SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC /166/2019**
Hearing Date: **6 - 9 February 2024**
Date of Judgment: **17 May 2024**

Before

THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE BLUNDELL
MR PHILLIP NELSON CMG

Between

C2

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT – FOR PUBLICATION

Robert Palmer KC, Nikolaus Grubeck and Julianne Kerr Morrison (instructed by **Bindmans LLP**) appeared on behalf of the Appellant

Rory Dunlop KC and Richard Evans (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Zubair Ahmad KC and Rachel Toney (supported by **Special Advocates' Support Office**) appeared as Special Advocates

MR JUSTICE JAY

INTRODUCTION

1. On 11 September 2019 the Secretary of State for the Home Department ("SSHD") decided to deprive C2 of his British citizenship pursuant to the exercise of her powers under section 40(2) of the British Nationality Act 1981 ("the BNA 1981"). C2 now appeals to this Commission under section 2B of the Special Immigration Appeals Act 1997 ("the SIAC Act 1997").

2. C2 was provided only with a limited amount of information by SSHD. In the notice handed to him at the British Embassy in Afghanistan on the date in question, the following was stated:

> "The reason for the decision is that you are a British/Afghan dual national assessed to be an agent of the Russian Military Intelligence Service ("GRU") and pose a threat to UK national security …"

3. In the Amended First OPEN National Security Statement ("1ONS") dated 21 December 2022, it was stated that C2 arrived in the UK on 3 September 2000 and was granted British citizenship in 2007. He has previously held UK security clearance, and has worked for the then FCO, in the Stabilisation Unit, as a subject matter expert on Afghanistan. From roughly 2011 to August 2021 he was based primarily in Afghanistan. Although he may have provided valuable service to HMG, 1ONS points out that this in itself would be of value to the GRU. Moreover, the fact that he has undertaken work for the US in Afghanistan does not change the position.

4. In the Second OPEN National Security Statement ("2ONS") SSHD addressed C2's lengthy witness statement filed for the purposes of these proceedings. It was not accepted that C2 held Developed Vetting clearance because at the material time he did not meet the requisite nationality requirement. It was accepted that C2 may have had contact with representatives of the Russian State in relation to matters not related to GRU tasking. It was assessed that C2's witness statement had not provided an accurate account of the relationship with the GRU.

5. C2's Grounds of Appeal before us are: (1) the decision that C2 poses a threat to national security is irrational[1] ("Ground 1"), and (2) the decision was procedurally unfair and was made in breach of natural justice in that SSHD failed to give C2 an opportunity to make representations prior to the making of it ("Ground 2").

6. Ground 1 was developed by Mr Robert Palmer KC in a slightly different way in oral argument. It had been suggested by the Chairman of the Commission in an email sent before the hearing that the legal test was arguably different. We will be addressing

[1] See para 2(a) of the Skeleton Argument dated 12 January 2024.

the decision of the Court of Appeal (Peter Jackson, Carr and Elisabeth Laing LJJ) in *U3 v SSHD* [2023] EWCA Civ 811 at a later stage in this judgment.

7. It must be obvious to anyone that this entire case hinges on SSHD's assessment that C2 at the material time was an agent of the GRU. On the premise that SSHD's assessment can withstand challenge in these proceedings, the second-order assessment that C2 posed a threat to national security would not seem difficult to support. It also seems fairly obvious that considerations of proportionality and balance carry close to nugatory weight in these circumstances. If the primary assessment is upheld, the notion that it would be proportionate to deprive C2 of his British citizenship is, equally, not difficult to support. Frankly, it would follow almost as night follows day.

C2'S EVIDENCE BEFORE THE COMMISSION

C2's Witness Statement

8. We are providing a detailed summary of C2's witness statement. It should be understood that the Commission cannot say in OPEN which parts of it are relevant to the national security issue and which parts of it are not. References to paragraph numbers of C2's witness statement, where we consider it helpful to provide them, are given thus: [XX].

9. C2 was born in 1973 in Kabul. He comes from a prominent Afghan family. His father was known to be supportive of the Communist regime. The Mujahadeen came to power in 1992 and formed an Islamic state. In 1994 C2's father was captured by the Mujahadeen and C2 informs us that the family received no news about him for seven years [24].

10. According to C2 he excelled at school. We have absolutely no difficulty in accepting that self-assessment. C2 is also a brilliant linguist whose command of English may be described as close to native, with a full grasp of idiom, nuance and irony.

11. In 1994 C2 decided to leave Afghanistan out of fear that he would be forcibly recruited into the civil war, and with the aid of smugglers travelled across Tajikistan and Uzbekistan into Russia. His evidence is that it was not possible to obtain visas for those countries [28].

12. In Russia C2 says that he lived as an illegal immigrant [32]. However, it was possible to obtain a temporary registration for six months and then to bribe the police to renew registration every six months or a year [30]. Shortly after arriving in Russia C2 undertook language courses and ended up enrolling for that purpose at a university in Moscow. In 1999 C2 met a woman, a Russian national, who became his wife in September that year. After he married he moved into the family house she shared

with her mother. The evidence as to C2's language level in Russian is not entirely clear, but it is a reasonable inference that by the time he left to come to the UK in 2000 it was good.

13. In 1999 or thereabouts C2 travelled to Afghanistan with his wife. He was worried about his mother although his intention was to travel back to Russia [35]. In Afghanistan he was detained by the Taliban on two occasions but his witness statement does not mention any ill-treatment. He secured his release by the payment of a bribe. He was in Afghanistan for 14 days in all.

14. According to [39], although C2 was now married to a Russian national he could not work and would have to wait five years to obtain residency. In the meantime, he was compelled to bribe the police to obtain temporary residency on the same basis as before, i.e. for six to twelve months. C2 felt vulnerable, and decided with his wife to leave Russia and travel to the UK. He hired an agent to ease his passage. The agent successfully obtained a holiday visa to travel to the Caribbean, with a UK transit visa, on the back of a false Russian passport. On arrival at Heathrow airport the agent took his, and his wife's, passports away and disappeared. C2 then applied for asylum on the basis of his Afghan nationality with his wife as his dependant. C2 spoke some English at the time but then went about improving it. Progress was rapid.

