The Commonwealth

CSAT/5(No.1)
THE ARBITRAL TRIBUNAL
OF THE
COMMONWEALTH SECRETARIAT
In the Matter between
RUMMAN FARUQI Applicant
and
THE COMMONWEALTH SECRETARIAT Respondent
Before the Tribunal Constituted by
Professor Duncan Chappell - President

JUDGMENT ON PRELIMINARY ISSUES

BACKGROUND
Application And Request For Interlocutory Relief
1 Mr Rumman Faruqi (the Applicant) instituted proceedings before the Commonwealth Secretariat Arbitral Tribunal (the Tribunal) with the lodgement of an application (dated 24 July 2001) received by the Tribunal on 25 July 2001. In his Application Mr Faruqi named two Respondents – the Commonwealth Secretariat and the Secretary-General of the Commonwealth Secretariat. As required by the Rules of the Tribunal (see in particular Rule 6) Mr Faruqi's Application contained a number of pleas which indicated the measures and decisions that he was requesting the Tribunal to order or take. In addition to certain substantive remedies sought by Mr Faruqi, these pleas included a claim for urgent interlocutory relief which it was requested should be dealt with and decided by the Tribunal by 31 July 2001. Thus interim orders were sought by Mr Faruqi pending hearing of his application on the merits, as to:
(i) Maintenance of the status-quo in regard to his formal employment position with the Commonwealth Secretariat including maintenance of his job title, remuneration and all other emoluments.
(ii) An order against the Secretary-General for costs incurred by him up to and including the issuance of the Formal Grievance Report of 8 May 2001, and/or assistance in the funding of his legal costs.
(iii) Direction as to the appointment of a Tribunal member upon consultation with and/or subject to the approval of the Applicant (see Application: Section B – Pleas; (A) For Urgent Relief – Before 31 July 2001 hereafter "Application Pleas").
2. Regrettably, due to the ill health of the then President of the Tribunal, Justice Ulric Cross, Mr Faruqi's request for this urgent interlocutory relief could not be dealt within the specified time frame. Justice Cross' continuing ill health resulted in his subsequent resignation as President of the Tribunal. In early September a new President, Professor Duncan Chappell, assumed office following his appointment by the Secretary-General of the Commonwealth.
3. During September the Tribunal was advised that Mr Faruqi had obtained new legal advisers. In October these advisers requested that the Tribunal should proceed to determine at the earliest opportunity the preliminary issues raised in Mr Faruqi's Application, as well as setting a time table for the lodgement of documents relating to the substantive matters requiring resolution by a hearing. Upon receiving this request the tribunal convened a telephone conference hearing on 29 October 2001, presided over by Professor Chappell.
4. After hearing oral submissions from the parties the President made the following directions:
(i) "as regards the preliminary issues raised by the Applicant in his Application dated 24 July 2001 – in Section B Pleas, under the heading (A) for urgent relief – the Applicant lodge his written submissions on these issues with the Tribunal through the Secretary by Monday 12 November 2001 and the Respondent lodge its written submissions in reply with the Tribunal by Monday 26 November 2001. The Tribunal will hold a telephone conference hearing on Monday 3 December 2001 to hear any further submissions from the parties. The President will thereafter rule on the preliminary issues including as to the composition of the Tribunal and whether there will be an oral hearing of the Application or whether the Application will be dealt with on the basis of documents.

(ii) As to the substantive Application the Respondent lodge with the Tribunal the Respondent's Answer by Monday 26 November 2001; the Applicant lodge his written reply with the Tribunal within a period of 14 days thereafter, namely by Monday 10 December 2001, and the Respondent lodge its written rejoinder with the Tribunal within a period of 14 days thereafter, namely by midday 24 December 2001". (Summary Minutes, 30 October 2001).

5. Since the making of these directions the parties have fulfilled each of their respective obligations relating both to the preliminary issues and the substantive Application. As indicated in the directions of 30 October 2001 the present judgment is concerned solely with the preliminary issues, including the composition of the Tribunal and the way in which the substantive Application is to be dealt with. Before considering these issues it is appropriate to review a jurisdictional plea raised by the Respondent.

Jurisdiction

6. There was no dispute between the parties about the jurisdiction of the Tribunal to hear and pass judgment upon the Application brought by Mr Faruqi. As required by Article II of the Statute of the Arbitral Tribunal of The Commonwealth Secretariat ("the Statute") Mr Faruqi was a member of staff of the Commonwealth Secretariat, serving as Director of the Secretariat's Economic Affairs Division for a number of years. Mr Faruqi alleged that the Respondent had erred in a number of ways when considering whether or not to renew or continue his contract of employment (Application Pleas: The Contested Decisions). Mr Farqui had also exhausted all other remedies available within the Secretariat (Statute: Article II 2.1) and had brought his application within the appropriate time period (Statute Article II 2.ii).

7. While in complete agreement about these general jurisdictional points the parties were in dispute about the jurisdiction of the Tribunal to entertain an application against the Secretary-General of the Commonwealth. The Respondent asked that the Tribunal strike out this application against the Secretary-General because it had no jurisdiction to hear such a claim. The Respondent contended that Article II of the Statute conferred jurisdiction on the Tribunal solely to hear and determine actions between the Commonwealth Secretariat, as employer, and its employees and staff members. Under the Agreed Memorandum establishing the Commonwealth Secretariat (paragraph 32) it was quite apparent that the Secretary-General was an employee of the Secretariat and not an employer.

