



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/08916/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 22nd July 2015**

**Decision and Reasons
Promulgated
On 13th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**E K
(ANONYMITY DIRECTED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs S Mayman, Solicitor

For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan who has been assessed as born on or around the 24th April 1998. He appeals, with permission, against the decision of Judge Shimmin to dismiss his appeal against the respondent's decision to refuse him asylum and remove him from the United Kingdom.
2. Judge Shimmin outlined the basis of the appellant's claim for asylum at paragraphs 12 to 22 of his decision:
 12. An outline of his claim is that he is of Tajik ethnicity and the family moved to Kabul when he was aged 9. He has 5 siblings. His father is an

administrator in the Education Ministry and well known in political circles. His father had been imprisoned for his political activities when younger. The appellant did not have any details of his father's political activities either now or in the past.

13. The appellant's parents were involved with an orphanage and sometimes he would reside there. He enjoyed playing music particularly the ghichak and violin. He was enrolled in the Afghan National Institute of Music.
14. The appellant recorded some music on YouTube and people in Afghanistan began to recognise who he was. He began to receive threats from people through telephone calls saying that because he played music he was un-Islamic.
15. As the appellant's family was struggling financially he wanted to help them and so he would play in a band and be invited to play at the parties given by influential people in Afghanistan. At first his family did not know he was doing this.
16. People at the parties would also act inappropriately towards him, touch him and this would end in fights. Sometimes people threaten him and on one occasion he was hit in the face.
17. The appellant first went abroad to play with the Institute when he was aged 10. He went to play once in Oman and South Korea and on three occasions in the USA, the last being in the winter of 2013. On 24 April 2014 an application was made for the appellant and several other musicians to play in the UK. A Tier 5 visa was granted. The appellant came to the UK and played in various locations including the Festival Hall in London.
18. The appellant and a fellow child musician decided they did not want to return to Afghanistan and so on the last day of their visit to the UK they ran away from the hotel where the school were staying. After a few weeks later they both informed the police that they could not return to Afghanistan. The appellant initially gave the police a false name before providing them with the correct information.
19. The appellant's headmaster attempted to get him to return but the appellant refused. The appellant's father spoke to him on the telephone and told him that his headmaster had tried to get him to blackmail the appellant to return to Afghanistan. The appellant refused to return and he stayed with a distant relative who lives in the UK. That relative could only accommodate the appellant for a limited period and he now lives with foster parents.
20. The appellant last spoke to his father 21 days before the hearing. Because of problems the family had moved to another area of Kabul. The appellant knows the name of that area and has his father's telephone number although there was no reply when he telephoned a few days ago.
21. The appellant fears that if he returns to Afghanistan the people who made threats against him for playing music or refusing their sexual advances will kill or harm him. He also fears the government because of his father's previous political activities and because, as a prominent musician, he has brought shame on the country by claiming asylum.

22. The appellant arrived in the UK on 14 May 2014 and claimed asylum on 28 July, 2014.
3. Judge Shimmin's reasoned findings are set out at paragraphs 27 to 50 of his decision:
27. The respondent accepts the appellant's identity and that he is an Afghan national. It is also accepted that he is an accomplished musician who has represented his country.
 28. The appellant's age is disputed but I do not find it necessary to make a finding in that regard because at either age he remains a minor for some time to come. Despite being an unaccompanied minor there is a decision to remove him. This is because he is in contact with his parents in Kabul and can return to them.
 29. Whether the appellant was 14 or 15 at the date of his claim for asylum and at his asylum interview, he was a child and I take this fully into account when assessing his credibility.
 30. There is before me the expert report of Mr Tim Foxley dated 11 February, 2015. The expertise of Mr Foxley is not challenged by the respondent and I accept, from his curriculum vitae, that he is well qualified to the report on matters relating to Afghanistan.
 31. Mr Smith acknowledged in his submissions that much of the appellant's story is plausible in that it is in line with the background evidence. I am satisfied this is a correct analysis.
 32. It is accepted that the appellant is an accomplished musician who has played in several countries with his fellow musicians from the Afghanistan National Institute of Music.
 33. In reaching my findings in this appeal I have considered section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and behaviour by the appellant to which that section applies. When he surrendered himself to the police the appellant gave a false name to the authorities of a country where he was seeking international protection. This is a breach of s.8 and I find it damages the appellant's credibility. However, I take fully into account the appellant's lack of maturity find that his actions in this regard do very limited damage to his credibility.
 34. I find the appellant's account in respect of his father's imprisonment at the time of the Najibullah regime is credible. I make the same positive finding in respect of his claim that his father has a low level administrative role in the Education Ministry. The appellant has not attempted to bolster his claim in this regard by elevating his father's position. Furthermore, what the appellant states is regarded as plausible by Mr Foxley (paragraph 18).
 35. With regard to the appellant's claims to have been approached inappropriately at parties Mr Foxley states (paragraph 22):