15. C2's asylum claim was refused in 2001 but he was granted four years' exceptional leave to remain on the basis of the account he had given of his experiences in Afghanistan. In 2002, after the invasion by coalition forces, C2's father was released from captivity and he managed to come to the UK with about 100 others. He was granted asylum very quickly.

16. C2 completed a BSc in International Politics at Brunel University in 2006 and he then enrolled on an MA course in Intelligence and Security Studies at the same university. He had been told that the course might help him get into one of the intelligence services. MI5 and MI6 gave lectures "behind closed doors" [48]. On 15 July 2008 C2 obtained his MA.

17. In or around 2006 the Home Office approached C2 to work as a linguist. He obtained Counter Terrorism Clearance. He also worked for the Metropolitan Police Service who paid him well. In late 2006 C2 says that he was approached by GCHQ to work for them as a contractor in London. The job required DV clearance [53] and C2 was required to submit to an intensive review process which took several months. He has provided a copy of a form described as a "DV supplement" which is dated 17 February 2007. C2 has also provided a copy of a letter which appears to be from GCHQ dated 22 June 2007 confirming that he would be employed by them for a period of one year less one day. GCHQ, in line with its usual policy, neither confirms nor denies whether the letter is in fact from them. In that capacity he reviewed tapes and transcripts, and it was his role to "make sense of conversations between Taliban members, Afghan officials,

drugs smugglers and other persons of interest" [55]. According to C2, he also carried out some translation work for MI6. When C2's contract came to an end, it was not renewed.

18. It is the practice of the Security Services neither to confirm nor deny employments or engagements of this alleged sort. It follows that we can say nothing more in OPEN about C2's evidence on this topic.

19. On 27 September 2007 C2 was registered as a British citizen. According to him, the whole process was extremely quick and he received the impression that the MoD was behind this [60].

20. At about this time, C2 joined the Stabilisation Unit of the then FCO. According to him, he was required to complete the FCO's own vetting process – "SC plus" [62]. In 2008 he was also registered with NATO in Brussels as a subject matter expert, and for that role he needed, and obtained, NATO security clearance [63].

21. In 2008 C2 was approached to apply for a more senior position. He was appointed to that role in September or October 2009; it lasted until early 2011 [73]. In that capacity he negotiated with senior Afghan officials on behalf of the UK, he worked on a number of counter-insurgency initiatives; he interpreted between MI6 and the Afghan National Directorate of Security ("NDS"), and he frequently accompanied high-level British officials and royalty, including Prime Ministers Brown and Cameron, and then-Prince Charles and Prince William. Much of this work was dangerous (e.g. [78]). As we have said, SSHD does not appear to dispute that C2 did valuable work for HMG during this period, although the exact nature of that work is not accepted.

22. Many Afghan officials believed that C2 was with the UK intelligence services. This belief was based on his studies and his high-level contacts [88]. C2 says that he had access to sensitive material, and that he took his responsibilities seriously. There was one occasion, in 2011 or 2012, when C2 was approached by the Pakistani Intelligence Service – they were fishing for information - and he passed on that fact to the Security Department of the FCO.

23. C2 believes that he did not have any contact with Russian officials at this time.

24. In 2011 C2 accepted an offer from the Afghan government to work in a senior position. Given that part of his role involved overseeing trade relations and supervising Afghanistan's fuel reserves, that inevitably brought him into contact with Russian officials. Given that it was the best quality, Russian fuel was particularly sought after in Afghanistan and a lot of political pressure was required to ensure that this source was sustained [108]. Russia was also the owner of shares in various Afghan state enterprises and extensive negotiations were required. C2 visited Russia on six occasions during this period [110].

25. In 2013 C2 was the victim of an assassination attempt when he was shot in the shoulder by a sniper [115].

26. Within days of that attempt, C2 resigned from his governmental position [116]. He had received a lucrative offer (see below) and the assassination attempt was the final straw.

27. In 2013 C2 acquired Russian nationality. According to his witness statement [118]:

> "I had now been married to a Russian national for a long time, so I was in principle eligible for citizenship, subject to a residency requirement. Whilst I did not live in Russia, I was still registered to reside at my mother in law's address. I filled out an application form and was granted citizenship fairly easily."

C2 explains that with a Russian passport trips to that country would be more straightforward [119].

28. C2's evidence is that after leaving his governmental role he had no further interactions at an official level with the British although both they and the Americans were aware of his Russian citizenship [120].

29. In August 2013 C2 was approached by a fuel trading company to work as their Russia and CIS senior representative [123]. The fuel trading company were based in London but wanted C2 to establish a market in Afghanistan and Central Asia. To that end, C2 set up their offices in Kabul and in Moscow [124]. In all, C2 worked for five years for this company.

30. C2 accepts, as must be obvious, that "fuel is a very dirty business" [129]. He means by this that commissions and bribes are the norm. Specifically:

> "The 'other price' is negotiated through cash. [The fuel trading company] was aware we were making these payments, which were necessary to obtain fuel. If I had to get 10,000 tonnes for approval, the commission the sellers wanted to charge was generally $2-5 per metric tonne. We were billing NATO for these commissions. We had to call them, 'consultancy fees.'"

31. An additional obvious complication was that NATO were being supplied with Russian fuel [130]. A further complication, perhaps slightly less obvious, was that the Taliban often intercepted truck convoys. This meant that the fuel trading company's margins had to be inflated.

32. On one occasion, in 2014, C2 says that he was instrumental in lodging a corruption case with the US Special Inspector General for Afghanistan Reconstruction ("SIGAR"). This was because a number of Afghan companies were striving to collude to fix the price in relation to a lucrative US contract, and the fuel trading company declined to join the cartel. C2 claims that the result of the ensuing investigation was that the US saved $300 million.

