

CSAT/5(No.2)
THE ARBITRAL TRIBUNAL
OF THE COMMONWEALTH SECRETARIAT
In the Matter between
RUMMAN FARUQI
Applicant
and
THE COMMONWEALTH SECRETARIAT
Respondent
Appearances
For the Applicant:
Simon Browne-Wilkinson QC Khawar M. Qureshi
For the Respondent:
Paul Garlick QC
Kimberly Prost
Before the Tribunal Constituted by

Professor Duncan Chappell
Justice Hassan Jallow
Miss Anesta Weekes QC

JUDGMENT

BACKGROUND

Mr Faruqi (the Applicant), in an application lodged with the Commonwealth Secretariat Arbitral Tribunal (the Tribunal) on 25 July 2001, alleges that there has been a non observance of his contract of employment with the Commonwealth Secretariat (the Respondent) with a consequence that he has suffered damage in respect of which he is entitled to be compensated.

Mr Faruqi's application is made pursuant to the provisions of Schedule 1 of the Commonwealth Secretariat Act 1966 and Article II of the Statute of the Arbitral Tribunal of the Commonwealth Secretariat (the Statute). It was not a matter of dispute between the parties that as a result of these provisions the Tribunal possesses the jurisdiction to hear and pass judgment upon Mr Faruqi's application. As required by Article II of the Statute Mr Faruqi was a member of staff of the Respondent, serving as Director of the Secretariat's Economic Affairs Division for a number of years. Mr Faruqi now alleges that the Respondent erred in a number of ways when considering whether or not to renew or continue his contract of employment. Before bringing this application before the Tribunal Mr Faruqi had also exhausted all other remedies available within the Secretariat (Statute: Article II 2i) and had brought his application within the appropriate time (Statute Article II 2ii).

As part of his application Mr Faruqi sought certain interlocutory relief from the Tribunal. In a judgment of 27 February 2002 (The Arbitral Tribunal of the Commonwealth Secretariat In the Matter Between Rumman Faruqi and the Commonwealth Secretariat) the Tribunal ruled on these preliminary issues. This ruling included a determination that the substantive hearing of the Applicant's claim would be by way of oral proceedings before a three member Tribunal, empanelled by and including the President. A Directions Hearing by telephone was subsequently conducted to agree upon a date for this hearing, and to resolve issues associated with the documentary and personal testimony to be presented. Following this directions hearing the case was listed for hearing over four days in April 2002. However, before the hearing date Mr Faruqi brought an action in the High Court of the United Kingdom in its Commercial Division, challenging the Tribunal's judgment on the interlocutory issues and seeking an injunction restraining the Tribunal from proceeding with its hearing of the substantive issues (High Court Case 2002 Folio 286). On Tuesday 26 March 2002 the High Court refused to issue an injunction. Subsequently, on Wednesday 27 March 2002, the Applicant's solicitors requested the Tribunal for an adjournment of the listed hearing because of the unexpected unavailability of its lead counsel. The Tribunal acceded to this request. A further directions hearing was then conducted to determine how best

to facilitate the conduct of the case. Agreement was then reached between the parties concerning a timetable for the presentation of skeletal arguments to the Tribunal prior to the hearing; the witnesses to be called at the hearing; and the provision of written submissions at the conclusion of the hearing. It was further agreed that the Tribunal would seek to deliver its judgment no later than sixty (60) days after the receipt of the parties' written submissions.

An oral hearing of the case was conducted on 22 and 23 September 2002 before the Tribunal comprising the President, Justice Hassan Jallow, and Miss Anesta Weekes ac. At this hearing the Tribunal received from the parties an agreed set of documents with an index. Subsequent references in this judgment to these documents utilise this index. In addition, the Tribunal heard personal testimony from Mr Faruqi, and from the Secretary-General of the Commonwealth, the Rt Honourable Donald McKinnon. At the conclusion of the hearing both the Applicant and the Respondent's counsel made oral submissions and also submitted written submissions on 27 September 2002.

CHRONOLOGY AND SUMMARY OF FACTS

Very few facts were in dispute between the parties. In addition, the parties prepared a most helpful chronology of the principal events surrounding Mr Faruqi's association with the Commonwealth Secretariat. This chronology, which appears in Appendix I in this judgement, has been utilised by the Tribunal in compiling the following summary of the principal and relevant facts in this case.

Mr Faruqi, the Applicant in these proceedings, is a Pakistani national. He was born on 2 September 1942 in Ajmer in what was then British-India. At the time of the hearing he had reached the age of sixty (60). Mr Faruqi is married and has three (3) children - Alaya, Semar and Uram. The two younger children - Uram and Semar, remain in full-time education and the family continues to reside in London while awaiting the outcome of the present proceedings.

Mr Faruqi, a professional economist has had a long and distinguished career in international financial institutions. In 1987, Mr Faruqi joined the World Bank as an Adviser to the Executive Director responsible for the Middle East and Pakistan. At the time of this appointment he moved with his family to Washington DC.

After serving in several positions within the World Bank Mr Faruqi became aware in 1993 of a position that was becoming available with the Commonwealth Secretariat as a Special Adviser. It would appear that the World Bank had a policy of encouraging its senior officials to gain experience in other parallel international institutions like the Commonwealth Secretariat. If a permanent employee of the World Bank, like Mr Faruqi, wished to gain such experience it was the Bank's practice to allow external service with another approved organisation for two consecutive two year periods which could often be extended further by agreement. During any period of external service long term employment and benefits with the World Bank were retained. In Mr Faruqi's situation this meant that at the expiry of any seconded position he could return to the World Bank until retirement age of sixty two years (62).

By letter of 1 June 1993, Mr Faruqi accepted an offer of employment with the Commonwealth Secretariat as Special Adviser (Economic Affairs) holding the rank of D2 which was the same rank as the then rank of Director, now known as CS2. Mr Faruqi commenced his duties in the Secretariat on 9 September 1993. At the time of this appointment Mr Faruqi was provided with copy of the Staff Regulations and Staff Regulations and Rules of the Commonwealth Secretariat (Staff Regulations and Rules) which set out his terms of employment.

In a letter of 19 August 1994, Deputy Secretary-General (DSG) Sir Antony Siaguru informed Mr Faruqi that the then Secretary General had decided to offer him an appointment as Director and Head of the Economic Affairs Division (EAD) for a period of three years, effective 1 October 1994. The DSG noted: "Your existing contract, salary, 02 terms and conditions of employment remain unchanged, and your appointment continues to be subject to the Commonwealth Secretariat Staff Regulations and Staff Rules as they appear now and as they may be amended from time to time" (Volume 2, Tab 3, Paragraph 2). Mr Faruqi accepted this offer and was placed on a six (6) month probationary period in the new position which he completed successfully.

On 26 July 1995 Mr Faruqi was offered a further contract by the Respondent, from 1 July 1995 until 30 September 1997. It would appear that the need for this further contract to be put in place arose from a request by Mr Faruqi that his initial terms of appointment as a Director should run from the date of that

appointment until 30 June 1995. Mr Faruqi accepted this renewal of his contract appointment on the terms and conditions set out which included being subject to the Staff Regulations and Rules.