My biggest concern in relation to music and your client is the pervasive sexual abuse subculture known as "Bacha Bazi" which I would describe as something between prostitution and paedophilia and which takes place in the context of music and dance parties. I think it highly plausible that this is the musical context

into which your client has been unwittingly inserted and is now the cause of the indirect threats being directed at him, as I describe below."

36. Mr Foxley says the appellant has described very plausibly attending parties where he has played music and has been asked to dress as a girl and then been sexually abused. He goes on to state (paragraph 23):

... Traditionally, women are not allowed to dance in public in Afghanistan. Bacha Bazi is a known, documented, practice of dressing up young boys in women's clothing and forcing them to perform at adult male parties - dancing, playing musical instruments.

... The most disturbing thing is what happens after the parties. Often the boys are taken to hotels and sexually abused.

The men behind the practice are often wealthy and powerful. Some of them keep several bachas (boys) and use them as status symbols - a display of their riches. The boys, who can be as young as 12, are usually orphans or from very poor families.

(Qobil, R., 'The sexually abused dancing boys of Afghanistan', BBC News, 8 Sep. 2010)

37. It is reported by Mr Foxley that, although illegal, bacha bazi is on the increase and tolerated by the authorities, even encouraged within some important power groups and individuals. At paragraph 25 he states:

... I suggest that these reports add weight to Master K's claims that government pressure (or at any rate, pressure from committed officials currently within government circles) might be brought onto himself and his family, directly or indirectly, and also that officials, including police, may be unable, or unwilling - or even complicit - to take steps to protect him.

38. Bearing in mind the appellant's musical ability I find it reasonably likely that he has played at such parties and that, in the light of the objective evidence and Mr Foxley's opinion, I am satisfied to the lower standard that the appellant has been approached inappropriately. I find it also reasonably likely that the appellant has been abused and threatened when he has declined to cooperate and indicated that he would report the occurrences to the police. Bearing in mind the background evidence that the police are involved, or at least conniving, I find it reasonably likely that the appellant and his father would not receive help from that quarter.

39. The appellant's representatives asked Mr Foxley for his opinion on the threat to the appellant from the government. The representative's question and his reply are set out at paragraph 26 as follows:

Master K has stated that his headmaster's brothers are government ministers. Please can you comment on the possibility of the authorities being aware of Master K's actions in claiming asylum in the UK and whether they would be interested in taking action against Master K on his return? Please can you comment on whether the Afghan government operates a form of a list of people arriving at major airports?

I note that the Afghanistan National Institute of Music states on its website homepage that it is part of the Afghan Ministry of Education. I find it highly plausible that your client's headmaster has family members also in government. If the headmaster is aware of your client's actions and intentions regarding asylum, then any relevant authorities might quite easily be made aware, particularly if the headmaster wishes any action to be taken against your client. I cannot specifically comment on the nature of security and processing arrangements made at Kabul, but I would be

surprised if there was no form of vetting the names of people arriving in Kabul – particularly if a government body or individual had a keen interest in a specific individual.

40. Mr Foxley is then asked to comment on how safe it may be for the appellant to return to Kabul given that he was threatened previously while living there and has received no protection from the police. Mr Foxley stresses the corruption and poor record for efficiency and capability in the Afghan police. He accepts that the appellant would receive no helpful response from the police. They would have no interest in protecting the appellant and might even be complicit in the sexual abuse.