33. C2 accepts that his work for the fuel trading company brought him into contact with Russian officials both within and without the Embassy in Kabul. According to [136-137]:

> "The Russian Ministry of Foreign Affairs was the 'face' of the country but everything was authorised by the Russian military attaché's office, which consisted of around 200 people. The Russian Ambassador generally remained in post for around 2 to 3 years whereas Russian military attachés were generally in post for 3-4 years.
>
> The military attaché at the time was called Boris Timofeevich. Before he arrived I had generally dealt with Dmitry Primachuk, who was a Russian deputy military attaché that I met in 2012 whilst I was working for the Afghan government in Kabul (and was in fact introduced at a British Embassy event) …"

34. C2 explains that during this period his interest in Afghan politics continued. The fuel trading company, but not it seems C2, were supporting the incumbent, President Ghani. In 2016 C2's former employer was considering running for president in the upcoming elections (in 2018, later postponed). C2 wanted to connect him to potential funders and to that end in September or October that year he arranged a dinner at the Russian Embassy. Russia was known to have provided material support to Afghan political candidates previously. Present at the dinner were C2, his former employer, the Russian Ambassador, the deputy Russian Ambassador and Boris [141]. The conversation appears to have covered two topics: first, whether the Ambassador and Boris could help provide the fuel trading company with a guaranteed quota of fuel from Russia [142]; secondly, whether the Russians might be able to provide financial support to C2's former employer [143]. It transpired that the people present at the Embassy dinner were not sufficiently senior to pledge the necessary support.

35. Those with the requisite seniority were not prepared to travel to Afghanistan, and C2's former employer did not want the meeting to take place in Afghanistan either: he was afraid of the intelligence services following him and interfering. The Russian Ambassador therefore decided that the meeting would take place in Larnaca, Cyprus [145] and C2 travelled there in December 2016 *en route* to the UK. Boris told C2 that he was only needed for one day but C2 decided to stay for 3-4 days. On the second day, there was a meeting at the Aeroflot offices attended by Boris, Alexander

Pereverzev (Head of the South Asia desk for the Russian Foreign Ministry) and C2 [148]. The topic of discussion was the former employer's candidacy. Pereverzev informed C2 that Russia would provide financial support only if the candidate in question got through to the second round [149]. C2 continued to press his former employer's case for some time but in due course the latter had to back out for want of sufficient financial support [151].

36. In 2018 C2's contract with the fuel trading company came to an end in somewhat acrimonious circumstances. The *casus belli* was the fuel trading company's attempt to compel C2 to engage in sharp practices [155-156]. The detail does not matter for present purposes. In July 2018 C2 was asked by his employer to travel to London and he reluctantly did so. Upon his arrival he was served with a freezing order and a notice to surrender his British passport. The order was made in connection with a claim for damages for the misappropriation of funds [157]. In C2's eyes, this was just a device to keep him in the UK whilst the fuel trading company went ahead with a scheme to sell untaxed fuel in Afghanistan. C2 surrendered one of his British passports but kept the other. With it he returned to Afghanistan. C2 now recognises that he should not have done this – it was considered to be a contempt of court – but he did not have a lawyer assisting him and thought that it would be the best way to extricate himself from the situation.

37. There was another assassination attempt in September 2018. C2's family advised him to pay for a settlement with the fuel trading company and to leave the fuel industry to focus on his political career, which he did [159].

38. In 2018 C2 resumed work for the Afghan government in a different role [161]. He then became involved in the Presidential Campaign of President Ghani. Following Ghani's re-election as president in 2020, C2 was appointed to a different posiiton. He remained in that role until the fall of Kabul in August 2021 [165].

39. In around January 2019 C2 travelled to the US at the invitation of SIGAR. Whilst there, Homeland Security told him that London-based FBI wanted to discuss a potential corruption case with him [167]. On returning to Kabul, however, C2 was advised by the CIA against meeting the FBI in London and not to go there for some time [168].

40. In April 2019 C2 travelled to London to visit his family. According to C2's witness statement, he then had the first of two meetings with the British Intelligence Services. This was at a hotel not far from Brize Norton. For present purposes it is unnecessary to summarise C2's account which is neither confirmed nor denied by the Security Services. As Mr Palmer's first skeleton argument explains (viewing this from C2's perspective), "[C2's] questioning appeared to proceed on the basis that C2 was a GRU agent, or had connections to GRU agents".

41. There is one aspect of C2's evidence in this regard that warrants express mention. C2 says that he confirmed to his interlocutors that he had a NATO Resolute Support badge. C2 remembers that he had sent Boris, or perhaps his predecessor, a photograph of this badge, along with a contract for fuel to NATO, via Facebook or WhatsApp. He did this in order to secure the import of a particular consignment of jet fuel destined for NATO [194]. This was not a secret, and Boris' letter giving the requisite approval would be shared with the NATO office.

42. C2 then returned to Afghanistan. The Security Service then invited him to the UK for a second meeting, and that took place in July 2019; they met at Canary Wharf [202]. Again, a recitation of what allegedly happened on this occasion is not required for present purposes. C2 says that he gave up his mobile phones for examination. He underwent a polygraph test which he was told he had failed. At the conclusion of the meeting C2 was informed that his main interlocutor would write a report to his seniors and they would decide what happened next [211].

43. C2's witness statement concludes with a review of "Individuals of Potential Interest to the UK Authorities". In 2016 C2 had a meeting with Ramzan Kadyrov, Head of the Chechen Republic. This meeting took place in Russia and C2 was acting on behalf of the fuel trading company. In 2019 the Security Service apparently alleged that this meeting was arranged through the GRU. C2 explains that this was not the case [243-249].

44. C2 met Dmitry Primachuk in 2012. This was at a reception at the British Embassy in Kabul to mark the late Queen's birthday (presumably, her Diamond Jubilee). C2's relationship with Dmitry was more personal than professional; he was very much a party animal [253-254]. There were Thursday night parties for a select group of about 30 people from various backgrounds, and Dmitry provided the alcohol [255]. They communicated via Facebook [257]. In exchange for the alcohol, which was difficult to come by in Afghanistan, C2 and his friends clubbed together to provide "hospitality" including flights. They also looked after him and his family when they holidayed in Dubai in 2013.

45. Dmitry was aware that C2 had previously worked for the British government but they hardly discussed work with each other [263]. C2 did not know that Dmitry was a GRU officer (the Security Service neither confirm nor deny that he was) and C2 never suspected that [264]. Dmitry's friends were predominantly female and of European backgrounds.

46. C2 met Boris Timofeevich in 2016. They got on well together [268]. Boris supplied alcohol at cost price. On one occasion C2 remembers sending Boris a photograph via Facebook of the NATO military camp at Kabul airport, the reason being to show him the defence structure there "which could also be installed above the Russian Embassy

as protection against rocket attacks". This was at about the time the Afghan Parliament was attacked by insurgents [268].