In accord with its employment practice that, wherever possible, advice would be given to an officer whether or not a further contract would be offered as nearly as possible one year prior to the expiry of a current contract, the Respondent offered Mr Faruqi on 15 October 1996, a further contract of employment of three (3) years with effect from 1 October 1997. Mr Faruqi accepted this offer of a further three (3) year contract on 5 December 1996. The new contract, like its predecessors, remained subject to the Staff Regulations and Rules.

In August 1997 Mr Faruqi was informed by the World Bank that it would not be in a position to extend his secondment to the Commonwealth Secretariat beyond September 1997 and that he would have to return to Washington DC. Upon receiving this advice from the World Bank Mr Faruqi stated:

"I knew that I had a coveted career position with the World Bank as a regular staff member which provided my family and I with security until retirement at age 62. At this time a considerable amount of restructuring was taking place within the World Bank. There was a prospect that a new severance package for all World Bank staff may be available as one of the options available to me when I returned. Another option I was discussing was to move to one of the regional departments of the bank.

I would not have been eligible for either the severance package or for another assignment at the World Bank if I did not return to base and would lose the valuable rights I had accumulated over a number of years service with the Bank. I still retained a house in Washington DC and it would not have been difficult to relocate my family" (Volume 3, Tab 2: paragraphs 20 - 21).

Upon receiving this advice Mr Faruqi advised the Respondent, on 11 August 1997, that he was giving notice to withdraw his agreement for a second three (3) year term. This advice seems to have been given orally, rather than in writing, to DSG Srinivasan who recorded his conversation with Mr Faruqi in a memorandum, dated 12 August 1997, in the following terms:

"Mr Rumman Faruqi informed me on 11 August that the World Bank would not continue his lien with the Commonwealth Secretariat any longer. His current contract ends on 30 September 1997 and he has already been offered, and has accepted, a new contract of three years. His acceptance of the new contract was based on the assumption that his leave from the Bank would be extended for a further period of three years, which is no longer possible. In order to negotiate the best severance package from the World Bank, Mr Faruqi informs me that he has, at the time of his negotiation with the Bank, to be without any employment.

I have explained the position to the Secretary-General today over the telephone, and the Secretary-General has instructed that Mr Faruqi can be given a new contract from 30 September 1997 to 31 October 1997 only, which will enable Mr Faruqi to cover FMM and CHOGM. All dues owing to Mr Faruqi as on 31 October 1997 will be settled by the Secretariat. When Mr Faruqi returns to the Secretariat in due course, which is expected in January 1998, he will then be considered for another contract with the Secretariat, but clearly there is no guarantee or cast-iron assurance that we could give Mr Faruqi that such a contract would be forthcoming" (Volume 2: Tab 8).

As a result of these discussions Mr Faruqi was offered an additional one (1) month contract to run from 1 October to 31 October 1997. Indulgence of the World Bank in allowing the Applicant to extend his leave to serve one additional month with the Secretariat was sought and obtained. On 16 October the head of the Respondent's personnel and staff development department, Mr John Barber, wrote to Mr Faruqi informing him about his contractual entitlements upon the end of his service with the Commonwealth Secretariat. These included a final payment of gratuity, termination grant, other termination payments, and air tickets for Mr Faruqi and his family to travel back to Washington DC.

Soon after arriving back in Washington DC the World Bank's board approved the severance package arrangements which were to be made available to any eligible staff, including Mr Faruqi. Before accepting this package it would appear that Mr Faruqi called the then Secretary-General to advise him that he was in the position to take up the severance package if he was certain that he would be given a new contract by the Secretariat. The Secretary-General, Chief Anyaoku, indicated that he would discuss this with the DSGs and that they would get in touch with Mr Faruqi. The Respondent's records reveal that on 11

November 1997, only eleven (11) days after the Applicant left the service of the Respondent, DSG Srinivasan advised the Secretariat's Director of Administration, Dr Mutahaba, that he had discussed the Applicant's situation with the Secretary-General who had agreed Mr Faruqi could rejoin the Secretariat on 1 December 1997. The period of his new contract would be communicated by the Secretary-General after he had a discussion with Mr Faruqi. A further annotation appears on the memorandum of this date indicating that Mr John Barber had a discussion by phone with Mr Faruqi, who was then in London but returning to Washington DC. It was agreed that his new contract should start on 8 December 1997.

The eventual term settled upon for Mr Faruqi's new contract was recorded in a memorandum dated 11 December 1997 as two years and six months from the date of the Applicant rejoining the Secretariat. Formal offer of contract was made on 15 December 1997 which in fact was a date after that upon which Mr Faruqi had returned to the Secretariat's employment. The letter confirming the new contract contained a sentence relating to appointments being on probation. However, after this was queried by Mr Faruqi it would seem that this probationary period was waived by the Respondent.

It should be indicated at this stage of this chronological review and summary of the relevant facts that it is not intended to make mention of what expectations may or may not have been present in the minds of the parties concerning these various contractual arrangements. These expectations will be considered later in the judgment when attention is given to the key issues requiring resolution by the Tribunal.

Mr Faruqi's contract of employment which commenced in December 1997 was due to expire on 7 June 2000. The then Secretary-General approved an extension of one (1) year to 7 June 2001 in order to enable his successor, who was to take up office shortly, to consider afresh the appointment of the EAD Director. On 17 September 1999, an offer was made to the Applicant in terms approved by the then Secretary-General, Chief Anyaoku. However, Mr Faruqi did not respond to the offer and on 28 April 2000 he was sent a reminder by DSG Srinivasan. On 4 May 2000 the Applicant annotated this reminder letter in his own hand writing in the following

terms:

"Mr Srinivasan, I am pleased to accept the offer made in your letter of 17 September to extend my contract to June 2001. Since I would have only fifteen (15) months to go to retirement after the latter date, I hope that my final contract would take this into account" (Volume 2: Tab 20).

On 6 November 2000 the new Secretary-General, Mr Donald McKinnon, wrote to Mr Faruqi in the following terms:

"Dear Rumman,

I am writing in confirmation of what I informed you today, namely, that I have decided not to offer you another contract after your present one expires on 7 June 2001, at which date you will have completed over six (6) and a half years as Director in the Secretariat. My decision is taken in conformity with the rotation policy approved by Commonwealth Member Governments and endorsed by senior management at our recent retreat in early October 2000. Sincerely, Don McKinnon" (Volume 2: Tab 21).

It will be seen that the Secretary-General's letter refers to confirmation of discussions which had taken place on the same date at his letter, namely, 6 November 2000. A dispute does exist between the parties about the specific date of this meeting between Mr Faruqi and the Secretary-General, Mr Faruqi claiming that it took place on 5 November 2000 in the Secretary-General's office. Mr Faruqi also disputes the detail of this discussion and, in particular, denies that it included reference to his performance. Further attention will be given to these disputed facts later in this judgment.

The Secretary-General's letter of 6 November 2000 was written in accordance with Staff Rule 53 requiring notice to be given not later than six (6) calendar months before the date of expiry of a contract of whether or not a staff member would be offered further terms of employment. On 8 November 2000 the Applicant requested the Secretary-General to reconsider his decision. Since this request for re-consideration contains a number of important references to the Applicant's expectations and assumptions about his employment with the Respondent it is set out in full below:

"Further to our conversation of Monday 5 November and to your letter of 6 November, I am setting out below a few facts, at your suggestions, which you may find helpful.