8. In oral submissions made on behalf of the Applicant it was stated that the Secretary-General had been made a party to the proceedings for two reasons – the fact that his decisions were being challenged, and to illustrate the anomaly of his position in that those decisions were being reviewed by a body, the Tribunal, which he had constituted (Summary Minutes, 4 December 2001: 12). In the Tribunal's view neither of these justifications are persuasive. The Tribunal has already ruled in its earlier judgement in Selina Mohsin v. Commonwealth Secretariat CSAT/3, 6 September 2001 that:

"There is no power under the Statute for the Tribunal to order remedies against individual employees. The duty of the Tribunal is to consider the complaint of the Applicant (which includes allegations against other employees) and to decide upon any appropriate remedies as against the Commonwealth Secretariat". (Mohsin v Commonwealth Secretariat: 5-6).

9. Likewise, in the present proceedings the Tribunal has power to order remedies only against the Commonwealth Secretariat. Accordingly, the Tribunal orders that the name of the Secretary-General of the Commonwealth be struck as a Respondent and that Mr Faruqi's application be brought only against the first Respondent, the Commonwealth Secretariat. The case will be now titled Mr Rumman Faruqi, Applicant v The Commonwealth Secretariat, Respondent.

10. Reference has already been made to the preliminary issues which require consideration by the Tribunal (see paragraphs 1 and 4 above). In both their written and oral submissions the parties raised a number of important and complex contentions about the nature and scope of the legal principles and authorities that should be applied by the Tribunal in reaching its ultimate determination of these issues. The general nature of these contentions, and the Tribunal's approach to them, will be dealt with under the following five heads:

(i) Applicable sources of law

(ii) Independence and impartiality

(iii) Costs

(iv) Interim relief
(v) Hearing

(i) Applicable Sources of Law

11. In well prepared and thoughtful oral and written submissions Mr Faruqi's legal advisers advanced the argument that the general principles of law that should be applied by the Tribunal in resolving the issues in dispute between the parties should be distilled from the interstices of three United Kingdom statutes – the Commonwealth Secretariat Act 1966 (CSA), the Arbitration Act 1996 (AA) and the Human Rights Act 1998 (HRA) – as well as Article 6 of the European Convention on Human Rights (the Convention). [See in general Applicant's Submissions: Paragraphs 7-34; Summary Minutes, 4 December 2001: 6-9.]

12. The essence of the contentions made on behalf of Mr Faruqi in relation to the application of these various provisions was the following. First, referring to the CSA, the Applicant noted that the Schedule contained in Part 1 provides that:

"1.1 The Commonwealth Secretariat shall have immunity from suit and legal process except – (b)… in respect of arbitration proceedings relating to any written contract entered into by or on behalf of the Secretariat."

13. Further, Section 1(3) of the CSA provides that:

"Every written contract entered into by or on behalf of the Commonwealth Secretariat, if it does not contain an express provision for the reference of any dispute in connection with the contract to arbitration, shall be deemed to contain a provision that any such dispute shall at the request of either party to the contract be referred to arbitration and (except where the contract falls to be construed by reference to the law of Scotland) shall accordingly be treated as an arbitration agreement for the purposes of (Part 1 of the Arbitration Act 1996)…"

14. On the basis of these references the Applicant concluded that, at least in relation to its arbitral functions, and in particular those of the Tribunal, no immunity attached to the Commonwealth Secretariat and that as such the Secretariat, as well as the Tribunal, was subject to the provisions of the AA. These provisions, which apply to arbitration agreements where the seat of the arbitration is in England and Wales or Northern Ireland, include a range of mandatory requirements, such as those provided for in section 33 of the AA:

"33(i) – the Tribunal shall:
(a) act fairly and impartially as between the parties …
(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense so as to provide a fair means for the resolution of matters falling to be determined".

15. Second, the Applicant further submitted that, in accord with the provisions of the AA, the Tribunal should also provide a mechanism whereby the Applicant could give consent or otherwise to the appointment of arbitrators to sit on the Tribunal.

16. Third, it was contended that the statutory underpinning of the Tribunal in the exercise of its arbitral functions was to be found in both the CSA and AA of the United Kingdom. The Applicant further contended that when interpreting these statutory provisions the Tribunal was obliged to have regard to section 3 of the HRA which stipulates that:

"3. Interpretation of legislation
1. So far as it is possible to do so, primary legislation and subordinate legislation must be read and given the effect in a way in which is compatible with the Convention rights.
2. This section –
(a) applies to primary legislation and subordinate legislation whenever enacted."

17. The interpretative obligation established by this provision of the HRA, according to this analysis, required that all United Kingdom legislation had to be applied so as to be consistent with the obligations and rights established by the Convention. In particular, the Tribunal therefore had to act in accordance with Article 6 of the Convention which states that:

"Article 6 – right to a Fair Trial
1. In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