47. There were also Facebook or WhatsApp communications between Boris and C2 over fuel quotas. C2 wanted these to be increased. He therefore sent a message along the lines, "please make it 25K or 30K", by which he meant 25,000-30,000 tonnes of fuel [268].

48. According to [269], Boris was never interested in C2's previous work for the British Government. He never told C2 that he was a GRU officer, nor did he invite C2 to join the GRU or to do any tasks for them.

49. Finally, C2's witness statement covers Alina Radchenko. She was the Deputy Head of Putin's administration in the Kremlin and was subsequently appointed as Russian Head of Trade to Cyprus [270]. Alina was in Cyprus in December 2016, and C2 asked Alexander if they could meet. She was not available [273].

C2's Oral Evidence

50. In his evidence in chief C2 stated that when he came to the UK in 2000 to claim asylum the Russian agent – who was paid $10,000-15,000 - prepared a written statement for him. The agent told him to give the statement to the immigration officials. It was taken from C2 at the airport and should be on the Home Office file. The agent explained that this was the story C2 had to advance, and thereafter it was the story that C2 said that he "defended". By contrast, however, when he was allegedly DV'd by GCHQ in 2007 he gave a truthful account which was in line with his current witness statement. C2 said that he told the vetting officer that the asylum account had been embellished.

51. In cross-examination, C2 was asked by Mr Rory Dunlop KC about the statement that was prepared for the purposes of his asylum claim. It is clear from the face of the statement that solicitors were involved although we doubt whether C2 had remembered that when the cross-examination started. According to this statement, C2's father had been responsible for the Propaganda Department of the Ministry of Defence of Afghanistan. C2 claimed to be unaware of that, and said that his agent must have added this detail. Later, he said that he was trying to defend the agent's prepared statement and that his solicitors advised him to stick to that story.

52. C2's account as to how the agent's prepared statement came into being was opaque. C2 said that prior to departure he had given the agent all the background, but the agent said that it would be typed up when they got to England. How that could have happened at Heathrow airport is unclear. No copy of this prepared statement has been produced by C2.

53. The account given in the asylum statement was certainly embellished. Although it records that C2 was in Russia between 1994 and 1999, it claims that he was shot by Taliban gunmen and, by implication, was severely wounded. He was taken by relatives to Pakistan, first of all to a hospital in Peshawar. However, the Taliban caught up with him and he was detained, and often beaten, for four months. Apparently, he travelled to the UK from Pakistan. C2 agreed in cross examination that these were all lies.

54. C2 was asked about the assertion in his asylum statement that in 1994 he applied for a visa to travel to Russia and paid $300. During his asylum interview C2 stated that his paternal uncle got him a Russian visa. Those assertions are inconsistent with his evidence to the Commission that he had travelled illegally. C2's explanation in cross-examination was that in 1994 there was no Russian Embassy in Kabul. However, C2 could not recall whether the agent advised him to conceal the fact that he held a Russian visa.

55. C2 said that when he was in Russia between 1994 and 2000, save for 14 days in Afghanistan, no one tried to recruit him to work for the Russian Security Services. C2 did not know whether the agent who got him to the UK worked for the Russian Intelligence Services.

56. C2 said that his temporary registration (for Russian residence) expired in 2000.

57. C2 was asked about what happened in 2007 before he worked, on his account, for GCHQ. He believes he received a letter saying that he was cleared for the job. GCHQ referred him to other agencies, including MI5 and SOCA. It was his understanding that he was DV cleared to work for GCHQ. C2 denied that he knows perfectly well that he did not have developed vetting. He also denied that he travelled to the UK just to get British citizenship.

58. Asked about his work for HMG in Afghanistan, C2 agreed that as a contractor he knew more about intelligence than did the average Afghan. He was aware, as [77] of his witness statement had made clear, that the CIA representative in Afghanistan referred to himself as the OGA (i.e. "other government agency") representative. Mr Dunlop then asked C2 a series of questions directed to whether he really never suspected that Dmitry or Boris were GRU officers. C2 said that he knew that they were military officers but adhered to the line that he never suspected more than that. He denied that "OGA" and "military attaché" were really cover terms. His relationship with Dmitry and Boris was friendly. They never suggested working against the interests of either Afghanistan or the UK. The position was different with the Pakistani Intelligence Services because they were specifically fishing for information. He could not recall whether the person in question said that he worked for the ISI.

59. C2 agreed, in line with [110] of his witness statement, that the Russian Ambassador came several times to his house in Kabul and that he travelled on six occasions to Russia. He had to explain his movements to the NDS.

60. C2 was asked about exactly when it was that he separated from his ex-wife (he did not formally divorce her until 2022). At [217] of his witness statement, the date he gave was 2012, although in his evidence he said that they were back together in 2013. C2 sought to clarify this by saying that it was in 2012 that he decided to live permanently in Afghanistan, and that his ex-wife had made it clear to him that this was something she was not prepared to do. However, she visited him in 2013 and 2014, and the final decision to separate and then to divorce did not come about until after her meeting with MI5, which was in 2020.

61. C2 was asked about his obtaining a Russian passport in 2013. C2 said that he did not tell the Russian authorities that he had separated from his wife. He did say that he was registered at his mother-in-law's address, which was the truth. She was paying his share of the property tax and utility bills. After his marriage in September 1999 C2 was registered to his mother-in-law's address. A Russian lawyer helped him with the application form. He did not speak to Russian officials about his application.

62. C2 freely admitted that his work in the oil business was corrupt. He was asked about [268] of his witness statement and said that the reference to "25K or 30K" was in fact to cash and not to tonnes of fuel. C2 said that he had access to large amounts of cash.

63. C2 was asked about the visit to Larnaca in December 2016. He denied that the Russian Ambassador was sufficiently senior to provide political support. He said that the meeting had to take place in person and not remotely.

64. C2 was asked about the High Court proceedings in this jurisdiction in July 2018. He claimed that he left the UK following a telephone conversation with SIGAR who wanted pressure to be put on The fuel trading company in Afghanistan. The matter was extremely urgent because The fuel trading company were in such a hurry to discharge fuel on the ground, which would have rendered C2 liable to pay tax there. C2 said that he left the UK within 2 days of being served with the freezing order. He accepted that he made an application to discharge the freezing order. He did not have the funds to fight this claim and said that he did not have a lawyer to assist him. He did not remember attending a court hearing although he did recall surrendering a passport at court.

