**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/00076/2014

**THE IMMIGRATION ACTS**

| **Heard at Birmingham** | **Decision & Reasons Promulgated** |
|---|---|
| **On 17 March 2016** | **On 25 April 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**FERNANDO SANCHEZ TAMAYO**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr H Sawar, Counsel, instructed by UK Migration Lawyers
For the Respondent: Mr I Richards, Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Gribble (the judge), promulgated on 28 April 2015, in which he dismissed the Appellant's appeal. That appeal was against the Respondent's decision of 29 November 2013, refusing the Appellant's human rights application and to remove him from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999.

2. The Appellant is a Colombian national, born on 17 December 1966. He originally arrived in this country back in 1996 as a student. In 1997 he clamed asylum. After one of several unexplained delays in processing the Appellant's applications, a substantive asylum interview date was set for 27 September 2000. The Appellant failed to attend this appointment, a fact which is central to the present appeal. The asylum claim was summarily rejected. On an unspecified date in 2000-2001 the Appellant married British citizen. An application for leave to remain as a spouse was made and rejected. A subsequent appeal was dismissed on 14 March 2003. Further representations and applications were then made to the Respondent. On 22 July 2011 a final application was made. This was initially refused without attracting a right of appeal, but following a request the matter was reconsidered by the Respondent on 29 November 2013 and a right of appeal granted. The basis of the Respondent's refusal in respect of the Immigration Rules (the Rules) was a narrow one: the Appellant's failure to attend the asylum interview on 27 September 2000 was deemed to bring him within the meaning of S-LTR.1.7(a) of Appendix FM to the Rules.

## The judge's decision

3. The appeal was argued on Article 8 grounds only (paragraph 16). The judge deals with the core issue of S-LTR.1.7(a) at paragraphs 38-42. In paragraph 40 the judge finds that the Appellant had no provided a satisfactory explanation for his failure to attend the asylum interview in September 2000.

4. As a direct result of this finding the judge goes onto conclude that the Appellant fell foul of the suitability requirement in S-LTR.1.7(a) and in light of the case of Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 00063 (IAC) he could not rely on EX.1. His appeal had to fail under the Rules.

5. Article 8 was then considered outside of the Rules in some detail. The judge considered that removal would be proportionate, largely, it appears to me, on the basis that the Appellant could return to Colombia and make an entry clearance application from there in order to re-join his wife in this country (paragraphs 60-62).

6. It is clear that both the Respondent and the judge accepted that the Appellant's relationship with his wife was a genuine and subsisting one.

## Grounds of appeal and the grant of permission

7. In succinct and well-drafted grounds by Mr Blundell of Counsel, the Appellant asserted that the judge misdirected himself in law by concluding that S-LTR.1.7(a) applied to historic failures to attend an interview.

8. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 1 July 2015.

## The hearing before me

9. At the outset, both representatives agreed that the sole basis of the judge's dismissal of the appeal under the Rules was the application of S-LTR.1.7(a) to the Appellant's historical failure to attend the interview in 2000.

10. Mr Sawar provided me with relevant extracts from the Respondent's guidance on Appendix FM (relating to the suitability requirements) and the guidance on the general grounds of refusal in part 9 of the Rules (in particular paragraph 322(10) of the Rules). The former dates from August 2015, and I was informed that there has been no material changes in content from the guidance in place as at the hearing before the judge. The latter is contained in version 24.0 of the current guidance, published on 4 February 2016. Again, I was told that there had been no material changes in content since the relevant time.

11. Mr Sawar relied on the grounds. He was unaware of any case law on the construction of S-LTR.1.7(a). He submitted that the wording of the Rule itself, combined with the guidance, indicated that only failures to attend interviews connected to the current application were relevant for the purposes of the suitability requirement. Other requirements in the suitability section were serious in nature and this indicated that only a current failure to attend an interview was caught. He pointed out that whilst S-LTR.1.7(a) was mandatory, the equivalent provision in Part 9 (paragraph 322(10)) was only discretionary. On the Respondent's case, this Appellant would always be refused outright because of the 2000 failure, whenever he made an application in the future.