18. Fourth, in the current context, the Applicant further submitted that the Tribunal, when delivering an award, would be acting in a way which was determinative of the Applicant's civil rights and obligations. Accordingly it therefore had a duty to provide a fair hearing, and to be constituted and to conduct itself so as to be viewed as an independent and impartial Tribunal. As will be seen in more detail in the next head of this judgment it was submitted on behalf of the Applicant that the Tribunal failed to meet such a test of independence and impartiality.
19. In its submissions the Respondent contended that the Applicant had failed to understand or acknowledge the true nature of the Commonwealth Secretariat as an international organisation. It was only by examining this aspect of the Commonwealth Secretariat that it was possible to appreciate the role and function of the Tribunal as an arbitral body (see in general Respondent's Answer paragraphs 49-96).
20. In order to appreciate the true character of the Commonwealth Secretariat as an international organisation it is necessary to delve briefly into the history of this international organisation, and the way in which the Tribunal was brought into being. The Commonwealth Secretariat was itself established as a result of a decision announced at the conclusion of the Commonwealth Prime Ministers' meeting in July 1964 (see Annex 13 of the Respondent's Answer). The announcement saw the Secretariat as:
"Being at the service of all Commonwealth Governments and…a visible symbol of the spirit of co-operation which animates the Commonwealth." (Annex 13:131)
21. The site for the new Secretariat was also announced, the British Government stating that it would arrange for the Secretariat to be accommodated in Marlborough House in London. No precise definition was attempted of the status of the Secretariat but in the Agreed Memorandum, published subsequently by the State parties involved, provision was made for certain administrative arrangements to give substance and form to the new international body. In particular sections 39 and 40 of the Agreed Memorandum stated:
"39 – the British Government will introduce legislation in order to give the Secretariat a legal personality under United Kingdom law and to accord to the Secretariat and its staff the immunities and privileges which are set out in Annex A.
40 – Other Commonwealth Governments will take steps to accord the corresponding immunities and privileges to the staff of The Secretariat when visiting their territories, subject to whatever constitutional processes are required." (Annex 13: 135)
22. In relation to the establishment of the proposed scale of immunities and privileges, Annex A of the Agreed Memorandum provided, in part, the following:
"Secretariat
(i) To have a legal personality and immunity from suit and legal process except –
(a) when expressly waived;
(b) in respect of motor accidents and motor traffic offences;
(c) when arbitration proceedings are taken in relation to written contracts (this implies the insertion of a compulsory arbitration clause in all contracts entered into by the Secretariat).
(ii) To have inviolability of premises, archives and communications.
(iii) To have relief from non-beneficial rates out of the United Kingdom Treasury Vote.
(iv) Goods imported for official purposes to be exempt from all Customs dues.
(v) To have immunity from direct taxes.
(vi) Indirect taxes on substantial purchases for official purposes to be reimbursed, out of the Commonwealth Relations Office Vote, e.g. on furniture and furnishings, office supplies, and British motor cars and road fuel duty on petrol used for official purposes. It is intended that the same treatment should be accorded to the Secretariat as is accorded to the Office of a High Commissioner." (Annex 13:135)
23. The Agreed Memorandum concerning the establishment of the Commonwealth Secretariat is an international agreement. Its content reveals clearly and unequivocally that the signatories to this document intended the Commonwealth Secretariat to be an international body which served different sovereign powers. The United Kingdom Government was given the honour of being the host country for the seat of the Commonwealth Secretariat and for the setting up of this body. It performed this function in 1966 by passing the CSA which fulfilled the express agreement, set out in Annex A of the Agreed

Memorandum, that the Commonwealth Secretariat should be given privileges and immunities in accordance with its international status.
24. Annex A, as already cited, is a typical clause providing for such privilege and immunity and it is one which is universally recognised under diplomatic convention and practice for international organisations. The CSA, in Parts I, II and III of its Schedule, now provides for these same privileges and immunities.
25. The genesis of the Tribunal is itself linked unequivocally to the Agreed Memorandum. It too is the product of an international agreement. The CSA was a necessary vehicle involved in this process, providing the Commonwealth Secretariat with its legal personality so that it could be sued within the framework of the Schedule. Without the exception referred to in that Schedule, so far as immunity from suit and legal process is concerned, no staff member within the Commonwealth Secretariat could sue that body, thereby denying that staff member the right of recourse to an institution which could deal with a complaint.
26. It is within this general context that the Applicant's contentions concerning the application to the Tribunal of the domestic law of the United Kingdom must be considered. Those contentions are, as already noted, that Article 6 of the Convention and the HRA are applicable to the Tribunal because the latter statute incorporates into the domestic law of the United Kingdom this provision of the European human rights document. Liability under the HRA arises if, and only if, an organisation or body is deemed to be a public authority. The definition of a public authority, according to section 3, includes "a Court or Tribunal".
27. In the Tribunal's view these contentions made on behalf of the Applicant misconstrue the true nature of the Arbitral Tribunal of the Commonwealth Secretariat. In particular they fail to recognise that the Tribunal is an international body established in the way that has been described. The Tribunal does not become a domestic body subject to the municipal law of the United Kingdom simply because it has been referred to in a domestic statute, the CSA. A much better appreciation of the nature of the Tribunal is to be found in its own Statute. The following Articles of this Statute are relevant:
"Article IX
3. The judgment of the Tribunal shall be final and binding on the parties and shall not be subject to appeal. This provision shall constitute an "exclusion agreement" within the meaning of the laws of any country requiring arbitration or as those provisions may be amended or replaced.
Article XIII
The present Statute may be amended by the Secretary-General. Before making any amendment, the Secretary-General shall seek the views of the President and shall consult with Commonwealth Governments and the Commonwealth Secretariat Staff Association.
Article XIV
l. In dealing with all cases before it relating to contracts of service, the Tribunal shall be bound by the principles of international administrative law which shall apply to the exclusion of the national law of individual member countries."
28. These provisions provide clear evidence in support of a number of conclusions. First, the Tribunal is an international body of the type commonly and appropriately referred to as an international administrative tribunal. Even if it could be contended that the Tribunal carries out functions of a public nature, those functions do not classify it as a domestic public authority within the meaning of the CSA when Articles IX and XIV of the Statute are taken into account. The Tribunal is a separate legal entity from other domestic Tribunals governed by the municipal law of the United Kingdom. It is competent to function as a separate legal entity because it is an international administrative Tribunal with its own Statute and Rules of Procedure.
29. Second, and most importantly, the decisions of the Tribunal are final and not open to appeal. To ensure that this situation is clearly understood Article IX of the Statute states that the provision on no appeal:
"shall constitute an "exclusion agreement" within the meaning of the laws of any country requiring arbitration or as those provisions may be amended or replaced".
30. The effect of this provision is that by agreement of all of the parties, which means of all the Commonwealth countries including the United Kingdom and Northern Ireland, all judgments of the