I first joined the Commonwealth Secretariat as Special Adviser EAD in September 1993 on leave of

absence from the World Bank. I was then promoted to the position of Director, Economic Affairs Division around October 1994. However, I terminated my contract with the Secretariat in September 1997 and my family and I were repatriated to Washington DC and given all the benefits available at end of service (please see attached).

While in Washington, I was able to negotiate a mutually agreed separation from the World Bank and was re-hired by the Secretariat after a clear break in employment of about 2 ½ months. On re-joining the Secretariat, I was issued with a fresh contract (there was no guarantee or iron-clad assurance that such a contract would be issued) starting in mid-December 1997. It is therefore only fair that the latter date should be taken as the starting date for my employment; this indicates that I would complete only 3 ½ years of continuous service in the Secretariat by June 2001.

It may also be worth pointing out that when I signed the new contract in 1997, it was understood that I would be able to extend my contract up to my retirement date in September 2002. On that basis, I took on personal and family commitments, especially with regard to my children's education, which are not possible to reverse without significant financial and personal costs and extremely disruptive dislocation. I have now been informed that my first contract with the Secretariat as Director, starting in 1994, has been used as the 'starting date' for purposes of continued employment in the Secretariat. This in turn has been taken to mean that the total number of years I have been employed with the Secretariat is six. This reasoning discounts the fact that there was a clear break in employment and that I was in effect hired 'afresh' under the new terms in a new contract.

Furthermore, to terminate my contract in June 2001, only 15 months before my retirement date would, I feel, be extremely unjust, bearing in mind that I rejoined the Secretariat in good faith and on the expectation that I would, in accordance with the usual practice, be offered a "final" contract for either the full 3 year period or up to retirement, whichever comes first. Indeed, it is my understanding that a number of senior staff members in similar positions to mine have had their contracts extend up to retirement. I believe that this is not too much to expect given that I have consistently maintained a good performance record and tried to make a contribution to the Commonwealth's programme in the economic area which has been recognised and appreciated by our governments.

I would therefore be most grateful if you would give the issues that I have raised above your kind consideration with a view to resolving them" (Volume 2: Tab 22).

On 14 December 2000 the Secretary-General responded to the Applicant's request in a letter which set out the considerations relevant to the original decision as well as the issues which the Secretary-General had taken into account in reconsidering that decision. Portions of this letter also require reproduction because of their overall importance and relevance to the issues in dispute between the parties:

.....

"2. The decision not to renew your contract was based on the need to apply the policy of rotation of diplomatic and professional staff even-handedly.

In my memorandum of 9 August 2000 I advised all staff that I intended to follow the procedures set out in the Report of the Change Manager and accepted by governments, namely that staff in the diplomatic and professional grades will serve two, or in exceptional circumstances, three contracts only.

3. In your memorandum of 8 November you advise that you expected to be able to extend your contracts with the Secretariat up until your retiring age in September 2002. You will appreciate that if each officer (or even each officer approaching retiring age) was guaranteed employment with the Secretariat until retiring age, a rotation policy could not operate. Contrary to your belief that other contracts have been extended up to retiring age, I can let you know that two of your colleagues have been advised that their contracts will not be extended to permit them to reach retiring age and they, like you, are within reasonable reach of the age of 60.

4. As you recognise, at the end of your first contract as Director, you accepted a new three-year contract but then asked to be released from this in order to obtain terminal benefits from the World Bank. You explained to us that the Bank was not prepared to extend your leave of absence and that you needed, at the time of your negotiation with the Bank, to be unemployed. Given our efforts to accommodate your

personal circumstances so as to facilitate your separation from the World Bank on the best possible financial terms for you, you were given a onemonth extension of your first contract as Director of EAD on 1 October 1997 to cover FMM and CHOGM that month. Following your negotiations with the World Bank you requested reinstatement in the Secretariat and we offered you a 2 % year contract as Director of EAD. I subsequently confirmed, and you ultimately accepted, the offer of my predecessor that you be offered a further contract for one year expiring in June 2001.

5. You suggest that your break in service should be construed as you being hired "afresh" and hence that your length of service should be calculated from December 1997. My difficulty with this proposition is that we have no letter of resignation from you when you left in 1997. Mr Srinivasan, on 12 August 1997, following your request to break your service, wrote a memorandum which was copied to you. That memorandum contains the following statement - "When Mr Faruqi returns to the Secretariat in due course ... he will be considered for another contract. I accept that there was no "guarantee or cast-iron assurance" given but equally you must acknowledge that both parties were operating on the assumption that you would return to the Secretariat. I think you must agree that this is not consistent with a "normal" resignation. Nor can I consider this very short separation as a break in service.

6. You are also aware that your re-appointment to the Secretariat was not subject to the probationary requirements imposed on new appointees. Indeed the original letter of offer included reference to probation and you specifically sought amendment of the offer to exclude that provision. Your request was granted - underlining the fact that your "re-appointment" was not in fact treated as a new appointment.

7. I can find no reference on your file to suggest that you had been led to believe that your employment with the Secretariat would continue until retirement. An examination of the senior staffing profile of the Secretariat over the years, and specifically, in the years immediately following the assumption of office by my predecessor, reveals that changes in senior staff can be expected when a new Secretary-General assumes office. Certainly you must have been aware that at the time you joined the Secretariat there were significant changes of personnel at director level and that knowledge itself must militate against any reasonable expectation that senior staff have a right to continue employment until retirement age" (Volume 2: Tab 23).

On 5 January 2001, Mr Faruqi wrote to the Secretary-General indicating that he wished to seek commencement of the formal grievance procedure provided for under the Staff Regulations and Rules. Mr Faruqi also indicated that he was anxious that the formal grievance procedure be dealt with expeditiously and that if not resolved to his satisfaction he intended to initiate the arbitral process as well as seeking independent legal advice from here onward (Volume 2: Tab 24).

On 12 January 2001, the Secretary-General responded to this request. He indicated that he would set in motion the measures required to invoke the grievance procedure provided under the Staff Regulations and Rules. The Secretary-General also stated:

"I think you should also be aware that, while my decision not to offer you a further contract was in accordance with the Secretariat's rotation policy, I also took into account concerns expressed by your current and previous line managers as well as my predecessor about your managerial abilities. I also made an observation in this regard in part 4 of your last performance appraisal" (Volume 2: Tab 25).

Further correspondence then took place between the Applicant's legal advisers and the Respondent in regard to the grievance procedure. On 8 March 2001 the Director of Administration advised the Applicant's legal advisers that Ms Tendai Bare, Director of the Secretariat's General Technical Assistance Division, had been appointed to investigate Mr Faruqi's grievance.

Having received her mandate to conduct this investigation Ms Bare (the Investigator) proceeded to undertake her task in accordance with the terms of Office Note Number 59/97: "Commonwealth Secretariat Mechanism For Resolving Contract And Administrative Grievances" (Volume 1: Tab 1). The Investigator noted that she had been advised that Mr Faruqi's correspondence to the Secretary-General dated 8 November 2000 and 5 January 2001, together with his legal advisers letter of 18 January 2001 also addressed to the Secretary-General, constituted the formal complaint. The Investigator further stated that she had followed the terms of reference given to her by the Director of Administration and had

studied key administrative documentation relevant to the investigation as well as conducting interviews as appropriate with persons involved in the decision making process. The Investigator also indicated that: "Specifically, my role was to establish whether a breach of Staff Regulations and Rules, Procedures and Practices had occurred as alleged by Mr Faruqi" (Volume 1: Tab 1, paragraph 1.3).