41. The summary of conclusions in Mr Foxley's report are as follows:

34. Your client provides highly convincing and unpleasant details of sexual abuse. But I think his understanding of the "political" impact on his father might be slightly confused because he might himself not understand the full impact of what may be going here.(sic) At the risk of speculating, I think that this case is about sexual abuse taking place within some official power networks within some aspects of the Afghan government. In the time available to produce this report I am not resourced to go into further detail about governments and the practice of 'bacha bazi'. But bacha bazi should be seen in the same light as prostitution and paedophilia rings. If this is exposed it might have any number of ramifications within the Afghan government. I suspect this is the sort of practice that President Ashraf Ghani would have no problem with clamping down on. This would put a lot of people's careers, reputations and incomes at stake. If your client is seeking asylum and is prepared to speak clearly about bacha bazi, this is at least highly embarrassing for your client's headmaster, even if he is not directly complicit himself (which I would actually also find plausible). All these issues risk coming to light in the context of your client's asylum case. I find it plausible that your client and his family could be at some risk of persecution in Kabul.

35. I feel the Home Office is unduly focusing on "inconsistencies" (passport dates, claiming asylum at the earliest moment, etc) in your client's case, in fact everything other than the implications and import of the highly disturbing sexual abuse aspect. I am sure that the Afghan government as a whole does not consider your client to have left the country illegally, but this is surely verging on irrelevant.

36. This could become a highly sensitive political issue in Afghanistan. In addition, it might be a very difficult issue for Master K and his family to speak about and come to terms with. Although in Afghan society, certain groups or individuals are certainly inclined to "look the other way" or even encourage it, there is much shame attached to bacha bazi for the young participants and this could easily transfer to the family and to other individuals implicated.

42. From the above I conclude that the appellant is really only at risk if:

(a) he continues to play at parties which could possibly be bacha bazi parties;

(b) he reports to the authorities and/or speak out to the media about those who have assaulted him at bacha bazi parties.

43. I find that if on return to Afghanistan the appellant remains silent about these matters he has not established that he would be at real risk of serious harm.

44. It is with some regret that I must make this finding because it means the offenders will continue to go un-reported and punished.
 45. With regard to the appellant's claim that he has received threatening telephone calls for simply playing music Mr Davison was not able to direct me to any evidence that anyone had been persecuted for such activities. If the problem was serious I would have expected there to be reports of attacks on musicians including the Institute and its adult musicians and teachers.
 46. In his report (paragraph 21) Mr Foxley states that music is much more widespread and accessible inside Afghanistan but the issue is not straightforward as the country's culture is still very conservative. Attempts to bring versions of 'Pop Idol' to Afghan TV lead to death threats to at least one female Afghan performer whom it was thought had danced too inappropriately. I find that this is a far worse breach of the country's conservative culture and traditions than that perpetrated by the appellant. The female performer was performing music to a very wide audience and the complaint was about dancing rather than the music she was performing. Furthermore, this 'offence' was perpetrated by a woman, which appears to be more serious than such activities by a man. Threats were made but they were not carried out.
 47. Having carefully considered all the available evidence in this regard I find the appellant, particularly as he approaches maturity, will not be at real risk of serious harm when performing in public in Afghanistan. He will simply have to be careful about where he performs.
 48. I have considered these restrictions on the life of the appellant in holding his tongue in respect of bacha bazi parties and where he plays his music in the light of the caselaw on homosexuality. Mr Davison acknowledged that he could not compare the appellant's musical talent/activities to homosexuality but submitted that it was 'not far short'. Requiring a person to act contrary to his normal behaviour in order to avoid persecution has been examined by the Supreme Court in HJ (Iran) [2010] UKSC 31. I find in the appellant's case the discretion that the appellant would have to exercise is not sufficiently, unreasonable, serious or debilitating as to substantially hamper his way of life. I find he can reasonably be expected to tolerate this situation. It will ease as he becomes an adult.
 49. Taking the above conclusions into account I find on the facts as established, that the appellant would not face a real risk of persecution on return to Afghanistan for a Refugee Convention reason and, especially given the high threshold of conduct which is necessary to find that he would face torture, inhuman or degrading treatment, I find that rights under the Human Rights Convention with respect to Article 3 would not be infringed by his removal.
 50. For the same reasons I find the appellant is not entitled to humanitarian protection under Paragraph 339C of Cmnd 6918.
4. Two grounds of appeal are raised against the above reasoning. I shall take them in what I consider to be ascending order of merit.
 5. It is argued that the judge erred in holding that it was reasonable to expect the appellant to abandon his career as a musician so as to avoid