Tribunal are excluded from the process of appeal in any one of those Commonwealth countries. Effectively each applicant seeking redress before the Tribunal agrees at the time of the signing of their contracts with the Commonwealth Secretariat that in the event of a judgment by the Tribunal which is wholly or partially not in their favour they will be denied the right of appeal from that judgment to a national court.

31. If appeals were to be allowed, a number of consequences would follow. These consequences were not and could not have been intended by the Agreed Memorandum. If granted, a right of appeal would mean that the immunities referred to in the Agreed Memorandum, and incorporated into the CSA, would be lost as the Commonwealth Secretariat would be subject to legal action by way of appeal in the High Courts of the United Kingdom. Such an outcome would be in breach of Annex A of the Agreed Memorandum, section 2 of the CSA, and Article IX of the Statute. It would also be in breach of Article XIV of the Statute which provides that international administrative law applies to the exclusion of the national law of any individual member country.

32. On the issue concerning the relationship between the immunity of an international body like the Tribunal and the domestic law of a country in which that international body resides it is instructive to look, by way of example, at how Germany has dealt with this matter in two recent cases: Waite and Kennedy v. Germany (APP.20683/94) and Beer and Regan v. Germany (APP.289394/95). Both decisions are from the European Court of Human Rights (ECHR) and both judgments were delivered on 18 February 1999.

33. The facts in these cases require brief statement. In both of these matters the applicants sought redress from the ECHR on the basis that the European Space Agency (ESA), which claimed immunity from suit, had denied them access to the Court in breach of Article 6 of the Convention. Each of the applicants did have access to the German Labour Court. On appeal from that Court the German Labour Appeal body rejected both applications as inadmissible due to their recognition of the immunity from suit claimed by the ESA. Further, in the case of Waite and Kennedy, the German Federal Court also rejected the applicant's claim.

34. In its judgment the ECHR in Waite and Kennedy found that the ESA has provided in its Convention an arbitration procedure by an international arbitral tribunal. It also found that the ESA was an international body, with a number of different State parties being signatories to the Convention. At paragraph 63 of the judgment the Court stated the following:

"Like the Commission, the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments. The immunity from jurisdiction commonly accorded by States to international organisations under the organisations constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international co-operation in all domains of modern society.

Against this background, the Court finds that the rule of immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate object."

35. Further, at paragraph 72 of the judgment, the Court in Waite v Kennedy stated:

The Court shares the Commission's conclusion that, bearing in mind the legitimate aim of immunities of international organisation (see paragraph 63 above), the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6(1) of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would in the Court's view thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international co-operations.

36. The ECHR found that the limitation of Article 6(l) imposed by ESA's immunity rule did not impair the applicant's right to access to the courts, nor was it disproportionate to the means employed and the aims sought. These recent decisions of the ECHR provide an important example of how an international court has approached the question of immunity of an international organisation and national law. The facts of

both cases raise issues similar to those raised by the Applicant in this case, namely, the applicability of municipal law of the host country (the United Kingdom) to the Tribunal.

37. In the United Kingdom this matter was adjudicated upon by the domestic courts in 1977, before the Tribunal was brought into being in 1995. The Court of Appeal in Gadhok v Commonwealth Secretariat no. 38968/76/A 9th May 1977 rejected an application from a claimant who had earlier been denied access to justice by the Employment Tribunal and the Employment Appeal Tribunal. Each refusal was based on the ground that the Commonwealth Secretariat had effective immunity from suit. In the Court of Appeal, Lord Denning stated:

"I can understand the Commonwealth Secretariat's not being subject to the ordinary statutes of the United Kingdom because it is, so to speak, a Commonwealth body serving the Commonwealth with its many different laws and regulations." (pp441)

38. Since the decision in Gadhok, the position is even stronger now following the establishment of the Arbitral Tribunal of the Commonwealth Secretariat which is governed by its own Statute and Rules of Procedure.

39. The Tribunal would be in clear and specific breach of the Statute and Agreed Memorandum if it were now to apply the HRA which is a domestic statute applicable to one member of the Commonwealth only. The HRA is not international administrative law but rather a domestic statute applicable to public authorities within the jurisdictions of the United Kingdom and Northern Ireland. Thus the Tribunal must as a matter of international administrative law, and interpretation of the Statute and Rules, reject the Applicant's submission that the HRA applies to the Tribunal. To do otherwise would be to go against the Statute and the clear intentions of the State parties who signed the Agreed Memorandum, and who never intended that the Commonwealth Secretariat or its Tribunal should be subject to the domestic law of any individual country. The Tribunal bears in mind when considering this submission that there are presently 54 nations of the Commonwealth who are serviced by the Commonwealth Secretariat and its Tribunal.