The Investigator reported on her findings to the Director of Administration on 9 May 2001. She said that her inquiry had established that the Secretary-General decided not to grant the Applicant a new contract at the expiration of his current contract to 7 June 2001 on the grounds of the rotation policy:

"This decision appears to have been based on an understanding on the part of the Secretary-General that Mr Faruqi had been in the service of the Secretariat for a continuous period of employment for seven and a half years and six and a half years in his position as Director EAD" (Volume 1: Tab 1, paragraph 7.1).

The Investigator said that her review of the evidence led her to the conclusion that in fact the Secretariat engaged Mr Faruqi on a fresh contract from 8 December 1997. Therefore Mr Faruqi had been in the Secretariat service for three and a half years by the time his current contract expired. In reaching this conclusion the Investigator also said that she had been mindful of a number of issues including the following:

"It is accepted that the Secretary-General as the Chief Executive of the Secretariat in the management of his staff has the discretion to renew or not to renew contracts. The Secretary-General's decision in this matter was taken in good faith and it is indeed no part of Mr Faruqi's case that this was not so.

Whereas it may have been perfectly understandable that the Secretary-General as the Chief Executive of the Secretariat, on the basis of the information presented to him decided not to renew Mr Faruqi's contract based on the rotation policy, I am of the view that the decision not to grant Mr Faruqi a new contract based on the rotation policy and longevity of service was informed by what I consider to be wrong assumptions and/or facts. The evidence on file and my interviews with the parties has shown that Mr Faruqi's current service with the Secretariat commenced afresh on 8 December 1997 I therefore reach the view that the complaint is sustained" (Volume 1: Tab 1, paragraphs 7.5 and 7.6).

On 18 May 2001 the Director of Administration reported to the Secretary-General that the grievance procedure had concluded and that the Investigator had found the complaint to be sustained. The Director of Administration then advised the Secretary-General to reconsider his decision.

On 23 May 2001 the Secretary-General reported that he had conducted a reconsideration of his decision but he declined to grant the Applicant a further contract of employment. Because of the centrality of this decision to the issues at stake in these proceedings the quite lengthy document setting out the factors taken into account in this re-consideration, as well as the reasons for the eventual decision, is reproduced in Appendix II. It is sufficient to state here that in re-considering his decision in light of the Investigator's report the Secretary-General stated that he had a number of options:

"a) Reconsider the entire issue and reach a new decision which may be to grant a further contract or not to grant a further contract;

b) Reconsider his decision to the extent required by the Investigator's report;

c) Expressly reject the investigator's finding and confirm his decision; or

d) Ignore the decision and confirm his finding" (Volume 2: Tab 32, paragraph 1; Appendix II).

The Secretary-General determined that the appropriate option for adoption in this case was for him to reconsider his decision to the extent required by the Investigator's report (option b above).

On 29 May 2001, Mr Faruqi's legal adviser stated his position in response to this reconsideration decision by the Secretary-General. On 31 May 2001, the Commonwealth Secretariat Staff Association representative also noted his concerns with respect to this decision, claiming it to be at odds with the formal grievance process. On 24 July 2001, an application was made by Mr Faruqi for arbitration of this matter before the Tribunal.

THE TRIBUNAL'S ROLE AND FUNCTION

Having summarised in chronological order the principal and relevant facts in this case, and before turning to the issues and contentions advanced on behalf of the parties, it is important to delineate the role and function of the Tribunal. The Tribunal is established by the Statute (Article I) and it is mandated to hear and pass judgment upon any application brought by a member of the staff of the Commonwealth Secretariat, or any person who enters into a contract in writing with the Secretariat:

"Which alleges the non-observance of the contract and includes, in relation to contracts of service the non-observance of the contract of employment or terms of appointment of such member of staff and in relation to contracts for services the non-observance of the terms of the contract" (Statute: Article II). As has been pointed out in earlier decisions of the Tribunal (see for example *The Arbitral Tribunal of The Commonwealth Secretariat in the Matter of Ms Selina Mohsin and The Commonwealth Secretariat*, Professor Stephen Matlin, and Dr Cream Wright), the Tribunal is an international administrative tribunal and, in accord with Article XIV of the Statute, "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 laws of individual member countries".

As Dr C F Amerasinghe has indicated in his learned treatise on *The Law of the International Civil Service* (Amerasinghe):

"It is also clear that while international administrative tribunals may be international tribunals, their task is to decide internal disputes between international organizations and their employees within the organized legal systems of those organizations, and in the process of such dispute settlement, a tribunal applies the internal law of the organization concerned as the law governing the conditions of employment" (Amerasinghe, Second Edition, Volume 1, chapter 5, page 107).

With these principles in mind it is clear that the Tribunal must, in deciding the present dispute between Mr Faruqi who was a former employee of the Commonwealth Secretariat, and the Respondent, apply the "internal law" of the Secretariat which includes the Staff Regulations and Rules as well as the Grievance Procedure and the Rotation Policy. It is also important to emphasise that the Tribunal, when exercising its role and function, is not a merit review body. The approach which should be taken by an international administrative tribunal when, as it is in this case, dealing with discretionary decisions is succinctly stated in *In re Ballo*, ILOAT 191, 1972 in the following terms:

"Discretionary authority must not, however, be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the tribunal, which has before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the organisation's own rules, whether essential facts had not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority" (*In re Ballo*, ILOAT 191, 1972: 4).

The Tribunal has espoused the approach outlined in *In re Ballo* in earlier decisions (see *Mohsin vs Commonwealth Secretariat*, page 15), and similarly adopts this principle and approach in the current matter. Further, it is an approach which has been referred to by Amerasinghe in his authoritative text. Amerasinghe states that when considering the nature of the control to be exercised over discretionary power, international administrative tribunals:

"will not substitute their own assessments or judgements for those of administrative authorities ... The fact the tribunals do not generally in dealing with discretionary powers make assessments themselves but look for particular defects in the exercise of the power is sufficient proof that they do not substitute their own judgments for those of the administration in reviewing the exercise of a discretionary power" (Amerasinghe; Second Edition, Volume 1, pages 271-272).

ISSUES, CONTENTIONS AND CONSIDERATION

Having set out the principal and relevant facts in this case attention is now turned in more detail to the issues which require consideration by the Tribunal. In regard to the issues both parties, at the suggestion of the Tribunal, prepared a joint list of matters which they considered required resolution. The Tribunal found this list to be most helpful and has kept it firmly in mind as it has reviewed the evidence presented by the parties.

The ultimate issue which requires resolution is that of whether or not a breach of contract occurred in Mr Faruqi's case, and if a breach did occur what is the nature of the damage he has suffered in respect of which he is entitled to be compensated. It was not disputed by the parties that the documents relating to Mr Faruqi's contract of employment expressly incorporated the Staff Regulations and Rules which "embody the general conditions of service and the rights, duties and obligations of the staff of the Commonwealth

Secretariat" (Volume 2; Tab 4). The Staff Regulations and Rules also incorporate a Grievance Procedure (see Volume 1; Tab 1). The Grievance Procedure provides that once a formal complaint has been received an investigation is mandated in order to find out whether or not a breach of Staff Regulations and Rules, procedures or practices has occurred. That investigation is to be carried out by a person who is independent.