65. C2 was asked questions about the merits of The fuel trading company's underlying claim, which was essentially based on fraud. He denied that their case was correct, although he admitted settling it for £1.8 million.

66. C2 was also asked about the extent to which he had shared information with Russian officials. He did not think that The fuel trading company's contracts with NATO were confidential. He was pressed by Mr Dunlop on [268] of his witness statement and the photograph sent by him to Boris. It was put to him that the military camp in question was a joint Afghan/NATO camp, and that he was sending details of their defence system. C2's explanation was that he did this in a jokey way, that this information was in the public domain, and that it was not his intention to harm NATO and the coalition.

67. The Chair asked C2 two questions. The first was about military attachés and whether he suspected Dmitry and Boris to be GRU officers. C2 emphasised that in respect of the "NATO/UK presence in Afghanistan, military attachés and defence intelligence [personnel] were usually different people", and that his relationship did not entail them probing for information. C2 then posed the rhetorical question, what information could I give them? The second was whether C2 accepted that he was or might be the sort of person the GRU would wish to recruit. C2 gave a lengthy answer to that question without answering it head-on.

WITNESS FL

68. FL is employed by the Security Service (MI5) in some capacity. There is little that he could say in OPEN and many of the questions put to him could not be answered in OPEN. We cannot say what happened in the CLOSED proceedings save to pay tribute to the sterling efforts of the Special Advocates, Mr Zubair Ahmad KC and Ms Rachel Toney, in probing the CLOSED material in full discharge of their obligations.

69. FL did not accept that Annex A, containing the national security case, had been "over-egged". He was referred to the Salisbury poisonings which took place in the previous year. FL stood by the assessment that, given C2's status as a UK national who had previously held security clearance and been employed within sensitive posts in the UK, that "would be of particular utility to the GRU, as a result of the knowledge that he had obtained in those roles". This was notwithstanding that C2's employment in those capacities had long since ceased.

70. It was put to FL that when bail was objected to by SSHD on 7 September 2021 (cf. 24 August 2021), reliance was not placed on the box, "your release is not considered conducive to the public good". SSHD did not seek to assist us with an explanation. However, the simple point may be that we are examining the position as at the date of SSHD's decision.

71. FL accepted the generality of the proposition that not all military attachés are intelligence officers.

72. FL was asked a number of questions about the alleged MI5/C2 contacts in 2019. These were questions that he could not answer in OPEN (whether this was a topic that was raised in CLOSED can neither be confirmed nor denied).

DISCUSSION AND CONCLUSIONS: THE EVIDENCE

73. In his helpful closing argument, much of which was reduced to writing, Mr Palmer emphasised a number of matters. Save in one or two respects, we propose to focus on those matters which bear on the adverse credibility points made by Mr Dunlop.

74. In relation to the embellished asylum claim, Mr Palmer pointed out that C2 did not conceal that he had been in Russia for five years. He correctly stated that he was a student at the Moscow Institute of Languages between 1995 and 1999. This tallies with C2's evidence that he met his wife there. According to C2's witness statement, he also conducted a fairly lucrative business, enabling him to send money back to his family, but nothing turns on that. Mr Palmer's submission was that C2 was later to give a truthful account when vetted to join GCHQ.

75. Mr Palmer submitted that a number of inferences may be drawn from the DV Supplement that was disclosed for the first time during re-examination. Why, he asked rhetorically, was C2 asked to complete such a form if he was not being DV'd?

76. Mr Palmer submitted that C2 carried out work of great importance for the UK, all of it at considerable personal risk. Subtracting as we think we must an element of hyperbole, we are quite prepared to accept the general tenor of Mr Palmer's submission. He also argued that although C2 accepted that he knew more about the intelligence world than the average Afghan, his knowledge was less than a career intelligence officer. That submission must, of course, be well-founded, although we consider that C2 was apt to downplay his level of knowledge and understanding. He may not have acquired it during his academic studies at Brunel University, but by the time he left the service of HMG he had a range of practical experience. Readers should not infer from this statement that SSHD's case in CLOSED is that C2's recruitment by the GRU took place subsequently: we are making a different point.

77. Mr Palmer pointed out that there is evidence in the public domain to demonstrate that not all military attachés are intelligence officers. We have absolutely no doubt that this is the case in relation to the UK. We cannot comment further one way or the other. The point for the purposes of this OPEN judgment is whether C2 suspected that Dmitry and Boris may have been GRU officers.

78. Mr Palmer made a number of submissions about C2's work for The fuel trading company and the commercial dispute which came to litigation in July 2018. Perhaps his strongest point was that whatever view we might form about the oil trade in

Afghanistan and the rights and wrongs of that commercial dispute, it can have no logical bearing on the fact in issue in the instant case.

79. Mr Palmer addressed C2's contacts with Dmitry, Boris and others, helpfully summarising and explaining the oral evidence he gave. It is unnecessary to repeat those matters: we have already summarised what C2 told us, and his oratorical skills cannot be called into question. Mr Palmer's submission in relation to the Facebook photograph was that the relevant structure was in plain sight and that C2 was indulging in no more than the sort of jokey exchange with Boris that characterised his dealings with him.

80. There is a limit to what we can say about the evidence in OPEN. The concern is that inferences may be sought to be drawn about what is or may be in CLOSED. This concern is particularly acute in a case such as the present where the Security Service have assessed C2 to be an agent of the GRU, and Russia is not a friendly power.

81. However, what we can fairly and properly do is set out our overall impressions of C2 and address the twelve credibility points advanced by Mr Dunlop in his closing submissions.

82. We consider that C2 was an extremely sophisticated witness. He is highly intelligent, quick-witted and cunning. He could see exactly from where Mr Dunlop was coming when questions were posed in cross-examination, and certainly gave the impression that he sought to give himself time either to answer them in part, or to evade them. In other words, he gave unnecessary lengthy answers to a number of questions, and on occasion he did not answer them. He certainly did not come across as someone who is frank, forthcoming and straightforward.

83. When consideration is given to C2's life to date, and at the time of writing he is only 50 years of age, any fair-minded commentator would have to accept that he has exhibited a quite extraordinary degree of enterprise, resource and – on occasion – bravery. Starting from rock-bottom in the UK, he built up a remarkable career making full use of his extravagant linguistic skills, personal charm and keen intellect. C2 appears to have no shortage of self-confidence and betrays no self-doubt. He is an entrepreneur, a fixer, a wheeler and dealer; and more. Somehow, he always manages to fall on his feet.