40. Similarly, and for reasons set above, the Tribunal rejects the Applicant's submission that the AA is applicable to the Tribunal. The Tribunal relies specifically upon the reasoning in the judgments of Waite and Kennedy / Beer and Regan; the immunity set out in the Agreed Memorandum and incorporated into the CSA and Article IX(2) and XIV(1) of the Statute.

41. Section 1 (3) of the CSA sets out for clarification that every written contract shall be deemed to have an arbitration agreement. It goes on to define an arbitration agreement by reference to Part 1 of the AA. This reference is intended to give access to a well-known definition of an arbitration agreement which is used all over the world. It is a definition to be found in section 6 of the AA, and is referred to in the footnotes of the CSA. It was not intended that the whole of Part 1 should be applicable to the Tribunal when dealing with disputes. Even if that were the case Article XIV of the Statute excludes in very specific terms the applicability of national statutes. In addition, as set out at paragraphs 56-60 of the Respondent's submissions, each contract entered into with an individual and the Commonwealth Secretariat is referred to Staff Regulations 28, 29 and 30. These Regulations deal with the provisions of any arbitration process, through the Tribunal, in the following items.

Regulation 28 There is established by these Regulations a Tribunal to be known as the Commonwealth Secretariat Arbitral Tribunal which has the right to determine issues arising out of the performance of contracts of service and contracts for services between the Commonwealth Secretariat and any person. The Tribunal shall be constituted as prescribed in the Statute of the Tribunal which is annexed to these Regulations and shall have jurisdiction to hear all matters described in the Statute.

Regulation 29 Where a dispute arises in respect of the operation of a contract of service or a contract for services entered into between the Secretariat and a person who is subject to all or any of these Regulations and Rules that dispute shall be settled only by the Commonwealth Secretariat Arbitral Tribunal referred to in Regulation 28 of these Regulations. Neither the Commonwealth Secretariat nor the person shall have the right to have such a dispute resolved by any other means and the decision of the Tribunal shall be final.

Regulation 30 Every person whose contract of service or contract for services with the Commonwealth Secretariat is subject to any or all of these Regulations and Rules agrees that Regulation 29 and this regulation constitute, for the purpose of sub-section 1(3) of the Commonwealth Secretariat Act 1966, an

arbitration clause in the contract giving rise to his or her employment by the Secretariat in whatsoever capacity."
42. It will be seen that Regulation 30 provides that all persons agree that Regulations 29 and 30 constitute an arbitration clause in their contracts for the purpose of sub-section 1(3) of the CSA, and refer any dispute in connection with the contract exclusively to the Tribunal, in accordance with Regulation 29. The applicable law for the Tribunal is only as described in the Statute of the Tribunal and does not include the AA or any other law of the United Kingdom.

(ii) Independence and Impartiality
43. In further support of his argument, that the HRA and the Convention apply to the Tribunal, the Applicant submitted that the Tribunal had already acknowledged that it had to act in accordance with the Convention in the course of its judgment in the case of Mohsin v The Commonwealth Secretariat. Further, whether as a matter of English common law, Commonwealth jurisprudence, or international administrative law the Tribunal had a duty to act in an independent and impartial manner (see Summary minutes, 4 December 2001: 9-11).
44. In his submissions the Applicant made it quite clear that he did not in any way impugn the subjective independence and impartiality of the members of the Tribunal. It was contended, however, that the Tribunal was so manifestly linked to and dependent upon the Secretary-General, the administrative head of the Commonwealth Secretariat, that a fair minded and informed observer would harbour an objectively justified fear that the Tribunal lacked both impartiality and independence (see Applicant's Submissions: Paragraphs 41-45). These were all matters which showed that the Tribunal, as presently provided for by its Statute and Rules, would fail to comply with Article 6 of the Convention.
45. The Applicant submitted that the only way in which compliance with Article 6 could be secured by the Tribunal would be to allow a new process of appointment of arbitrators, permitting selection of one member of a panel by the Applicant and the remaining members to be chosen jointly by the Secretary-General and the Commonwealth Secretariat Staff Association (CSSA). It was further proposed that the President of the Tribunal could, through the exercise of the wide discretion provided by the Tribunal's Rules, and especially Rule 23, limit the scope for involvement of the Secretary-General in the operations of the Tribunal.
46. In its written and oral submissions the Respondent did not dispute the contention that the Tribunal was bound to act in an independent and impartial manner (see Respondent's Answer: Paragraphs 97-38; Summary Minutes, 4 December 2001: 18). The Respondent stated that this obligation was imposed not by Article 6 of the Convention but by the principles of international administrative law. When these principles were applied to the appointment process of members of the Tribunal, and the practice and procedures contained in the Tribunal's statute and Rules, it was quite apparent that the Tribunal did fulfil this obligation.
47. Having given careful consideration to these submissions made on behalf of the parties the Tribunal acknowledges its general duty, as an international body applying the principles of international administrative law, to act in an independent and impartial manner and to apply the principles of fairness when dealing with matters brought before it for redress. Indeed, the Tribunal has already expressed this view in the context of its earlier judgment in the matter of Mohsin v The Commonwealth Secretariat when it stated:
"that being a Tribunal of final decision that it had to adopt principles of fairness in dealing with the Applicant's case. An example of the principles of fairness applicable to the Tribunal can be found in Article 6 of the European Convention on Human Rights."
48. It should be emphasised that in making this statement the Tribunal did
not conclude, as contended by the Applicant, that it was bound by the specific requirements of Article 6 of the Convention. Rather, it was utilising a provision of the Convention as just one example of the principles of fairness that should apply. The Convention is itself but one illustration of an international human rights treaty incorporating principles of fairness which should be adopted by an international arbitral body like the Tribunal. Another important example can be found in the International Covenant on