The Grievance Procedure further provides that:

"Where the investigator concludes that there is sufficient evidence to sustain the complaint, in that the decision complained of was not made in accordance with the Staff Rules, established Secretariat procedures or normal Secretariat practice in parallel cases, the Director of Administration shall take such action as is necessary to have the matter resolved in accordance with the Rules, Practice and Procedures. The Director of Administration may consult with the DSG (Political) and/or the Secretary-General for the purpose of determining an appropriate means of rectifying the error or resolving the complaint" (Volume 1; Tab 1, page 5).

It was contended on behalf of the Applicant that having made a complaint pursuant to the Grievance Procedure about the termination of his employment, an Investigator had found the complaint to be sustained. It was determined that the decision to terminate Mr Faruqi's employment had not been made in accordance with the Staff Regulations and Rules, established Secretariat procedures or normal Secretariat practice. Accordingly, Mr Faruqi was contractually entitled to have the decision reversed or resolved in accordance with the Staff Regulations and Rules. In fact, in breach of contract and notwithstanding the finding of the Investigator, the decision to terminate the Applicant's employment had not been reversed or resolved in this way with the consequence that Mr Faruqi had suffered substantial loss.

It was further submitted on behalf of the Applicant that the grievance of the Applicant which had been submitted to and adjudicated upon by the Investigator was that the termination of his employment was contrary to the Rotation Policy of the Commonwealth Secretariat because there had been a break in his contract of employment in late 1997. The basis upon which the Secretary-General had decided that his employment should be terminated was that there had been no such break in service. Prior to the initiation of the Grievance Procedure the Applicant, the Respondent and the Investigator all proceeded on the basis that the correct construction and meaning of the Rotation Policy was that if there was a break in service, periods of employment prior to the break did not count for the purposes of applying the Policy. Given the finding in Mr Faruqi's favour by the Investigator, the Applicant submitted that the Director of Administration had failed to take action in accordance with the Grievance Procedure. Rather than ensuring that the matter was resolved in accordance with the Rules he purported to refer the matter back to the Secretary-General who then purported to uphold his original decision on the basis of a different construction of the Rotation Policy. It was not, the Applicant submitted, open to the Secretary-General to take that course. Having been found in breach of the Rules, the Secretary-General was bound by that finding and it was not open to him to maintain his decision on the basis that there had been no such breach because he now preferred a different construction of the Rules. Further, the Secretary-General was estopped from seeking to put forward a different construction for it would enable him wholly to undermine the purpose and effect of the Grievance Procedure which was to provide a mechanism for the independent adjudication of the matter in dispute which was binding on both sides. Accordingly, it was contended that the Applicant was entitled to succeed on the question whether or not there had been a breach of his contractual rights.

In submissions made on behalf of the Respondent it was contended that the Secretary-General had, at the time of each of the decisions he had taken in regard to the non-renewal of the Applicant's contract, properly taken into account the cumulative period of the Applicant's employment with the Secretariat. There was nothing in the wording of the Rotation Policy that referred to the concept of "continuous employment". The independent Investigator had concluded that at the time of reaching his first decision on 6 November 2000, the Secretary-General had wrongly assumed that there had been no break in the continuity of the Applicant's period of employment. The Investigator found that the Applicant's employment had started afresh when he returned from the World Bank. However, the Investigator had not addressed the question of the proper construction of the Rotation Policy, nor were there pleadings or lists of issues considered by her. The Secretary-General had been interviewed but had

not been asked by the Investigator to make submissions on the appropriate meaning to be given to the Rotation Policy. There was, in fact, no agreed construction of this Policy as had been alleged by the Applicant. Nor did the Investigator make any finding as to whether the initial decision of the Secretary-General was made in breach of the Staff Regulations and Rules.

In regard to the actions that had taken place after the Investigator had reported her finding, the Respondent submitted that the Director of Administration had behaved quite appropriately in referring the matter back to the Secretary-General for reconsideration. No other course was open to him. The Director of Administration had no power to quash the decision of the Secretary-General, nor any power to substitute his decision for that of the Secretary-General or to offer the Applicant a new contract of employment.

Upon being asked to do so the Secretary-General had reconsidered his decision. He had not rejected the finding of the Investigator but had come to the view that, notwithstanding her decision that there had not been a break in the Applicant's period of employment, it would in the circumstances of the case be in breach of the Rotation Policy to offer him a new contract of employment. Further, it was contended that there was no basis for the suggestion that this decision had been made by the Secretary-General on the basis of a different construction of that Policy.

Having reached this decision the Secretary-General then had to go on to consider whether there were exceptional grounds upon which to depart from the Rotation Policy and to offer the Applicant a further contract of employment. In reaching a decision on this question the Secretary-General was entitled to consider the Applicant's performance. He had done so and found that there were no exceptional grounds upon which to depart from the Rotation Policy.

The various contentions summarised above, which were advanced on behalf of the parties by their respective counsel, represent a distillation of a far more comprehensive and very helpful series of both oral and written submissions received by the Tribunal. On the basis of these submissions, and having regard to the evidence presented, the Tribunal finds it appropriate to deal with the core issues which require resolution by asking the following questions:

1. What was the finding of the independent Investigator following from her inquiry?
2. As a result of the finding of the Investigator what was required to be done under the provisions of the Grievance Procedure, and did the Director of Administration fulfil his obligations?
3. Can the Secretary-General's re-consideration of his decision be impugned?
4. Did the Applicant have a legitimate expectation concerning renewal of his contract?

1. INVESTIGATOR'S FINDING

As noted earlier the independent Investigator appointed to undertake the inquiry required under the provisions of the Grievance Procedure identified her specific role as being that of establishing "whether a breach of Staff Regulations and Rules, Procedures and Practices had occurred". When reporting the results of her investigation, Ms Tendai Bare acknowledged that she was not writing her report "from the vantage point of being a lawyer. Rather it is informed by common sense" Ultimately, as again has been stated earlier, the Investigator determined that the Secretary-General's decision not to grant the Applicant a new contract under the provisions of the Rotation Policy was "informed by what I considered to be wrong assumptions and/or facts". The "wrong assumptions and/or facts" referred to was the belief by the Secretary-General that there had been no break in service at the time of the Applicant's departure to the World Bank and subsequent return to the Secretariat during the latter part of 1997. The Investigator said that the evidence presented to her showed that there had been a break in service and Mr Faruqi had commenced a fresh contract of service with the Respondent on 8 December 1997.

It is within this framework that it has been contended on behalf of the Applicant that there was a common assumption between the parties and the Investigator that the proper construction to be given to the Rotation Policy was that if there was a break in service, periods of employment prior to the break were not to be taken into account for the purposes of applying of the Policy.

Having given careful consideration to the evidence, and in particular to the Investigator's report, the Rotation Policy, and to the statement and oral testimony of both the Applicant and the Secretary-

General, the Tribunal can find no basis upon which a common assumption of this type can be supported. The Rotation Policy itself was first set out in a Notice issued to Secretariat staff in 1996 (Office Notice 23/96; Volume 1, Tab 1, page 2). The Notice, headed Staff Rotation and Longevity of Service and Career Prospects, stated, in part;

"The Secretary-General has been given the responsibility by member governments for the selection of all Commonwealth Secretariat staff. In making appointments and renewals, the Secretary-General is required by the 1965 Agreed Memorandum on the Commonwealth Secretariat to pay due regard to the importance of recruiting staff on as wide a geographic basis as possible within the Commonwealth. Additionally, in line with the Commonwealth Plan of Action on Gender and Development, he seeks to achieve as far as possible a gender balance of staff at all levels.