12. Mr Sawar confirmed that no issue has been taken with the judge's consideration of the Article 8 claim outside of the Rules.

13. Mr Richards asked me to interpret the provision in light of the natural and ordinary meaning of the words used. The outcome may be harsh to the Appellant but this was irrelevant: the Rules are the Rules.

## Decision and reasons on error of law

14. The issue in this appeal is a narrow one: does a historic failure to attend an interview, unrelated to the application currently being made to the Respondent, fall within the scope of S-LTR.1.7(a) of Appendix FM to the Rules?

15. If the answer to this question is 'yes', the Appellant's appeal fails. If it is 'no', he succeeds, as no other matters under Appendix FM are in dispute.

16. S-LTR.1.7(a) of Appendix FM states:

> ‘S-LTR.1.7. The applicant has failed without reasonable excuse to comply with a requirement to-
>
> (a) attend an interview;
>
> …’

17. Having considered the submissions made, the materials provided to me, and what I consider to be all other relevant matters, I conclude that historic failures to attend an interview unrelated to the current application do not fall within the scope of S-LTR.1.7(a) of Appendix FM. Only a failure, without reasonable excuse, to attend an interview connected to the application currently under consideration by the Respondent can trigger the mandatory refusal under S-LTR.1.7(a). I base this conclusion on the following matters.

18. First, it is of course right that I must give the words used in the provision their natural and ordinary meaning, insofar as that is sensibly possible to do, as is made clear in Mahad [2009] UKSC 16, at paragraph 10:

> “The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy.”

19. In respect of S-LTR.1.7(a), the words actually used are somewhat ambiguous: “has failed” could potentially mean any failure, current or historical; equally, it could apply only to a failure connected to the application being considered by the Respondent.

20. In my view the need to construe the provision without undue strictness and in the context of sensible application is of particular importance here. A strict view of the phrase “has failed” could, and as Mr Richards argues, should, encompass any and all historic failures, however disconnected from the application being considered. Yet that construction would tend towards undue strictness and thus run contrary to the approach laid down in Mahad.

21. Further, the strict construction urged upon me by the Respondent must be considered in the context of the effects of such an outcome. S-LTR.1.7(a) is a mandatory basis for refusing an application made under Appendix FM. Thus, an historic failure to attend an interview, wholly unconnected to the application itself, would have the effect of precluding success under the Rules in perpetuity. It would apply with equal effect to any applications made from abroad (in a scenario where the individual returns to his home country to seek re-entry, in line with what the Respondent normally considers to be the ‘correct way’ of regularising status without jumping the queue) because S-EC.1.6(a) is a mirror image of S-LTR.1.7(a).

22. The present case places the point in sharp relief. The Appellant failed without reasonable excuse to attend an asylum interview in September

2000. No further asylum claim was made. He subsequently marries and makes a number of applications to the Respondent, the last one 27 August 2011, almost eleven years after the non-attendance in 2000. By the time of the hearing before the judge, the failure in 2000 was well over fourteen years distant. On any rational view, the 2000 matter could not be said to have a material bearing on the Appellant's claim as the spouse of a British citizen, certainly not a determinative bearing, as would be the case if the Respondent's view of S-LTR.1.7(a) were correct. The construction proffered by the Respondent could lead to outcomes bordering on the absurd.

23. One may think of another example where a failure to attend an interview occurred only a short time prior to the application under consideration, perhaps in respect of a previous application made a few of months beforehand. There would appear to be greater strength in the Respondent's argument in this scenario. However, S-LTR.1.7(a) makes no temporal or other distinction between a recent historical failure and one occurring in the distant past.

24. Turning to the application of the term "sensibly" to the construction issue before me, I would refer back to what I have just said above concerning the significant difficulties in the way of the strict approach. Putting it rather bluntly, I find it very difficult indeed to see how the consequences of Mr Richard's view of S-LTR.1.7(a) could be said to flow from a truly sensible meaning of the phrase "has failed."

25. Therefore, on an application of the "natural and ordinary meaning" approach, the sensible and less-strict view of the words used in S-LTR.1.7(a) favours the Appellant's argument above that of the Respondent.