Civil and Political Right (ICCPR), at Article 14. 32 of the 54 member states of the Commonwealth are party to the ICCPR. Article 14 states in part:
"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice, but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law."
49. A further example of the recognition of the principles of fairness is to
be found in the American Convention on Human Rights, Article 8 of which also sets out the right to a fair trial in terms similar to those adopted by the ICCPR. Of the three international treaties which have been referred to containing provisions for fair trial procedures it is apparent that the ICCPR is the most popular among Member States of the Commonwealth with the majority having signed and ratified the treaty. In contrast, of Member States of the Commonwealth only the United Kingdom has both signed and ratified the European Convention on Human Rights (Check if this is accurate. Has Cyprus also signed and ratified?) Five Member States of the Commonwealth have also signed and ratified the American Convention on Human Rights.
50. It would be inappropriate for the Tribunal to adopt in toto any one of these international treaties. Rather, the Tribunal must distil from them the principles that do reflect the essence of international administrative law in regard to the provision of an independent and impartial forum for the resolution of disputes. The Statute and Rules of the Tribunal, as well as the Staff Regulations and Rules of the Commonwealth Secretariat, all reflect general principles of fairness. The appointment of members of the Tribunal is governed by Article IV of the Statute which states:
"4. The members of the Tribunal, all of whom shall be Commonwealth
nationals, shall be of high moral character and must:
(a) hold or be qualified to hold high judicial office in a Commonwealth country;
(b) be jurisconsults of recognised competence with experience as such for a period of not less than ten years.
5. The President of the Tribunal and four other persons shall be appointed by the Commonwealth Secretary-General on a regionally representative basis after consultation with governments and the Commonwealth Secretariat Staff Association to be available to serve as members of the Tribunal. Each appointment shall be for a period of three years and may be extended for further periods of three years."
51. It will be seen that appointments are made in consultation with the CSSA which represents all of the staff of the Commonwealth Secretariat, is elected annually and whose representative capacity is itself recognised by the Staff Regulations and Rules. Consultation is also made with Commonwealth Governments. It is one of the governing principles of the Commonwealth that it operates on the basis of consensus, and the selection process is one which gives effect to this approach. It is also a process which is in accord with the practice of other international organisations as is apparent from the detailed references supplied in the Respondent's written submissions (see in particular Annexes 27 and 28).
52. The Tribunal can see no need for any amendment to be made to the Statute, as proposed by the Applicant, in order for it to be compliant with Article 6 of the Convention or any other human rights treaty. Any amendment to the statute must also comply with Article XIII which states.
"the present Statute may be amended by the Secretary-General. Before making any amendment, the Secretary-General shall seek the views of the President and shall consult with Commonwealth Governments and the Commonwealth Secretariat staff association."
53. It is not for the Tribunal, on a request of a party to an action, to amend the Statute or Rules of Procedure. It is quite apparent that a consultative process is required of the nature set out in Article XIII.

This consultation process is one which reflects the consensus approach favoured by the Commonwealth in all of its activities. It is most certainly not a process which allows unilateral action by the Secretary-General, the President of the Tribunal, or any of the other parties involved.

(iii) Costs

54. The urgent interim relief sought by Mr Faruqi included a request for an order by the Tribunal that the Respondent should pay costs, amounting as at 18 June 2001 to £18,000, incurred in contesting the various decisions taken by the Secretary-General up until the time of the issuance of the report in regard to the formal grievance procedure. (See in general Application Pleas. Applicant's Submissions: paragraphs 49-57). In summary form the Applicant's submissions on this point stated that one of the principles of fairness required by Article 6 of the Convention, as well as by international administrative law, was that there should be "equality of arms" between the parties. This equality was only possible if Mr Faruqi had access to legal advice and assistance of the scope and calibre available to the Respondent. Mr Faruqi had been obliged to exhaust all of the remedies available to him within the Secretariat, including the formal grievance procedure, before bringing his application to the Tribunal. The formal report issued as a part of these internal remedies had made findings in his favour. Irrespective of how the Secretary-General then decided to act upon the findings of the formal grievance process, principles of fairness led to the conclusion that it would be manifestly unjust for Mr Faruqi to be left out of pocket for having pursued and won a mandatory precondition to making an application to the Tribunal. The Applicant further submitted that the Tribunal had the power, under Article V(4) of the Statute, to determine the costs of the application which encompassed all necessary and incidental steps, including the formal grievance process.

55. The Respondent contended that the Tribunal lacked the power to grant an order for costs of the type sought by the Applicant (*See in general Respondent's Answer, paragraphs 30-48). The Tribunal accepts this contention. The general power of the Tribunal to make an order for costs does come from Article V(4) of the Statute. By its very nature such an order can only be made after the application has been considered and determined since the Tribunal would not otherwise be able to assess what the appropriate costs should be. This approach is supported by earlier decisions of the Tribunal in which the question of costs has been raised. In the matter of Gurmeet Hans v The Commonwealth Secretariat (CSAT/1, 26 October 1998) the Tribunal recognised that:

"just as a plaintiff is entitled to his/her costs if he/she wins a substantial part of his/her claim, so the applicant also is entitled to her valid expenses incurred in connection with this application." (Judgment 22)

56. In the more recent matter of Mohsin v The Commonwealth Secretariat the Tribunal again made an award for costs against the Respondent. In making this order the Tribunal took into account the fact that the "applicant was successful in only a small part of her claim" (Judgment 6) in setting the amount of costs to be awarded.