Apart from the requirement on the Secretary-General to achieve a regional and gender spread among staff (and to take into account changes in Commonwealth membership), there are other organisational needs which will be significant features of a staff appointment policy. These include the capacity of the Secretariat to respond to the changing demands and priorities of member governments by an appropriate skills balance; the desirability of ensuring a regular inflow of new ideas and energy; the need to meet the Secretariat's programme requirements with the significantly reduced staff numbers within which it must now operate; and the importance both of some degree of continuity and the maintenance of an effective institutional memory.

All this requires a steady turnover of staff, especially at the diplomatic and professional levels. However, a balance has to be struck between the needs of the Secretariat and the understandable requirement of staff for a degree of job security. The 1984 ad hoc Committee on Personnel Administration laid out the principles governing staff rotation, and these continue to guide Secretariat practice. But it is clearly important to staff that the operation of the policy should be well understood by all, including by prospective employees. It is in this spirit that the following agreed guidelines are set out below" (Volume 1, Tab 1, page 2).

The guidelines included a reference to diplomatic staff in the following terms:

"There is a clear expectation among governments that staff at the diplomatic level will serve for a number of years and then move on. Diplomatic Officers may normally expect two (2) three (3) year contracts for the post for which they have been contracted, depending on performance, but the Secretary-General will retain the flexibility to approve or decline extensions as circumstances warrant" (Volume 1, Tab 1, page 2a).

In both his written statement received into evidence by the Tribunal, and in his oral testimony, the Secretary-General made it very clear that member governments expected him to implement the Rotation Policy which was already in place at the Secretariat when he took up his duties. He also stressed that the decision to implement the Policy was not unilateral but one taken with the full participation and agreement of the DSG's and all Directors at the Secretariat. A retreat had been held in early October 2000, at which the implementation of the Policy had been discussed in detail and all of the Directors present, including Mr Faruqi, had said categorically and individually that they accepted that it needed to be implemented. The Secretary-General said that everyone concerned was aware that Directors would not receive further employment after they had served a total of six (6) years in that capacity and that this could be extended, at his discretion, in very exceptional circumstances.

The Secretary-General said that in regard to the non-renewal of Mr Faruqi's contract he had personal discussions with Mr Faruqi on 6 November 2000. At this meeting he had explained to Mr Faruqi that he was applying the Rotation Policy to him and he could not bend the rules on the basis of his personal circumstances. He had written to Mr Faruqi confirming his decision not to offer him another contract on the same day as this meeting. On 8 November 2000, he had then received the request from Mr Faruqi to reconsider his decision on the basis that the Policy did not apply to him because there had been a break in his employment. It was at this point, said the Secretary-General, that he had made inquiries about the circumstances surrounding Mr Faruqi's departure and return in 1997. The Secretary-General said that he concluded:

"That the break in service was done for Mr Faruqi's own benefit and to facilitate his getting whatever benefits he was due from the World Bank. All indications were to the effect that Mr Faruqi was expected to return to the Secretariat, as indeed he did. I also concluded that despite the break in service, the Rotation Policy did apply to him such that he could not receive another offer of contract" (Volume 2, Tab 36; paragraph 10 - emphasis added).

It will be noted that in this statement the Secretary-General took the view that even with a break in service the Rotation Policy did apply to the Applicant.

The correspondence passing between the Applicant and the Secretary-General in the wake of the 6 November 2000 decision has already been set out in some detail earlier in this judgment. It is clear from the letter of 14 December 2000, from the Secretary-General to the Applicant refusing to re-consider his original decision that the Secretary-General did not view the short separation "as a break in service" on Mr Faruqi's part. However, there is also nothing in this correspondence which indicates that the Secretary-General was taking any alternative view regarding the application to Mr Faruqi of the provisions of the Rotation Policy expressed in his original decision.

The same situation would appear to have prevailed at the time of the further correspondence between the Applicant and the Secretary-General in early January 2001, when Mr Faruqi indicated that he was intending to invoke the Grievance Procedure to resolve his complaint. Mr Faruqi made it quite apparent that he regarded the decision not to renew his contract as being extremely unjust because in his view there had not been a continuous period of service in office which brought him within the provisions of the Rotation Policy. Mr Faruqi carried this view forward into the Grievance Procedure process. Mr Faruqi stated that it was his clear expectation that:

"If Miss Bare found in my favour that the Director of Administration would as a matter of course take the necessary action to re-instate me" (Volume 3, Tab 2: paragraph 65).

There is nothing in the evidence given by the Secretary-General to indicate that he shared this expectation of the Applicant, nor that he viewed the issue of whether or not there was a break in service as one which would affect his interpretation of the Rotation Policy. Indeed, when the Investigator interviewed the Secretary-General on 10 April 2001, she raised with him the question of whether he recognised Mr Faruqi had been in continuous service or that the service had been interrupted and he had started afresh. The Secretary-General responded to this question in the following terms:

"I had looked at Mr Faruqi's period of service. He was appointed as a Special Adviser in 1993 and then moved to the position of Director in September 1994. At that time both positions were at the same rank. There was an unusual break in service in 1997 to allow Mr Faruqi to return to the World Bank to sever his connection with that organisation. To enjoy maximum benefits from the World Bank Mr Faruqi had to be able to inform the Bank that he was not employed. I understand that he was allowed to do this as a humanitarian gesture on the part of the Secretariat. He was allowed to resign from this organisation so he could truly inform the Bank that he was not employed.

There is a debate over whether or not the short break in service granted to assist Mr Faruqi's personal situation really interrupts his period of service to the Secretariat or not. I formed the view that Mr Faruqi's total service to the Secretariat was relevant and in particular his service in the position of Director" (Volume 1, Tab C, page 81 a - emphasis added).

In his written statement and personal testimony the Secretary-General confirmed that he had not considered that there had been a break in service as such on the Applicant's part. Nonetheless, this did not change his view about the application of the Rotation Policy to Mr Faruqi as he had explained to the Investigator at the time of the interview.

At the hearing it was acknowledged by the Respondent that, as found by the Investigator, the Secretary-General had proceeded upon a wrong assumption and/or fact. However, as a result of this acknowledgment the Respondent did not also concur with the submission made on behalf of the Applicant that this determination brought into play a common assumption that the Rotation Policy would then not apply to Mr Faruqi. As stated, none of the evidence would support a view that there was a common assumption of the type contended by the Applicant. Nor did the Investigator find that the decision complained of was not made in accordance with the "Staff Regulations and Rules, established Secretariat Procedures or normal Secretariat practice in parallel cases". Perhaps because of her lack of legal training,

and her desire to use common sense language, the Investigator left open the possibility of her finding being construed as establishing a breach of the Staff Regulations and Rules. However, her report contains no identification or mention of any rules, practices and procedures that ought to have governed decision making. Indeed, the Investigator made a positive finding that at all times the Secretary General had acted in good faith. The report also lacks any detail regarding the views of the parties about the proper interpretation of the Rotation Policy, and the effect any finding by the Investigator would have upon these views. Nonetheless, the Investigator did find that the complaint was sustained and the next question to be addressed must be that of determining what action was then required under the provisions of the Grievance Procedure.

