Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03023/2017**

THE IMMIGRATION ACTS

Heard at Royal Court Justice	**Decision & Reasons Promulgated**
On 3rd July 2017	**On 5th July 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss M. Butler, Counsel instructed on behalf of the Appellant
For the Respondent: Mr D. Clarke, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Algeria.

2. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who in a determination promulgated on the 1st May 2017 dismissed his claim for protection. The Appellant's immigration history is set out within the determination at paragraphs 3-6 and in the decision letter issued by the Secretary of State. It can be summarised briefly as

follows. The Appellant arrived in the United Kingdom on the 17th May 2015 having been granted a business visa on the 4th December 2014. He remained in the UK after his leave expired. He was encountered on an enforcement visit on the 8th January 2017 and after removal directions were set he made a claim for asylum which resulted in a substantive interview and a decision letter issued by the Secretary of State dated 10th March 2017 in which his application for asylum was refused.

3. The basis of the Appellant's protection claim is recorded in the decision of the First-tier Tribunal at paragraphs [13] to [19] which is also referred to in the detailed reasons for refusal. His claim for protection related to fear on return to Algeria; he had worked as a trader but had made losses from his business and had received threats from those who traded with. He also had not undertaken is military service despite having received a summons to do so. It failed his first appointment after receiving call-up papers and after receiving a second summons have been granted a deferment. He left before the third summons would have been issued and thus feared return on account of not attending to military service. He feared being punished disproportionately for not undertaking military service and fear that he would be forced to fight.

4. The Appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal on the 19th April 2017.

5. The judge set out her findings at paragraphs [90] to [119]. It had been conceded on behalf of the appellant that whilst he did have business problems, this was not part of his asylum claim and relied upon his claim relating to military service. The judge considered the appellant's evidence relating to his claim to have failed to attend for military service. The judge accepted the documents provided were genuine (paragraph 99) and considered them in the light of the country materials. The judge made reference to his failure to produce third summons. At paragraphs 101-103 the judge considered whether the appellant was a conscientious objector but found that he had not stated this in his screening interview or in his asylum interview and that had been raised in submissions following the screening interview. Furthermore when asked if he had been a member of any organisation for conscientious objectors, the appellant had said he had not. The judge therefore found that if he was a conscientious objector he would have contacted one of the organisations in the United Kingdom. The judge considered military service and that the penalty for draft evasion was imprisonment for 2 to 10 years. The judge acknowledged that there was no alternative service offered in Algeria but in any event had not found the appellant to be a conscientious objector. Thus whilst the judge accepted that the appellant may not choose to undertake military service, he was not a conscientious objector and that he provided no evidence that it received third call-up papers and that registering late for military service would cause him any problems. Thus the claim for protection was dismissed on all grounds.

6. The Appellant sought permission to appeal that decision and the grounds are set out in the papers dated 17th May 2017. Designated Immigration

Judge Shaerf granted permission to appeal on the 25th May 2017 in the following terms:

"the grounds for appeal focus on the judge's decision on the issue of the appellant's draft evasion. The appellant asserts that he is a conscientious objector. It is arguable the judge erred in her consideration of this. She accepted he was a draft evader but the findings of fact at paragraphs 101 – 104 and 112 are arguably insufficient to support the conclusion that the appellant is not conscientious objector. Consequently permission to appeal is granted but only on the grounds relating to the appellant's draft evasion and the jurisprudence in Sepet and Bulbel [2003] UKHL 15."

7. At the hearing before this Tribunal Miss Butler, who had drafted the grounds relied upon those that were before the Tribunal and by reference to her skeleton argument.

8. There are three grounds advanced on behalf of the appellant although the grant of permission by Designated Immigration Judge Shaerf granted permission on grounds one and three only. Ground one relates to the failure of the judge to give anxious scrutiny to the claim and to give sufficient reasons for finding that the appellant was not a conscientious objector to military service. The remaining ground relates to the whether the decision of the House of Lords in Sepet and Bulbel is still good law in the light of the status of conscientious objection in international law. It is common ground that if the appellant succeeds on ground one, it is not necessary to consider ground 2 as the first ground relates to the factual circumstances of the applicant's claim. I have therefore considered ground one in the light of the submissions that I have heard from both parties and by reference to the written documentation including the skeleton argument produced by Miss Butler and the rule 24 response provided on behalf of the Secretary of State.

