 444.
> The visa class subclass 444 details check:
> Work entitlement has unlimited work entitlements as well work place rights are protected by Australia law including the visa subclass 444.
> The employment agreement renewal with SACM is YEARLY on 10th of December of every YEAR after SACM check the passport and visas.
> Because iam carrying visa subclass 444 the Australian GOVT granted me citizenship by conferral and the ceremony was been on 11th June 2024.
> For more information about visa subclass 444 (Immi. Homeaffairs.gov.au/visas/working. In-australa/work-rights-and exploitation).
> Thank you,
> Elhadi Almahadi.

[23] Attached to the email were a series of documents comprising: (i) photocopies of Mr Almahadi's New Zealand passports issued in 2011 and 2016; (ii) documents entitled 'Visa Entitlement Verification Online, Visa Details Check' recording that that Mr Almahadi had a subclass 444 visa in March 2022; (iii) a statement of service from the Embassy dated 30 November 2021; (iv) Mr Almahadi's certificate of Australian citizenship dated 11 June 2024; (v) a medicare card valid to February 2025; and (vi) a type written document apparently prepared by Mr Almahadi purporting to summarise his visa and employment history.

[24] In addition, at the hearing which took place on 25 February 2026, Mr Almahadi was provided with an opportunity to give oral evidence on affirmation. The most salient aspects of the evidence given by Mr Almahadi may be summarised as including that: (i) the only passport he held until he became an Australian citizen in 2024 was a New Zealand passport; (ii) he entered Australia using his New Zealand passport on 1 December 2012; (iii) as a New Zealand citizen he was entitled to be issued with a subclass 444 visa on arrival at the airport and that is what happened in 2012; and (iv) no stamp was placed in the passport or other document provided upon entry to evidence the grant of the subclass 444 visa and he had been unable to obtain documentary evidence of the issue of that visa in 2012.

[25] The Embassy opposed the Full Bench receiving further evidence on appeal. The Full Bench may admit the further evidence on appeal under s 607(2) of the Act. The circumstances in which the courts have considered it may be appropriate to admit new evidence on appeal are discussed in *Akins v National Australia Bank* (1994) 34 NSWLR 155 as follows:[5]

> Although it is not possible to formulate a test which should be applied in every case to determine whether or not special grounds exist there are well understood general principles upon which a determination is made. These principles require that, in general, three conditions need be met before fresh evidence can be admitted. These are: (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict; (3) The evidence must be credible.

[26] Whilst the principles governing the admission of fresh evidence on appeal in the courts provide a useful guide to the exercise of the discretion in s 607(2), the discretion is not

constrained by those principles.[6] Ultimately, the Full Bench must make a broad discretionary decision as to whether to admit that evidence having regard to the objects of the Act and to equity, good conscience and the substantial merits of the matter as well as the requirement that the Commission exercise its functions in a manner that is fair, just and is quick, informal and avoids unnecessary technicalities.[7]

[27] We are satisfied that it is appropriate to admit further evidence on appeal. In relation to the first consideration referred to in *Akins*, it may be correct to say that, in a literal sense, the further documents and oral evidence now provided by Mr Almahadi could have been put forward at first instance to the Deputy President. However, we do not consider that Mr Almahadi, as an unrepresented applicant, can necessarily be assumed to have understood that it might be necessary for him to do so.

[28] The direction issued by the Deputy President on 15 March 2024 permitted the applicants to 'file and serve further evidence in relation to whether or not they were, on the date listed next to their name, "a person resident in Australia whose continued presence in Australia [was] not subject to a limitation as to time imposed by or under a law of Australia" (for the purposes of section 12(6) of the *Foreign States Immunities Act 1985*)'. As explained by this Full Bench in its earlier decision, and now by the Full Court, the position at the relevant time was that a New Zealand citizen was entitled to be issued with a visa upon arrival which permitted them to reside in Australia indefinitely at least unless there was a behaviour or health concern in relation to the person. There is no suggestion there has ever been a behaviour or health concern with respect to Mr Almahadi.

[29] There was no reason for Mr Almahadi to think it was necessary to provide anything in answer to the Deputy President's direction other than to state that he arrived in Australia in December 2012 holding a New Zealand passport and to provide a photocopy of the New Zealand passport. It would have been reasonable for him to assume this would be sufficient to confirm that he was, at that time, entitled to remain in Australian without a limitation as to time. Although the entitlement to remain in Australia arose by the mechanism of being granted a subclass 444 visa, the only criteria for being granted such a visa (leaving aside cases of behaviour or health concerns) was being a New Zealand citizen and upon entering Australia, presenting a New Zealand passport that was in force. In those circumstances, we think it is explicable that Mr Almahadi did not provide more than he did to the Deputy President.

[30] As to the second and third considerations referred to in *Akins*, Mr Almahadi's oral evidence to the effect that he entered Australia on 1 December 2012 using a New Zealand passport and was issued with a subclass 444 visa upon arrival plainly has the potential to result in a different decision. The Deputy President dismissed Mr Almahadi's application on the basis he had not provided sufficient evidence that he held a subclass 444 visa. Direct testimony given on affirmation that he was issued with a subclass 444 visa when he entered Australia and prior to making the employment contract with the Embassy has the potential to fill the perceived gap in the evidence. We also note that the Deputy President accepted that Mr Namaoui, Mr Belkamel and Mr Abdul-Hwas were permanent residents for the purposes of the FSI Act in circumstances in which they had provided no more than copies of their New Zealand passports and asserted in submissions that they held a subclass 444 visa at the relevant time.