2. DIRECTOR OF ADMINISTRATION AND THE GRIEVANCE PROCEDURE REQUIREMENTS

Reference has already been made to the provisions of the Grievance Procedure which set out what is required after a finding by an Investigator that "there is sufficient evidence to sustain the complaint" of a person who has, like the Applicant, invoked the mechanisms of the formal grievance process. As noted above, it was submitted on behalf of the Applicant that upon receipt of the Investigator's finding, Mr Faruqi was entitled to have the decision that had been found to be in breach of the Staff Regulations and Rules reversed. However, rather than acting in this way the Director of Administration took other actions which were, in the Applicant's view not in accord with the Grievance Procedure.

The Tribunal has now stated its view as to the nature of the finding that the Investigator did make on the basis of the evidence before her. It was a finding, which under the terms of the Grievance Procedure required the Director of Administration to "take such action as is necessary to have the matter resolved in accordance with the rules, practice and procedures". The Grievance Procedure is constructed in flexible terms. It does not mandate the reversal of a decision, nor does it indicate that the Director of Administration must act alone in dealing with the matter. In fact the Grievance Procedure says quite specifically that the Director of Administration may consult with "the DSG (political) and/or the Secretary-General for the purpose of determining an appropriate means of rectifying the error or resolving the complaint".

What the Director of Administration did in the Applicant's case, following the receipt of the Investigator's report and finding, was to refer the matter back to the Secretary General for his re-consideration. The question then becomes whether this was an action on his part which was in accord with the provisions of the Grievance Procedure, and the Staff Regulations and Rules at large.

In determining whether or not the Director of Administration acted in an appropriate manner, the Tribunal must apply the principles which have been outlined earlier, drawn from the decision in *In re Ballo*.

The Respondent contended that the Director of Administration had no option but to act in the way that he did. The Director of Administration had no power to quash a decision made by the Secretary-General in regard to the Applicant, nor to substitute his decision for that of the Secretary-General. The Director of Administration also had no power to offer the Applicant a new contract of employment.

The nature of the power flowing to the Director of Administration in general is to be found in the Staff Regulations and Rules adopted by member governments. The following provisions are of particular relevance:

"Regulation 10

Senior staff members may be engaged either on contract or by secondment from their present employers.

Regulation 11

The appointment and tenure of office of the Secretary-General and Deputy Secretaries-General are determined by Heads of Commonwealth Government.

The Secretary-General, in accordance with the provisions laid down in the Agreed Memorandum on the Commonwealth Secretariat of July 1965, has authority to make appointments of staff members below the grade of Deputy Secretary-General, but appointments to the staff are subject to clearance to the extent that their own governments raise no objection

Regulation 26

The Secretary-General may delegate to its Deputy Secretary-General any duty which the Secretary-General is required by these regulations to undertake" (Volume 2, Tab 4, pages 13-14,47).

Having regard to these Regulations, and to the Grievance Procedure, the Tribunal is satisfied that the Director of Administration exercised his responsibilities in a lawful manner when he did refer the matter to the Secretary-General for his reconsideration. The limited delegation power which is permitted under the Regulations is restricted to the DSG's. Thus, there was no lawful way by which the Director of Administration could have taken his own decision about the granting of a new contract to the Applicant. In this regard the provisions of the Grievance Procedure could also not grant additional jurisdiction to the Director of Administration in a manner which would be plainly contradictory to the Regulations of the Commonwealth Secretariat which have been adopted by all member governments.

An appraisal of the Grievance Procedure Rules shows that they are, within their particular constraints, intended to be flexible and to allow the Director of Administration to adopt a remedy that would be most appropriate in the circumstances. It is equally clear that in the present case the power to take the decision in question rested solely with the Secretary-General, and the only lawful way in which to resolve the matter was to refer the decision back for reconsideration by the Secretary-General. The Director of Administration's actions were reasonable, not arbitrary, and exercised in accordance with the internal law of the Commonwealth Secretariat. Further, they were not actions that amounted to a breach of contract as contended by the Applicant.

3. RECONSIDERATION BY THE SECRETARY GENERAL

Having determined that there was a lawful referral by the Director of Administration to the Secretary-General, attention must now be given to his re-consideration of the decision not to grant Mr Faruqi a new contract. The full text of this re-consideration, as already stated, is to be found in Appendix II. In undertaking this review it is important to re-emphasise that the Tribunal's role and function is not to determine whether the ultimate decision was justified on the merits, but rather to ensure that the discretionary power exercised by the Secretary-General was lawful, within the meaning of the principles identified in *In re Ballo*.

It was the Applicant's contention, as outlined above, that the Secretary-General was bound by the finding of the Investigator. It was not open to him to now maintain his decision, on the basis no breach had occurred of Staff Regulations and Rules, by advancing a new construction of these Rules. Further, he was estopped from now putting forward a different construction given that all parties had proceeded on the basis of a common assumption about the interpretation of these Rules.

The Tribunal has already indicated its views about the interpretation given to the Rotation Policy by the parties, and the Investigator. On the basis of the evidence before it the Tribunal is satisfied that there was not a common assumption about this interpretation at the time of the Investigator's inquiry, nor was there any basis for the suggestion that the Secretary-General had up until the time of the inquiry and during its conduct preferred any construction of the Rules other than that cumulative service was the relevant factor under the Rotation Policy.

In the absence of a common assumption about the interpretation of the Rotation Policy, and in the light of the limited finding of the Investigator in her report, the Tribunal can find no support for the Applicant's contentions that the Secretary-General either changed his construction of the Rotation Policy or was estopped from advancing a different construction. The Investigator did not in her findings make any determination as to the construction of the Rotation Policy. The doctrine of estoppel can only operate in such a situation if there has been a clear understanding of the issues upon which a determination has been made and which are binding upon the parties. This is not the situation which is to be found in the present case.

In both his written and personal testimony to the Tribunal the Secretary-General described the way in which he went about undertaking his re-consideration following the referral to him of the Investigator's report by the Director of Administration on 18 May 2001. The Secretary-General said that having read the Investigator's report he considered that her finding took him back to the contents of the Rotation Policy and its spirit and intention:

"At this stage, the question for me was whether the Policy operated so as to disallow its application in cases where there has been a break in service of a member of staff. I considered that if this was the case, the intention of rotation would be defeated, in that staff could arrange to take short breaks, leave the Secretariat's employment and collect terminal benefits and then come back and claim that they were starting anew, and therefore that the Rotation Policy did not apply to them. I did not understand this to be the way member governments expected me to implement the Policy. I determined that the Policy was intended to apply cumulatively to the whole period that a staff member spends in the Secretariat because the idea behind the policy is that employees of the Commonwealth Secretariat are expected to serve the Organisation for a limited number of years after which they are expected to return to their home countries and utilise the experience they have gained while working with the Organisation. I therefore concluded that the finding of the Investigator did not mean that I was estopped from applying the Rotation Policy to Mr Faruqi's case" (Volume 2, Tab 36: paragraph 22).