9. In the rule 24 response it is submitted that there were a number of reasons given by the judge for the factual finding that the appellant was not a genuine conscientious objector to military service. However a reading of the determination demonstrates that the judge gave two reasons for reaching that decision. Firstly, that he had not stated that he was a conscientious objector in the screening interview or his asylum interview (see paragraphs 101) and secondly, that he was not a member of any pacifist organisation.

10. When considering whether those reasons were sufficient to reach such a conclusion, it is necessary to consider the evidence and the way that the case proceeded before the First-tier Tribunal. Miss Butler has set out in the skeleton argument the requirement for the judge to consider claims for protection with anxious scrutiny which involves taking into account every factor which might tell in an asylum seekers favour (see R(YH) v SSHD [2010] EWCA Civ 116). There is also reference to the UNHCR Handbook at paragraph 174 dealing with the establishment of conscientious objection. Against that background she submits that there was a failure to make

sufficient enquiry both during the interview and during the hearing relating to this issue which had been raised by the appellant in his evidence both in the interview and in the further representations sent by his legal representatives. This was further referred to by the judge at paragraph 78 of the determination. However only one question was asked by the judge and in the circumstances the findings were insufficient. She submitted that the judge had made no general adverse credibility findings and had in fact accepted large parts of his evidence (see paragraphs 95, 96, 98 and 105). She also made reference to the appellant's screening and asylum interviews and that the alleged failure to raise conscientious objection was not put in cross examination or by the judge. However that had been relied upon by the judge for rejecting his claim (based on failure to raise the issue) thus he had been denied the opportunity to respond to that. Similarly, the judge relied upon his answer that he had not joined any pacifist organisation in the UK but that he was not asked any reasons as to why that would be the case by reference to his own personal circumstances.

11. Mr Clarke on behalf of the respondent submits that there was no reference to the screening interview to any conscientious objection to military service and similarly in the asylum interview. He further submits that there was no evidence from the appellant in this regard and consequently it is not incumbent on either the interviewer or the judge to raise the issue and to ask further questions concerning this issue. He points to the lack of evidence in the witness statement and that his case had previously focused on his fear of traders. In the interview, he points to the end of the interview and question 116 and that the appellant did not try to add anything and when taken in the round, the judge's findings were sufficient to reach the conclusion that he was not a genuine conscientious objector.

12. The appellant's screening interview was carried out on 20 February. Whilst it is right that he did not mention the issue of conscientious objection in the screening interview, I do not find at this by itself demonstrates that he had not raised the issue during the course of his case. The preamble to the screening interview makes reference to providing a "brief outline" and that the appellant will be able to give full particulars at any asylum interview at a later date. Whilst the appellant made reference to his business problems (see paragraph 4) he did make reference to military service at paragraph 5.2 and that he had not undertaken his military service. At paragraph 73 of the determination the judge records the appellant's evidence, that he had been told that he screening interview that he would be given an opportunity to give any other reasons at his substantive interview but when reaching a conclusion on this issue, the judge makes no reference to this explanation (see findings of fact at paragraph 101).

13. In his asylum interview on 2 March 2017, he was asked a number of questions concerning his fear of business traders. However questions 32 onwards the interviewer asked questions concerning whether he feared others in Algeria. In answer to a question at question 33 the appellant

made reference to being summoned to join military service and the difficulties with this and at question 34, when asked if he feared the government he responded that he did fear the government because they wanted to force him to take part in a war that "I am not convinced of". He made reference to his fear in the context of avoiding the army and that he could be punished. Whilst Mr Clarke submits that there was no duty on the interviewer to take this further, in my judgement it must have been clear that the appellant was articulating a further reason why he was in fear of return which gave rise to a claim possibly based on conscientious objection particularly when seen in the light of the country materials. However the interviewer did not ask any further questions. The interview did however return to military service at question 101 onwards concerning letters/summons relating to why he did not undertake military service. There were no further questions asked about his conscientious objection. On the face of it, this was a new ground advanced by the appellant but no further questions were asked of him. Against that background I do not consider that the judge's finding is made out or was sufficient in the circumstances.