84. All these things having been said, overall C2 was not a credible or reliable witness. His evasiveness and ego count against him. Furthermore, we think that many of Mr Dunlop's forensic points were well made. We address them in the order in which he advanced them, fully taking into account Mr Palmer's written and oral closing arguments on these topics and all the evidence in the case.

85. First, we are driven to conclude that not merely did C2 tell lies in connection with his asylum application in 2000 (which lies are freely admitted), his explanations for those lies are entirely unconvincing. In essence, they boil down to the proposition that the Russian agent wrote his story for him and that he therefore had to stick to it. Yet, there is no evidence that this happened, and it is entirely implausible. For it to have happened, the agent must have taken a detailed note of what C2 told him when they were still in Russia and then have had the wit and imagination to embellish it in an entirely convincing fashion. There is a wealth of detail that only C2 could have provided. The explanation that he travelled to Afghanistan in 1999 to visit his sick grandmother could only have come from him, yet it does not appear in his witness statement prepared for our purposes. C2's account that the prepared statement was typed up by the agent before travelling, copied at Heathrow airport and then handed to the immigration officer appears far-fetched, particularly in circumstances where the statement has apparently disappeared. We conclude that what really happened is that the agent had no role to play in relation to the asylum statement and that the whole story came from C2 himself.

86. Secondly, although there is force in the submission that C2 has given conflicting accounts as to how he got to Russia in 1994, either with or without a visa, we do not make an adverse credibility finding on that basis. This was, after all, a very long time ago, and recall may not be accurate.

87. Thirdly, there is force in the submission that C2 gave implausible and internally inconsistent evidence about the residence requirements for obtaining a Russian passport. Until he met his future wife in 1999, it may well be that he obtained short-term residence permits on payment of bribes. However, C2 told us that he moved into the family home in September 1999 and, save for a brief visit to Afghanistan in 2000, lived there until coming to the UK in September 2000. C2 said in terms that his temporary residency expired in 2000 (see §56 above). It is unclear to us why he said this if, in line with [118] of his witness statement, he was registered to the mother-in-law's address between September 1999 and 2013. Further, given that there was no suggestion that C2 would ever return to live in Russia – a country that he was describing as lawless and mafia-run – it is not clear why his mother-in-law was somehow keeping some sort of toe-hold for him in Moscow by paying monies unnecessarily, even if they allegedly amounted to no more than "a few roubles".

88. Fourthly, Mr Dunlop submitted that C2 has admitted to bribery and corruption whilst working for The fuel trading company. Without condoning this mode of doing business, we cannot think that much turns on that.

89. Mr Dunlop's fifth to eighth points related to the freezing order and its aftermath. We think that we may take these points quite briefly. C2 did have the benefit of legal advice from a barrister in the chambers where his sister was doing her pupillage (apparently, he is the head of those chambers), and a discharge application was made

with that barrister's assistance. We think that it is probable that C2 did not leave the UK until after the return date of the freezing order, 31 July 2018, on which occasion the discharge application was dismissed. It is highly unlikely that counsel would have pressed the discharge application if he knew that his client had already left the UK. In any case, it would have made better sense for C2 to wait and see what happened. Once he lost, he was aware of the seriousness of the situation and yet decided to flee the jurisdiction regardless, aware that this was a risky strategy should he ever return. Finally, C2 did have sufficient funds to fund the settlement of the claim, and could have released funds by the same means to fight it, had he wished to. Overall, this saga places him in a poor light.

90. Ninthly, Mr Dunlop submitted that it is implausible that C2 never suspected that Dmitry and Boris could be GRU officers, if that is what they were. There is force in that submission. Given C2's acumen and knowledge, it is close to inconceivable that he did not harbour suspicions. If Afghans believed or suspected that he, C2, was working for British intelligence before 2011, it seems unlikely that (a) Dmitry and Boris did not hear about that, and (b) C2 himself did not apply the same thought-process to the Russians.

91. Tenthly, Mr Dunlop drew attention to C2's statement, at [285], that it was not in Russia's interests to see the coalition forces or NATO fail in Afghanistan. Mr Dunlop linked this to C2's statement that the Russians used oil as a weapon. We agree that [285] is somewhat surprising but it may not be Mr Dunlop's strongest point.

92. Eleventhly, Mr Dunlop relied on C2's contradictory evidence relating to the "25K – 30K" in his message, given by way of example, to Boris. On one point, C2's evidence was that this related to metric tonnes of fuel; at another point, it related to cash bribes measured in US dollars. There would be equivalence between the two if C2's oral evidence - $1 bribe per tonne – were correct, although [129] of C2's witness statement gives a rather higher rate. We agree with Mr Dunlop that C2's evidence on this topic was not particularly convincing, although it is possible to imagine that the rate of the bribe may have fluctuated over time.

93. Twelfthly, Mr Dunlop pointed out that C2 has given different and contradictory evidence in relation to what may be called the Boris photograph. According to [268] of C2's witness statement, the photograph was taken to help the Russians with their security arrangements. His oral evidence was that this was just a joke. It was clear from C2's demeanour that he considers that this is an important point against him. We cannot say in OPEN whether he is right about that. What we can say is that Mr Dunlop's submission about contradictory accounts was well-placed.

94. Further reasoning in relation to C2's credibility and reliability is set out in our companion CLOSED judgment. The significance of any or all of the foregoing points, whether taken individually or in combination with others, cannot be discussed in this OPEN judgment.

95. What we can say in OPEN, however, is the following. First, we are entitled to be very wary about some of the assertions given in C2's evidence. This is the consequence of our overall assessment of C2's credibility, or lack of it. Secondly, for an adverse credibility finding to be capable of affording positive support to SSHD's case, it would have to be logically connected to it. Thirdly, it would certainly be fair to say that C2's OPEN evidence does not serve to enhance his position *vis-à-vis* the CLOSED material. Fourthly, it is always to be borne in mind that C2 cannot be expected, as it were, to prove a negative. Ultimately, therefore, SSHD's CLOSED case has to stack up.