57. It is apparent from these decisions, as well as from the plain meaning of Article V of the Statute which delineates the scope of power granted to the Tribunal, that its authority to order costs is limited. It is a power which can only be exercised properly at the end of proceedings, and upon the determination of the substance of the case. If the Tribunal were to grant the Applicant costs at this stage in the proceedings it would in effect be doing so without having considered the merits of the matter before it. The jurisdiction of the Tribunal cannot be so extended in the absence of an explicit power contained in the Statute. No such power is to be found in that document, nor as contended by the Applicant through the use of Rule 23, to make an interim order for costs. Rule 23 does allow the Tribunal to vary its procedures or to address procedural issues which may not be dealt with explicitly in those Rules. It cannot be interpreted to incorporate a power to create new rules outside the parameters of the Statute.

(iv) Interim Relief

58. The major interim relief sought by Mr Faruqi, when he lodged his application on 25 July 2001, was maintenance of the status-quo in regard to his formal employment position with the Commonwealth Secretariat. The Tribunal was asked to rule on this request by 31 July 2001. For reasons which have already been set out the Tribunal was not able to make such an immediate ruling and Mr Faruqi is now no longer in the employ of the Respondent.

59. There would appear to be a dispute between the parties as to the precise date upon which Mr Faruqi's employment with the Commonwealth Secretariat was terminated. The Applicant contended that the termination date was 31 July 2001, while the Respondent contended that this date was 7 June 2001. (See in general Summary Minutes, 4 December 2001: 12, 15 and 19). Regardless of the date of termination the fact remains that Mr Faruqi has now ceased to be an employee of the Commonwealth Secretariat for almost seven months. It should be emphasised that the delay which has ensued in making any determination concerning the request for interim relief is in no way attributable to any fault on the part of the Applicant. The Tribunal very much regrets this delay and is currently putting in place administrative practices and procedures designed to prevent such a situation occurring in the future.
60. In their respective oral and written submissions the parties drew the attention of the Tribunal to a number of authorities concerning the general power of international arbitral tribunals to issue interim orders. (See in particular Application Pleas; paragraph 7; Respondent's Answer: paragraphs 11-29). As has already been emphasised earlier in this judgment the general jurisdiction of this Tribunal is described by the terms of the Statute and the other instruments under which it has been established. Similar principles apply to the delineation of the jurisdiction of other international arbitral tribunals: see In Re: Fagotto, Judgment 1260(ILOAT); In Re: Zhu, Judgment 1509(ILOAT).
61. The orders that the Tribunal may prescribe if it finds that "an application is well founded" are contained in Article X of the Statute. That Article provides as follows:
"1. If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked. Where an application is made by a staff member, the Tribunal shall, at the same time, fix the amount of compensation to be paid to the applicant for the injury sustained, provided that such compensation shall not exceed the equivalent of three years' net pay of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher amount of compensation. A Statement of the specific reason for such an order shall be made.
2. If the Tribunal finds that the procedure prescribed in the rules of the Secretariat has not been observed, it may, at the request of the Secretary-General and prior to the determination of the merits, order the case to be remanded for institution or correction of the required procedure, provided that the aggrieved staff member is still in the employment of the Commonwealth Secretariat.
3. The filing of an application shall not have the effect of suspending execution of the decision contested."
62. It is clear that Article X of the Statute allows the Tribunal to grant substantive remedies to an applicant only after a finding that "the application is well founded". This is not the situation prevailing in the present matter. However, it is also apparent from the principles of international administrative law that an arbitral body like the Tribunal has power to issue interim orders, depending on the circumstances of a particular case. The general principles governing such a power suggest that it should only be exercised where the applicant would suffer serious and irreparable damage if an interim order were not to be made, and that there is an urgent requirement for the action sought to be taken: see Suss v Commission of the European Communities (ECR 1981, page 2041); Reichardt v Commisison of the European Communities (ECR 1980, page 265); Henry Compte v European Parliament (ECR 1984: 2575); In Re: Villegas (4) (ILOAT 14 May 1981). It has also been noted by a learned commentator on international administrative law that:
"In most cases in which preliminary or interim measures have been requested they have been refused for a variety of reasons" (Amerasinghe, The Law of the International Civil Service, Vol 1: 604).
63. In its decision in the matter of Compte the European Court of Justice stated the following concerning the exercise of power by an international arbitral body to issue an order for interim relief:
"2 According to Article 83 (2) of the Rules of Procedure of the Court, the suspension of operation of a measure or the adoption of any other interim measure is subject to the existence of circumstances giving rise to urgency and of grounds establishing a prima facie case for the adoption of such a measure.
3 In numerous previous cases the court has held that such a measure may be adopted by the judge responsible for granting interim relief provided there are factual and legal grounds establishing a prima facie case for its adoption; provided there is an urgent need for the measure, that is to say it is