[31] There is also no reason to think the evidence is not credible and we did not understand the Embassy to submit we should not accept Mr Almahadi's evidence if further evidence was received on appeal. Given that a subclass 444 visa permits a New Zealand citizen to enter and reside in Australia indefinitely, and to work without limitation while in Australia, it is difficult to imagine any reason why Mr Almahadi would seek or be granted any other form of visa. It is inherently credible that he was granted a subclass 444 visa upon arrival and held that visa at the time his contract of employment with the Embassy was made on 10 December 2012.

[32] The additional documents provided by Mr Almahadi fall into a somewhat different category. Those documents, with the exception of the copy of his 2011 New Zealand passport which was already before the Deputy President, do not directly assist in answering that question. The typewritten document apparently prepared by Mr Almahadi could only be treated as a submission or Mr Almahadi's assertion as to the factual matters referred to in the document. In the particular circumstances of this matter, we nonetheless consider it is appropriate to receive the additional documents as further evidence on appeal. The documents at least demonstrate the efforts Mr Almahadi has taken to endeavour to substantiate his visa position in 2012 and Mr Almahadi was cross-examined in relation to the documents. We also note that assertions from Mr Namaoui, Mr Belkamel and Mr Abdul-Hwas as to their visa status were accepted by the Deputy President in the proceedings at first instance.

[33] In any event, as we have explained, other than his New Zealand passport – a copy of which Mr Almahadi provided to the Commission in the proceedings at first instance – there is nothing to establish what, if any, documentary evidence with respect to visa status was provided to the holders of New Zealand passports entering Australia in 2012, that Mr Almahadi could have provided to establish that he held a subclass 444 visa at that time This was explained in the submissions at first instance of Mr Belkamel, who outlined the effect of the Trans-Tasman Agreement upon the rights of New Zealand passport holders generally, to freely enter and work in Australia. That submission was accepted by the Deputy President at first instance, and by this Full Bench in the appeal in C2024/3320. There is no reason in Mr Almahadi's case to depart from that approach. Even if Mr Almahadi had provided no additional evidence in the appeal, the evidence as it stood (that he held a New Zealand passport in 2012 when he entered Australia) established to the required standard that Mr Almahadi was a permanent resident of Australia when he commenced employment with the Embassy, and is entitled to have his application for an unfair dismissal remedy determined by the Commission.

Determination of the appeal

[34] As we have observed, the question posed by s 12(6) and (7) of the FSI Act turns on whether the person was a permanent resident of Australia 'at the time when the contract of employment was made'. The earlier decision of the Full Bench and the decision of the Full Court demonstrate that a New Zealand citizen who held a subclass 444 visa in 2011 or 2012 was a permanent resident for that purpose. If Mr Almahadi held a subclass 444 visa at the time that he made a contract of employment with the Embassy on 10 December 2012 then the Embassy is not immune from the jurisdiction of the Commission and Mr Almahadi's unfair dismissal application should not have been dismissed.

[35] Mr Almahadi has now given direct evidence that he entered Australia on 1 December 2012 using his New Zealand passport and was issued with a subclass 444 visa upon his arrival.

He has also given evidence that he did not hold any other passport at that time. Although there was some uncertainty as to whether Mr Almahadi now has a discrete recollection of being issued with a subclass 444 visa on 1 December 2012, we consider that it is overwhelmingly likely that this was the case in circumstances in which he held a New Zealand passport at that time and had an automatic right to the grant of such a visa, in circumstances where he was not the subject of behaviour or health concerns. As we have said, there is simply no reason why Mr Almahadi would seek or be granted any other visa as a New Zealand citizen entering Australia at that time. We are comfortably satisfied, and find, that Mr Almahadi held a subclass 444 visa on 10 December 2012 and was a permanent resident for the purposes of the FSI Act at that time.

[36] The appeal should be allowed and the decision of the Deputy President should be quashed. Mr Almahadi's unfair dismissal application should be remitted to be determined by a member of the Commission in due course.

[37] The Full Bench makes the following orders:

(a) The appeal is allowed;
(b) The decision [2024] FWC 1211 of Deputy President Easton and order PR774674 in Matter Number U2022/4565 are quashed;
(c) The application made by Mr Almahadi in Matter Number U2022/4565 is remitted to a member of the Commission to be determined.

VICE PRESIDENT

Appearances:

E Almahadi appeared for himself.

H Cooper, of counsel, instructed by Norton Rose Fullbright appeared for the Saudi Arabian Cultural Mission/Saudi Embassy.

Hearing details:

25 February 2026.
Sydney (using Microsoft Teams).

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<PR797364>

[1] *Saleh & Ors v Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of the Kingdom of Saudi Arabia, Cultural Mission* [2024] FWC 1152.

[2] *Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of The Kingdom of Saudi Arabia, Cultural Mission v Saleh & Ors* [2024] FWCFB 372.

[3] *Royal Embassy of Saudi Arabia Cultural Mission v Saleh & Ors* [2025] FCAFC 184; (2025) 313 FCR 325.

[4] *Saleh & Ors v Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of the Kingdom of Saudi Arabia, Cultural Mission* [2024] FWC 1211.

[5] *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160 (Clarke JA).

[6] *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963; (2010) 202 IR 180 at [95] (Lawler VP and Bisset C); *Mermaid Marine Vessel Operations Pty Ltd v Maritime Union of Australia* [2014] FWCFB 1317; (2014) 241 IR 35 at [18]; *Construction, Forestry, Maritime, Mining and Energy Union v LS Precast Pty Ltd* [2019] FWCFB 1431 at [19].

[7] *Fair Work Act 2009* (Cth), ss 577 and 578. See discussion in *Australian Manufacturing Workers' Union v Sublime Infrastructure Ltd* [2024] FWCFB 432 at [20]-[21].