THE LEGAL FRAMEWORK

96. In *Begum v SSHD* [2023] UKSIAC 1; [2023] HRLR 6 ("*Begum 2 SIAC*"), the Commission attempted a synthesis of the relevant principles governing section 2B appeals. That synthesis wove into the tapestry the then leading cases in this domain, namely *SSHD v Rehman* [2001] UKHL 47; [2003] 1 AC 153; *R (Begum) v SSHD* [2021] UKSC 7; [2021] AC 765 ("*Begum 1*"); *P3 v SSHD* [2021] EWCA Civ 1642; [2022] 1 WLR 2869; and (at the time of *Begum 2 SIAC*) the decision of this Commission in *U3 v SSHD* (SC/153/2018 and SC/153/2021).

97. A repetition of that synthesis is not required.

98. Since *Begum 2 SIAC*, the Court of Appeal has handed down its judgment in *U3 v SSHD* [2023] EWCA Civ 811. After the hearing but during the course of our preparing this judgment, the Court of Appeal handed down judgment in *Begum 2*: [2024] EWCA Civ 152 ("*Begum 2 CA*"). The parties were invited to provide brief submissions on the impact of *Begum 2 CA*. In terms of the overall approach that this Commission should be taking to appeals under s. 2B of the SIAC Act 1997, the relevant paragraphs in *Begum 2 CA* are 10 and 110-111. These do no more than summarise previous authority.

99. Mr Palmer's core submission was that the correct approach on a section 2B appeal where factual issues arise is that the Commission should make a finding of fact which is capable of being dispositive in an appellant's favour. Applying that submission to the circumstances of the instant case, Mr Palmer contended that we should find as a fact, applying a probabilistic standard, that C2 was not a GRU agent when SSHD's deprivation decision was made.

100. Mr Dunlop's core submission was that some of the Court of Appeal's observations in *U3* were both *obiter* and unclear, and that we should apply the conventional public law approach explained by Lord Reed PSC in *Begum 1*, in particular at para 71.

101. Both counsel developed their respective cases at some length. Their focus was on *U3* and the lead judgment for the Court of Appeal delivered by Elisabeth Laing LJ. We bear their helpful submissions in mind.

102. The House of Lords in *Rehman* and the Supreme Court in *Begum 1* were, as *U3* pointed out [166], addressing the issue at hand at a high level of generality. There was no CLOSED material before them. Further, there was no explanation of how the Commission should evaluate post-decision evidence from an appellant which bore on a state of affairs existing at or before the date of SSHD's decision.

103. There is an obvious tension between on the one hand applying a traditional public law (i.e. *Wednesbury* and *Edwards v Bairstow*) approach to the material that was before SSHD, and on the other an appellate [168-172] approach to later evidence. In *U3* the Court of Appeal had in mind exculpatory evidence from SSHD and the appellant's evidence before the Commission. U3's oral evidence will not have been considered by SSHD until he gave it.

104. We consider that there is no difficulty if the subsequent evidence taken in the round does not help an appellant's case. In such circumstances, the Commission considers all the available material applying the principles laid down in *Rehman*, *Begum 1* and *Begum 2 CA*. If anything, the subsequent evidence may reinforce SSHD's original conclusions. To be clear: the fact that the subsequent evidence may not avail an appellant does not mean that SSHD must be right, applying public law principles. But what it does mean is that the Commission must examine the CLOSED material with meticulous care, ultimately applying public law principles to it.

105. Doubtless hoping that we would take a favourable view of C2's evidence, Mr Palmer submitted on the back of [174] of *U3* that the Commission is empowered to, and must, make a finding of fact on the balance of probabilities that C2 was not a GRU agent. The relevant passage in *U3* reads as follows:

> "In other words, if it considers that it can, and that they are appropriate, it may make findings of fact which may be relevant to the assessment of national security, as long as it does not use those findings of fact as the platform for substituting its view of the risk to national security for that of the Secretary of State. Those findings of fact are the material to which SIAC must apply the tests set out in *Rehman* and *Begum* when it considers a challenge to the Secretary of State's assessment of national security. For example, one of SIAC's tasks is to allow the appeal if there is no factual basis for the assessment. That would mean, in my judgment, that if there were evidence, which SIAC accepted, which showed, for example, that on the balance of probabilities, that U3 had never been to Syria, and that the Secretary of State had mistaken someone else for her, SIAC's duty

> would be to make that finding and to allow the appeal. As long as it respects the limits expressed in *Rehman* and *Begum* when it considers a challenge to the Secretary of State's assessment of national security, SIAC can also make whatever findings of fact it considers it is able to make on the evidence, on the balance of probabilities, and which, in its expert judgment, it considers that it is appropriate to make."

106. The whole of this passage is predicated on there being post-decision evidence that may or may not have been considered by SSHD in subsequent national security assessments, which in the Commission's view alters the evidential picture in an appellant's favour. The hypothetical example of an appellant not travelling to Syria at all assumes that post-decision evidence has come to light which demonstrates that the appellant has been mistaken for someone else. If, on the other hand, the evidential picture remains the same or is now worse from an appellant's perspective, the only finding of fact that the Commission could logically make would have to be to an appellant's detriment. The Commission may be completely satisfied that it is appropriate to make such a finding, but there would be no need to. The appeal would be dismissed on the straightforward basis that, operating within the limits of *Rehman*, *Begum 1* and *Begum 2 CA*, there was material that could justify SSHD's national security assessment.

107. Mr Palmer's submission is entirely academic in the circumstances which have arisen. But if Mr Palmer's submission were right, at least in its widest iteration, the constraints of *Rehman*, *Begum 1* and *Begum 2 CA* would be wished away on the wave of the metaphorical wand. The Commission would be abandoning any application of administrative law principles, and instead carrying out a full merits appeal. That is not the law.

108. Thus the true meaning and scope of [174] of *U3*, read in conjunction with other passages in the judgment of Elisabeth Laing LJ, is moot in the circumstances of this case, in the light of our assessment of C2's evidence. We consider, however, that what the Court of Appeal had in mind was clear-cut, objectively verifiable evidence to the effect that an evaluation of "pivotal" [175] evidence made by SSHD simply could not stand. That would be so even if there were CLOSED material that did support the proposition that the hypothetical appellant was in Syria. That material would be trumped, in this hypothetical, binary example, by compelling or perhaps unanswerable OPEN evidence that demonstrated the contrary proposition.