necessary, in order to avoid serious and irreparable damage, that it should be adopted and come into effect before judgment is delivered on the substance of the case, and, finally, provided the measure is provisional, that is to say, it does not prejudge the substantive decision and it does not decide contested points of law or of fact at that early stage or neutralise in advance the effects of the decision to be given subsequently on the substance of the case.
The requirement of urgency and the existence of serious and irreparable damage
4. In principle, purely pecuniary damage cannot be regarded as
irreparable or even as difficult to repair since, in theory, it may be the subject of subsequent financial compensation, as the court has held on several occasions (Order of 17.9 1974 in case 62/74 R Velozi v Commisison (1974) ECR 895; Order of the President of the first chamber of 22.5.1980 in case 33/80 R Albini v Council and Commission (1980)ECR 1671). Nevertheless, the judge hearing the application for the adoption of interim measures must examine the circumstances of each case. He must consider those matters enabling it to be established whether immediate application of the decision in question is likely to involve the applicant in irreversible damage which could not be made good even if the decision were to be annulled and which in spite of its provisional nature would be disproportionate to the interest of the institution in question, pursuant to Article 185 of the Treaty, in having its decisions applied even when they are the subject of an application to the court (Order of 21.8.1980 in case 174/80 R Reichardt v Commission 1980 ECR 2665)."
64. The Tribunal having considered the above authorities along with the Applicant and Respondent submissions, conclude that there would have been no basis for granting interim relief at the time that the Applicant made that request to the Tribunal in July 2001. The need for urgency is no longer in relation to the granting of an order for interim relief but rather in the conduct of the hearing of the substantive issues in contest between the parties. In regard to the existence of "serious and irreparable damage" it has been contended by Mr Faruqi that he has suffered severe financial loss and continuing unemployment as a result of the decisions made by the Respondent. If on the hearing of this matter on the merits Mr Faruqi's "application is well founded" it is clear that the Tribunal has the power to order payment of compensation to redress this damage. In these circumstances this is therefore not the type of case in which the Tribunal should order interim relief, quite apart from the fact that to be able to make such an order it would also be required to prejudge contested points of law and fact.
(v) Hearing
65. The Applicant requests that the Tribunal conduct an oral hearing with a panel of three members. More particularly, it was asked that the President should issue the following directions.
"2. The Applicant be permitted to appoint one arbitrator to sit upon the
CSAT which shall deal with the application. That person shall be a practising lawyer of at least 15 years standing qualified to practise in the United Kingdom or a retired judge of the High Court of England and Wales or an Appellate Court of that jurisdiction.
3. The President and the panel member appointed by the Applicant shall between them nominate the third member of the CSAT constituted to deal with the Applicant's claim.
4. The substantive hearing of the Applicant's claim to take place in the first available date in the year 2002 with a time estimate of three days. Each party limited to one day for submissions and evidence with the final day reserved for closing submissions (half day for each party)." (Applicant's Outline Submissions: paragraph 62).
66. Article IV and VIII of the Statute provide guidance and direction as to the way in which the Tribunal should conduct its hearings. Article VIII states that:
"The Tribunal should normally decide each case on the basis of the documents only. Where a party requests oral hearing, the Tribunal shall decide whether oral proceedings are warranted. Any oral proceedings shall be held in public, unless the Tribunal decides that exceptional circumstances require that they be held in private."
67. Article IV of the Statute states, in part:
"1. The Tribunal shall normally be composed of one member who
should be the President or if the President is for any reason unable to sit some other member of the Tribunal designated by the President.

2. In exceptional cases where in the opinion of the President the complexity of the matter requires it, the Tribunal shall sit as a three member Tribunal empanelled by and including the President but no two members may be nationals of the same country."

68. It is quite clear that these provisions of the Statute neither permit nor envisage any participation by a party to proceedings before the Tribunal in the selection of members to determine the merits of a case. The Tribunal is bound by the terms of the Statute. An amendment to the Statute would be required before any effect could be given to a request of the type made on behalf of the Applicant. Such amendment would have to comply with the process detailed in Article XIII of the Statute.

69. As is apparent from the issues explored in the present judgment the dispute between the parties in this matter is complex. Further, the Applicant has made a request for an oral hearing and has indicated a desire to call a number of witnesses to address particular points of contention between the parties. In these circumstances the Tribunal believes that this is a case in which oral proceedings are warranted and that it should sit as a three member Tribunal.

70. Having now given consideration to each of the issues concerned with the interim relief sought by Mr Faruqi, and for the reasons that have already been set out in this judgment, the Tribunal makes the following decisions and directions:

1. Within the terms of the Tribunal's Statute and Rules it has no power to make an order for costs leading up to and including the formal grievance process.

2. The Statute and Rules of the Tribunal do not permit any participation by any party in the designation of members of the Tribunal to determine an application.

3. That the substantive hearing of the Applicant's claim will be by oral proceedings before a three member Tribunal empanelled by and including the President. This hearing will be listed on the first available date convenient to the parties and the Tribunal. The details of the witnesses to be called and the time involved will be settled by a telephone directions hearing to be scheduled within 14 days of the publication of this judgment.

4. In the circumstances of the case, the Tribunal rejects the request of the Applicant for maintenance of the status quo through the payment of certain sums equal to his salary and emoluments, and re-instatement to his position with the Commonwealth Secretariat. The question whether redress of the type sought by the Applicant is justified is a matter to be determined in the substantive hearing. If the application "is well founded" the remedies available to the Tribunal are to be found in Article X of its Statute.

Dated this 23rd day of February 2002

Signed

Duncan Chappell

President