The relevant issues and considerations which were addressed by the Secretary-General at the time of undertaking his re-consideration of the decision not to grant Mr Faruqi a new contract are set out in substantial detail in the document reproduced in Appendix II. It will be seen that as a component of this re-consideration the Secretary-General took account of Mr Faruqi's performance. In both his written and personal testimony the Secretary-General told the Tribunal that at the time of his meeting with Mr Faruqi on 6 November 2000, he had referred to the issue of performance. Mr Faruqi, on the other hand, denied that performance had been raised at this meeting. He also stated that the meeting had taken place on 5 November 2000, rather than 6 November 2000.

In his personal testimony, the Secretary-General said that at the time of this meeting with Mr Faruqi he was in a quite emotional state, and that he could only believe that Mr Faruqi's failure to recall that he had raised the issue of performance with him could be accounted for by this situation. The Secretary-General also explained that when writing to Mr Faruqi on 14 December 2000, confirming his decision not to offer him further employment, he had not included any reference to the issue of performance because he had not wished

"... to taint Mr Faruqi's future career and professional standing by raising in writing his performance deficiencies. He knew and all concerned knew that there was a problem with his performance but with a generous spirit I decided not to raise the issue in writing" (Volume 2, Tab 36: paragraph 14).

Having heard both parties' personal accounts of what was said at the meeting between the Applicant and the Secretary-General in November 2000, and also taking account of the other documentary evidence presented, the Tribunal prefers and accepts the Secretary-General's testimony in regard to both the raising of performance as an issue, and the date of the meeting. It should also be noted that when writing again to Mr Faruqi on 12 January 2001, about his invocation of the Grievance Procedure, the Secretary-General did mention in writing his concerns about Mr Faruqi's performance. The Secretary-General indicated at this point that he continued to hold a firm view that the Rotation Policy did apply to Mr Faruqi so that he was not entitled to further contracts, but had his performance been exemplary he might have exercised his discretion in his favour.

Having given very careful consideration to the entire circumstances surrounding the Secretary-General's re-consideration of his decision about the granting of a contract to the Applicant, the Tribunal is of the view that he undertook this task in a lawful manner. The re-consideration document of 23 May 2001 indicates that when making his decision the Secretary-General took account of all of the essential facts while applying the relevant Regulations and Rules of the Commonwealth Secretariat. He exercised his discretionary power within the scope of his authority including that of taking account of the Applicant's performance. The Rotation Policy allowed him to do this and the Secretary-General indicated that he remained concerned about Mr Faruqi's managerial abilities. This was not, however, the principal reason for the ultimate decision reached by the Secretary-General not to renew Mr Faruqi's contract. The Tribunal can find no grounds upon which it could justify a finding that in reaching this decision the Secretary-General had breached the contractual rights of the Applicant.

Reinforcement for the Tribunal's views about this issue can be found in the recent decision of M.H.J. and the International Atomic Energy Agency (IAEA) (ILOAT 2138, 2002). The IAEA possessed a rotation policy for professional staff not dissimilar to that of the Commonwealth Secretariat. Applying that policy, the

Director General of the IAEA declined to extend the contract of service of Mr M.H.J. (the Complainant) despite a finding of an internal Joint Appeals Board recommending that the Director General reconsider this decision. In upholding the Director General's decision, and dismissing the Complainant's application, the ILOAT determined that an IAEA staff member like Mr M.H.J. who fell within the ambit of the rotation policy had no automatic entitlement to a further longer term contract:

"A long-term contract is given at the sole discretion of the Director General after the latter has considered several factors outlined in paragraph 8 of the [Staff] notice. The passage from the letter of 25 October 2000 quoted above shows clearly that paragraph 8 was specifically considered before the Director General came to the conclusion that an extension was "not warranted in the complainant's case.

Lastly, the complainant can take no comfort from the case of another staff member in a somewhat similar situation who was given a long-term contract. As indicated, the awarding of such contracts is exceptional and wholly discretionary and the fact that a contract is granted to one staff member creates no rights for any other staff member." (M.H.J. and The IAEA, ILOAT 2138 (2002): paragraphs 11-12).

This ILOAT decision makes it quite clear that when exercised in a lawful manner, discretionary power of the type incorporated in both the IAEA and Commonwealth Secretariat's rotation policies will not be interfered with by an international arbitral tribunal. In Mr Faruqi's case the Secretary-General was entitled to consider the spirit and intention of the Rotation Policy when interpreting its scope and application. The interpretation favoured by the Secretary-General was, quite appropriately, one which maintained the integrity and viability of a policy which had received the endorsement of all member governments of the Commonwealth.

4. LEGITIMATE EXPECTATION

In his written statement, and in the course of his personal testimony to the Tribunal, Mr Faruqi referred to an expectation that he had when re-joining the Commonwealth Secretariat in December 1997 that he would be entitled to two (2) three (3) year terms taking him up to 6 December 2003 (Volume 3, Tab 2: paragraphs 37-39).

In the course of his personal testimony, Mr Faruqi said that he had received an assurance from the former Secretary-General, Chief Anyaoku, at the time of returning to the Commonwealth Secretariat in December 1997, that he would be able to continue in employment until the time of his retirement. He said that if he had not had such an understanding, and assurance, he would either have stayed with the World Bank or moved to another organisation where he could have gained security of employment until retirement.

The Tribunal finds it difficult to accept Mr Faruqi's testimony on this matter. If the former Secretary-General had given such an assurance it would seem almost certain that he would have raised it in writing or mentioned it to his successor, Mr McKinnon. Instead, the former Secretary-General offered Mr Faruqi a one (1) year contract in June 2000, and the expressed reason for that limited contract was to give his successor an opportunity to consider the senior staff compliment and to make his own decisions regarding personnel. Mr Faruqi accepted that one (1) year contract without making any mention of the assurance that he claimed to have been given by the former Secretary-General. Further, Mr Faruqi made no mention of this assurance in his conversation with Mr McKinnon on 6 November 2000, nor did he raise it in subsequent correspondence which led up to the initiation of the formal Grievance Procedure. The assurance was also not referred to in the interview that Mr Faruqi had with the independent Investigator and the Investigator herself makes no mention of it in her report.

The former Secretary-General was not called upon by the Applicant to provide a witness statement nor to give personal testimony to the Tribunal. In addition, during the course of the personal testimony provided by Mr McKinnon, no questions were directed to him by the Applicant concerning this particular issue. In these circumstances the Tribunal has given no weight or credibility to the Applicant's statement about this alleged assurance and his expectations that flowed from it. Additionally, the Tribunal can find no basis upon which Mr Faruqi could have had a legitimate expectation, at the time of his return to the Commonwealth Secretariat in December 1997, that he would be entitled to and receive two (2) three (3) year contracts which would extend his service beyond his retirement age.

CONCLUSION

The principle issue requiring resolution remains that of determining whether or not a breach of contract has occurred as a result of the various matters which have been under consideration in this judgment. The Tribunal concludes, on the basis of all of the evidence, that there has not been any breach and that in accord with the principles of international administrative law, and the particular provisions of the internal law of the Commonwealth Secretariat, the discretionary powers exercised by the Secretary-General in reaching a decision not to renew Mr Faruqi's contract were conducted in a lawful manner. As a consequence of this ruling the Applicant is not entitled to be compensated for any damage pursuant to Article X of the Statute.

Given on this 22nd day of November 2002 in London

Signed:

Professor Duncan Chappell President

Anesta Weekes Q.C. Mr Justice Hassan B. Jallow