109. It would still be correct to say, in the hypothetical case under examination, that the assessment that X went to Syria is part of the national security assessment, whether or not the Commission is in a position to contradict it [175]. It may also be pointed out that the general rule is that the Commission's factual findings, if made, cannot overset SSHD's contrary view if there is evidence to support the latter [175, latter part; 186 in particular]. As Elisabeth Laing LJ has explained, the use to which any

factual findings made by the Commission may be limited [175]. However, her stark hypothetical example, although still exhibiting the features we have just enumerated, was clearly intended to fall into a special category.

110. Our preferred approach would be to hold that the statement made in September 2019 that C2 is an agent of the GRU (transposing the tenses to make it clear that the position is being considered as at that date) is not a finding of fact. SSHD is not required to make findings of fact, and the present case falls squarely within the principles set forth by Elisabeth Laing LJ in the first part of [175]. SSHD has, on advice, assessed that C2 is an agent of the GRU. As [175] makes clear, that assessment may have been based on a range of different types of material, some of which may not be "evidence" for the purposes of civil litigation. Intelligence may or may not qualify as "evidence". The assessment may also be based on inferences and secondary facts. The making of assessments of this nature is very much the bread and butter of the work of all the Security Services. As Lord Hoffmann made clear in *Rehman*, there are sound reasons of institutional competence and democratic accountability which mandate an austere approach by this Commission.

111. Had the Commission taken a different view of C2's evidence, and decided for example that he was a highly compelling witness of credibility, reliability and integrity, we do think that uncomfortable issues would have arisen in light of *U3*. Those advising SSHD are experts in the assessment of intelligence, but the making of human judgments are quintessentially for a judicial tribunal. This is particularly the case in a situation where those advising SSHD did not see C2 give evidence and be cross-examined at length until after the hearing started. Fortunately, these uncomfortable issues lie in the realm of the academic and the hypothetical in the circumstances of C2's case.

GROUND 1

112. Given our foregoing legal analysis and our conclusion that C2's credibility does not avail him, Mr Palmer is forced back to the position he advanced in his pre-hearing skeleton argument: that SSHD's decision is irrational.

113. We cannot provide any of our reasons for rejecting that submission in this OPEN judgment; to do so would harm national security. For the reasons set out in our CLOSED judgment, SSHD's conclusion that – at the material time – C2 was a GRU agent is, we think, amply justified. Furthermore, the extent to which we have, if at all, taken into account against C2 one or more of our adverse credibility findings cannot be explained in this OPEN judgment. This is because it would harm national security to give this explication, not least because readers might be able to identify which matters are more important than others.

114. For completeness, we now address Mr Palmer's further submissions on Ground 1 advanced both before and at the end of the hearing.

115. First, Mr Palmer complains that SSHD has failed to provide any explanation in OPEN as to how the core assessment was reached. That is true. The explanation has been given in CLOSED, and we have applied our "powerful microscope" to it turned up to its fullest magnification.

116. Secondly, Mr Palmer submits that, given C2's very full account, we should subject any circumstantial or inference-based allegations against C2 to anxious scrutiny. Mr Palmer expanded on that submission in his closing address to us. We have applied the anxious scrutiny standard. It would be unthinkable that a lower standard might suffice.

117. Thirdly, it is said that no reasonable authority could conclude, in the light of C2's apparently undisputed career history, that he was a GRU agent. Reliance is placed on his work for both the UK and US governments at various times. The only response to this submission that we may give in OPEN is that C2's credentials cut both ways. SSHD has made that point.

118. Fourthly, it is said that the decision failed to consider, adequately or at all, material considerations: in particular, but not limited to, C2's account of his interactions with Russian officials and the valuable work that C2 has undertaken. In OPEN there are two responses that we are able to provide. First, and as has been stated at some length in *Begum 2 SIAC*, the discretionary power under section 2B of the SIAC 1997 is broad, and the matters prayed in aid by C2 could only be "material considerations" if no reasonable decision-maker could fail to take them into account. Secondly, regardless of what matters (as opposed to considerations) SSHD did take into account at the time of her decision, or subsequently, this Commission has considered the evidential picture as a whole. Taking that approach does not help C2.

119. Fifthly, it is said that SSHD failed in her *Tameside* duty to undertake sufficient or reasonable inquiry. Reliance in this regard is placed on what C2 says are the interactions he had with MI5 officers in 2019. The Commission cannot really comment on this submission in OPEN because the MI5 contacts are NCND'd by SSHD. Even if, *arguendo*, what C2 says about them is wholly or substantially true, we do not think that they alter the evidential picture.

GROUND 2

120. C2 accepts that this ground is no longer available to him in the light of para 112 of *Begum 2, CA*. Mr Palmer reserved his position on this point in case *Begum 2, CA* or the instant case goes further.

121. The Commission should, however, express its conclusions on the submissions it received during the hearing. Those submissions were predicated on *Begum 2, SIAC* setting out an accurate statement of the law.

122. On that premise, a duty to permit, or obtain, prior representations does not arise if national security reasons militate to the contrary or the Commission were to conclude that it would be pointless to afford the predicated opportunity.

123. Taking the more straightforward point first, affording the opportunity to make representations would only be of potential value to C2 if he could or might say something to contradict the national security case. However, for reasons of national security he could never have been told anything about the CLOSED material. It follows that he could not say anything useful about the central issue in the deprivation case against him, and although C2 has given a detailed witness statement we have come to the conclusion, following cross-examination, that he certainly is in no better position than he was at the time of the decision. Accordingly, we conclude that it would have been pointless to afford C2 the opportunity he contends for, and that in any event this is an absolutely clear example of a case where even had the opportunity been afforded, it would have made no conceivable difference to the outcome.

124. As for the existence of national security reasons militating against the affording of the predicated opportunity, all that may be inferred in OPEN is that the decision was taken when C2 was outside the UK. We reject Mr Palmer's submission that a favourable inference may be drawn from C2 being invited back to the UK in July 2019 by MI5 (an invitation that must be NCND'd). Beyond this, our reasons for rejecting this limb of Ground 2 are set out in our CLOSED judgment.

DISPOSAL

125. For the foregoing reasons, and the reasons set out in our CLOSED judgment, we have reached the conclusion that SSHD's assessment, on advice, that C2 was an agent of the GRU as at September 2019 is amply justified.

126. It follows that this appeal must be dismissed.