14. The representation sent by his solicitors on 8 March did raise the issue further. Whilst Mr Clarke submits that the challenge raised to the interview questions related to other issues, at page 3 of the representations the letter clearly stated "conscientious objection" and referred to this in the context of the objective evidence and the country materials and expressly made reference to the appellant claims a conscientious objector and that he did not wish to go to war as it would "offend his religion beliefs and moral values." It was therefore clear in my judgement that this was a ground being advanced on behalf of the appellant and he provided further documentation relating to the issue of military service which were attached to a letter of 13 March. That letter again reiterated the basis of the claim based on conscientious objection that he did not wish to engage in war.

15. The refusal letter was issued on 10 March and gave consideration to the risk on return as regards military service (page 8). However the refusal letter did not express any adverse credibility findings concerning this issue or whether the appellant was in fact a conscientious objector or the genuineness of this. It is against this background that the hearing took place. I am satisfied after hearing the submissions of the parties that the appellant's representative appears to have approached the hearing on the basis of the refusal letter did not expressly challenge the genuineness of his conscientious objection and that those circumstances it was accepted. This was supported in my judgement by the lack of evidence in chief expanding on this and importantly the lack of cross examination relating to this issue. The judge however was alert to this issue are set out at paragraph 78 where the judge recorded: – "I then asked Mr X some questions. I noted that he stated (in his submissions) that he is a conscientious objector. I asked whether he is a member of any conscientious objectors organisations, either in Algeria or in the United Kingdom. Mr X stated that he was not. Nor could you name any organisation. Mr X said he had no knowledge of any organisations."

16. It is plain from this paragraph that the judge did recognise that this was an issue. The judge had been referred to the UNHCR Handbook and had made reference to it in the determination at paragraphs 59 – 63. The judge however did not record paragraph 174 which makes reference to the reasons given for conscientious objection and in particular that there should be a "thorough investigation of his personality and background." Consequently if the judge was going to reach a conclusion on the evidence that he was not a genuine conscientious objector, it was necessary for this issue to be ventilated given that the refusal letter did not raise any adverse credibility issues. It was insufficient in my judgement to ask the one question that was set out at paragraph 78 relating to pacifist organisations in the UK. As Ms Butler submits, there was a requirement of anxious scrutiny. I do not think that the judge was assisted by the advocates and there was a misunderstanding as to the basis upon which the hearing proceeded which led to this situation. However once it had been identified by the judge it was necessary for a greater consideration.

17. The only question asked related to whether he was a member of a pacifist organisation (see paragraph 78] which led to the finding at paragraph 103 that had he been a genuine conscientious objector that he would have contacted one of the organisations in the UK. There are a number of issues arising from this finding. As Ms Butler submits, there is no requirement in law or practice that someone who is a conscientious objector must show that they are a member of any pacifist organisation to prove the genuineness of their belief. The UNHCR Handbook makes reference to personality and background rather than affiliation to any such organisation. Furthermore, no questions were asked as to the circumstances of the appellant in the UK, such as his knowledge of English to determine whether joining such an organisation was either feasible or realistic when reaching such an adverse credibility finding. In my judgement then, the two reasons given for rejecting his factual claim of being a genuine conscientious objector were insufficient in circumstances where there was no dispute that Algeria has compulsory military service with no alternative for those who are conscientious objectors. For those reasons I am satisfied at the determination demonstrates an error of law. Thus the decision cannot stand and will be set aside.

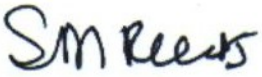
18. As to the remaking of the decision, both advocates submitted that the correct course to adopt in a case of this nature would be for the appeal to be remitted to the First-tier Tribunal because it would enable the judge to consider the Appellant's evidence in the light of the objective evidence and any issues of law arising from the factual findings made.

19. In the light of those submissions, I am satisfied that this is the correct course to take and therefore I set aside the decision of the First-tier Tribunal and it will be remitted to the First-tier Tribunal to hear afresh.

Decision:

The decision of the First-tier Tribunal involved the making of an error on a point of law and is hereby set aside; it shall be remitted to the First-tier Tribunal for a further hearing.

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. The 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: 4/7/2017
Upper Tribunal Judge Reeds