“persecution” on account of his alleged membership of “a particular social group”. However, I reject the premise upon which that argument is based. Whilst apparently conceded by the respondent in the ‘Reasons for Refusal Letter’, I do not accept that as a matter of law a professional musician is member of ‘a particular social group’. Whilst it is debatable whether musical talent is the product of nature (and thus an innate characteristic) or of nurture, the decision to earn a living as a professional musician is simply a career choice. Thus it was that McCloskey J accepted the Secretary of State’s contention that “the Refugee Convention does not protect a right to pursue a profession of one’s choice” [**MSM v SSHD** [2015] UKUT 00413 (IAC), at paragraph 50]. The distinguishing feature of that case was that the appellant risked being persecuted, not as the result of his chosen career, but due to his imputed political opinion. The Tribunal thus concluded that, “the fact that the imputation of political opinion arises in the context of the Appellant’s chosen profession is immaterial and incidental”. That is a feature which in my view clearly distinguishes it from the facts of the instant case.

6. It is true that the appellant’s case was in part put upon the basis that public performances of music were considered by many in Afghanistan to be ‘un-Islamic’. However, this implies that such performances are pursued professionally rather than for the private satisfaction and enjoyment of the performer. The other basis upon which the appellant’s case was put was that he was at risk from those for whom he had performed in the past. However, that risk did not arise from the appellant being imputed with a political opinion. Rather, it arose from a desire on the part of those who might wish to harm him to prevent their sexual abuse of children being exposed. That brings me neatly to the ground of appeal that I consider has rather more merit.
7. It will be recalled that Judge Shimmin concluded that the appellant would be at risk if he reported the abuse that he and others had suffered to the authorities. It follows from the fact that he thereafter dismissed the appeal that he must therefore have overlooked the appellant’s claim to have already done so [see paragraphs 6 and 9 of the appellant’s statement dated the 26th November 2014]. Given that the judge found that the appellant was a generally credible witness, Mrs Mayman argued that there was no basis upon which he could or would have disbelieved this particular aspect of the appellant’s account. I agree with that analysis. Indeed, Mrs Pettersen did not seek to persuade me otherwise. She did however argue that the judge’s error was immaterial given that it was the appellant’s case that the police had not followed up his complaint. That does not in my view provide a sufficient answer to the argument of Mr Foxley, upon whose evidence Judge Shimmin concluded that there was at least a contingent risk of harm to the appellant upon return to Afghanistan. Mr Foxley’s evidence was to the effect that there are powerful people in Afghanistan who would seek to silence the appellant if they considered that he was willing to place their careers, incomes and reputations at stake by reporting matters to the authorities. I therefore conclude that the judge made a material error of law and I set aside his decision. In remaking that decision, I preserve each of the judge’s factual findings save that I am satisfied that the appellant has already

placed himself at risk of “serious harm”, for the purposes of paragraph 339C of the Immigration Rules, by making a report to the Afghan police about occurrences at the various bacha bazi parties at which he has performed. Moreover, in view of Mr Foxley’s evidence that the police may be complicit in such occurrences (which Judge Shimmin again accepted) I am satisfied that the appellant could not avoid that risk by relocating within Afghanistan.

Notice of Decision

8. The decision of the First-tier Tribunal to dismiss the appeal is set aside and is substituted by a decision to allow the appeal on the ground that the decision is not in accordance with paragraph 339C of the Immigration Rules in relation to the granting of humanitarian protection.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Kelly