26. Second, there is a sensible and perfectly legitimate aim in providing for mandatory refusal where an applicant fails to attend an interview required for the purposes of the application currently being considered. The failure is an inexcusable frustration of the application process: it prevents the Respondent from eliciting information from the individual. That information may include details about historical failures to attend other interviews. The point is, there is a rational and logical connection between the failure to attend, the application in question, and the consequences for the individual.

27. Third, and connected to the previous point, there is in my view some value in looking at the other suitability factors in S-LTR.1.7. It would seem to me perfectly sensible to have a mandatory refusal for failure to provide requested information or physical data, or to submit to a medical examination in connection to the application under consideration. Conversely, it would be nonsensical to be able to rely upon purely historical failures, however distant and irrelevant to the current application.

28. Fourth, with respect to Mr Richards, I have not been provided with any materials from the Respondent, whether by way of Ministerial statements or other sources, which support his submissions on the construction question.

29. Fifth, as far as I am aware, there are no decisions from the Upper Tribunal or elsewhere on the proper construction of S-LTR.1.7(a) itself. I have considered the decision of the President in Muhandiramge (section S-LTR.1.7) [2015] UKUT 00675 (IAC). The ratio of this decision is that the burden of establishing that an appellant has failed to provide a reasonable excuse under S-LTR.1.7 rests with the Respondent, and that the standard of proof is that of the balance of probabilities. I am not concerned with that particular issue. Whilst it may have been arguable that the judge in the Appellant's case placed the burden on the wrong party, the point has not been taken in the grounds of appeal and no amendment to those grounds has been sought.

30. I note that on the facts of Muhandiramge the failure to provide information related to the application under consideration and not an historical omission. However, as the issue in the case before me did not arise in Muhandiramge, that decision is of little assistance. In passing, I observe that the President noted with some concern the dichotomy between mandatory refusal on S-LTR.1.7 grounds on the one hand, and discretionary refusal on similarly-worded provisions elsewhere in the Rules. In a slightly different context, there is also a somewhat strange dichotomy here, as a failure to attend an interview is only the basis for a discretionary refusal under paragraph 322(10) of the Rules.

31. Sixth, Mr Sawar has urged me to look at the Respondent's guidance when construing S-LTR.1.7(a). It is tempting to do so, given what is said therein. However, Mahad precludes recourse to the Respondent's guidance when seeking to interpret the Rules. My conclusion on the proper construction of S-LTR.1.7(a) is not based in any material way upon the Respondent's guidance.

32. If one were permitted to consider the guidance, it would if anything support my interpretation above that offered by Mr Richards. The Appendix FM guidance refers the reader to the guidance on Part 9 of the Rules. At page 50 of that guidance paragraph 322(10) is considered. The opening passage on the page states:

> "This page contains guidance for caseworkers on what to consider when an applicant applying for leave to remain fails to come to an interview."
>
> *Underlining added*

33. On a fair reading, this strongly suggests that the failure must relate to the application then being considered, rather than a purely historical one.

**Conclusion on error of law**

34. In light of the foregoing, I find that the judge did misdirect himself in law as to correct meaning of S-LTR.1.7(a) of Appendix FM.

35. The error was clearly material to the outcome of the Appellant's appeal.

36. I therefore set the judge's decision aside.

**Remaking the decision**

37. The only live issue in respect of Appendix FM has always been, and remains, whether the Appellant was caught by S-LTR.1.7(a). Although on the judge's unchallenged finding the Appellant has not provided a reasonable excuse for failing to attend the interview in 2000, in light of my conclusion on the proper construction of the relevant provision, this is irrelevant. S-LTR.1.7(a) does not apply to the Appellant.

38. It follows that the Appellant satisfies all the requirements of Appendix FM. His appeal therefore succeeds under the Rules.

**Anonymity**

39. No direction has been sought and none is appropriate.

**Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**I set aside the decision of the First-tier Tribunal.**

**I re-make the decision by allowing the Appellant's appeal under the Immigration Rules**

Signed Date: 21 April 2016

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

**TO THE RESPONDENT**
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. This is because the Appellant's case involved a contentious question of law that required adjudication on appeal.

Signed Date: 21 April 2016

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal