

## **IN COUNTRY GUIDANCE ON PERSONS INTENDING TO ESTABLISH THEMSELVES IN BUSINESS UNDER TURKISH- EC ASSOCIATION AGREEMENT**

**Introduction** - This guidance is concerned only with the handling of right of establishment Turkish - European Community Association Agreement (Turkish ECAA) applications, that is **applications from Turkish nationals who are already in this country and wish to take up self-employment or are already self-employed and are seeking further leave to remain**. Applications under the Turkish ECAA from those already in legal employment (as opposed to self-employment) in the UK are considered separately according to different requirements. Instructions on handling these applications are provided in the Immigration Directorate Instructions at Chapter 6, section 2.2.

This guidance replaces that contained in previous guidance issued to caseworkers on these cases in April 2002, July 2002 and January 2004.

New guidance on the handling of leave to enter - on entry cases - was issued in January 2005 and is available on the caseworking section of the IND website.

### **Background**

The Turkish ECAA was set up under the Ankara Agreement, signed on 12 September 1963. Article 13 of that Agreement refers to a process of abolishing restrictions on freedom of establishment. A step forward in that process was Article 41 of the Additional Protocol to the Turkish ECAA (signed on 23 November 1970). Article 41(1) of the Protocol states that:

"The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services." This is known as "**the standstill clause**."

The effect of the standstill clause is that Turkish nationals seeking leave to enter or remain in the UK as business persons should generally have their applications considered under domestic rules that are no less favourable to them than those in force when the UK joined the EU (then EEC) on 1 January 1973. The on entry rules at that time were HC509 and the after entry rules were HC510.

In *Dari and Tum v SSHD* (2004) the Court of Appeal held that a Turkish asylum seeker who had no other grounds for being within the United Kingdom and was otherwise returnable to another EU state under the Dublin Convention (i.e. a third country case), and was a person seeking to establish a business within the UK, was by virtue of the standstill clause entitled to have his application to establish himself in business determined by reference to the applicable business immigration rules in place as at 1 January 1973. The case has been referred by the House of Lords to the European Court of Justice (ECJ). However a judgement is unlikely before 2006.

In *Dari and Tum*, the Court of Appeal also confirmed that, although a person who was already in the United Kingdom was entitled to rely on the standstill clause and have his case determined by reference to the 1973 rules, this was subject to an exception where the person had entered the United Kingdom fraudulently. This fraud exception is not the subject of the reference to the ECJ and the Home Office position is that the 1973 rules do

not apply to those who entered the United Kingdom fraudulently. However, the extent of the fraud exception has been the subject of some legal challenges.

## **Public policy proviso**

The entitlement for someone to rely on the standstill clause may be limited on grounds of public policy, public security or public health. The relevant test is the EU public policy test (see European Directorate Instructions Chapter 3).

Different types of cases

- **Applications considered under the current business rules (Pre-entry)** The UK position is that only the current business Immigration Rules (HC395 as amended) are applied to entry clearance applications to enter the UK.
- **Applications considered under the 1973 rules pending ECJ judgement (Port cases)** Policy guidance on leave to enter - on entry cases was issued in January 2005.
- **Applications for Switching, Further Leave to remain and Indefinite leave to remain (non-fraudulent)**. Applicants who are already in the UK legally are entitled to rely on the standstill clause and have their case determined by reference to the 1973 rules.
- **Applications where fraud has been practised**

The current Rules (HC 395 as amended) are still relevant to those applicants who have practised fraud in seeking to enter or remain in the UK. Applicants who have practised fraud waive their right to consideration under the 1973 rules. However, the 1973 Rules should still be applied in order to defend the Home Office position (see below).

- **Dependants** - that is those who apply for leave to remain as the dependant of a person who has been granted leave in country under the Turkish ECAA.

## **Illegal/fraudulent cases - general position**

The underlying Home Office position is that by virtue of their fraudulent behaviour, applicants in the following categories waive the right to have their case considered in accordance with the standstill clause and the 1973 Rules. Therefore, the current Immigration Rules (HC 395) will apply. However, an assessment should also be made on whether the application would meet the 1973 rules. This will ensure that, if an applicant subsequently challenges whether he falls within the scope of the fraud exception, then this challenge will only need to be resolved if the assessment is that he would have met the requirements of the 1973 rules.

An applicant refused under the current Rules for lack of an entry clearance will then be required to submit an entry clearance application under the current business Rules in their country of origin. Nevertheless, if a person would meet all the other requirements of the current rules, it is necessary to consider whether it would be disproportionate to send such a person back to his country of origin to make an application for entry clearance. The question of whether there might be a realistic claim under the ECHR should be examined if

raised by the Applicant. Article 8 of the European Convention on Human Rights, right to respect for private and family life might be particularly relevant (see IDI Chapter 1, Section 10).

Illegal entrants (meaning both clandestine entrants and those who made false representations on entry) would fall within the scope of the fraud exception but overstayers would not. This is because of an ECJ case called Savas in which the court held that an overstayer, was entitled to the benefit of the 1973 rules.

### **1) Illegal entry - fraudulent cases**

These cases are defined as those who have practised fraud in entering the UK. If such an application is made prior to the person passing Immigration control, the case should be dealt with by Port. This guidance deals with illegal entrants who make an application for ECAA once they have passed Immigration control and are in the UK.

Illegal entry/fraudulent cases means firstly those who enter without leave, either arriving clandestinely or seeking to evade immigration control. Secondly those who misrepresent their position and use verbal or documentary deception to enter the UK. It will usually be the case that illegal entry papers will already have been served, however if new evidence is uncovered it may be appropriate for illegal entry papers to be served after the ECAA application has been made. These cases (meaning both clandestine entrants and those who made false representations on entry) would fall within the scope of the fraud exception.

Those applicants that do not meet the requirements of the current business Rules should be refused under the relevant paragraphs of the current Rules. This reflects the underlying HO position. However, as discussed above the case should also be considered in accordance with the business requirements of the 1973 after-entry rules set out in paragraphs 21 and 4 of HC 510 (Appendix A). Therefore, the refusal notice should also refer to the application having been considered in accordance with the relevant paragraph 21 and 4 of HC510 of the 1973 rules and the applicant not having satisfied the decision maker that they would be able to establish themselves as a self-employed person under these Rules.

In order to apply paragraphs 21 and 4 of HC510 of the 1973 rules, in the case of illegal/fraudulent entry, the decision maker should refer to the guidance at Appendix B which is to be used when a person is applying to start up a business for the first time. Although the case is an in-country application, the business is not yet up and running and therefore the decision maker must establish whether an initial business is viable or not.

Those applicants who do meet the requirements of the 1973 Rules should be refused with reference to their fraudulent entry by virtue of which they waive their right to benefit from the standstill clause and it should be stated that their case has been considered under the current Rules (HC395). The application may then accordingly be refused under the relevant paragraphs of the current Rules.

### **2) Extension of stay: fraudulent cases**

These cases are defined as those in the UK who have current leave under the general business person (Paragraph 200 - 210 of HC395 as amended) or ECAA category but practised fraud to obtain entry to the UK or in seeking an extension of stay in the UK. In order to have "practised fraud" such a person must have proactively used deception. This

would include persons who have obtained an initial period of leave as a business person whose subsequent conduct has shown they have not had any intention to become self-employed and those who have presented a fraudulent document to obtain previous leave to enter or remain in the UK.

Those applicants who do not meet the requirements of the current business rules should be refused under the relevant paragraphs of the current rules HC 395. This reflects the underlying HO position. As discussed above, an assessment should also be made on whether the application would meet the 1973 after entry Immigration Rules business requirements. These are set out in paragraph 21 of HC510 (Appendix A). (The reference, in the first sentence of Appendix A, paragraph 21, to visitors being able to apply to establish themselves should be taken to mean migrants in any legal immigration category being able to apply to establish themselves.

The general immigration considerations in paragraph 4 of HC510 are also relevant to consideration of business cases under the 1 January 1973 Rules.

The decision maker should keep in mind whether the applicant might have a realistic claim under ECHR. Article 8 of the ECHR might be particularly relevant. However this should be addressed only if it is raised by the applicant.

Those applicants who do not meet the requirements of paragraphs 21 and 4, and where it is deemed a refusal is proportionate should be refused under the relevant paragraphs of the current Rules (HC395). This reflects the underlying HO position. However the refusal notice should also state that the application has been considered in accordance with paragraph 21 and paragraph 4 of HC510 and give the reasons why the applicant did not satisfy the decision maker that they would be able to establish themselves as a self-employed person under these Rules.

Those applicants who do meet the requirements of the 1973 Rules should be refused with reference to their fraudulent action by virtue of which they do not benefit from the standstill clause and it should be stated that their case has been considered under the current Rules (HC395). In this situation the application will be accordingly refused under the relevant paragraphs of the current rules if it is deemed this action is proportionate.

The decision maker should refer to guidelines at Appendix C when making a consideration on the facts of these applications. These guidelines focus on an assessment of a business that is already up and running.

### **3) Switching - fraudulent cases**

These cases are defined as those in the UK with non-business leave to enter (such as visitors and students) who practised fraud to obtain the right to enter the UK. In order to have "practised fraud" such a person must have proactively practised deception. There are a limited number of circumstances in which this might occur but could include a person granted leave as a student who had no intention of undertaking a course of study. The fact that a visitor had sought to switch into Turkish ECAA within a very short period after entry, such as a week, may also provide evidence of intentional fraud in obtaining leave as a visitor. A declaration at the entry clearance stage that the applicant did not intend to establish a business in the UK may also provide such evidence. Nonetheless this may be difficult to prove and a denial of the right to rely upon the standstill clause should only follow in the clearest cases. Where clear evidence is not present it should be treated as a

category 4 case.

Those applicants who do not meet the requirements of the current business Rules should be refused under the relevant paragraphs of the current Rules (HC395). This reflects the underlying HO position. As discussed above an assessment should also be made on whether the application would meet the 1973 after entry Immigration Rules (HC510) business requirements and general considerations. The policy for handling these cases is the same as with Category 2 (above), Extension of stay: fraudulent cases.

The decision maker should refer to guidance at Appendix B when considering these types of applications. The guidelines at Appendix B should be applied to these in-country applications as the decision maker is assessing the viability of an initial business.

## **NON FRAUDULENT IN-COUNTRY CASES**

### **4) Extension of stay switching - non-fraudulent cases**

Turkish nationals who have lawful residence in the UK in the business category or a non-business category (for example, as a visitor or as a student) without the use of fraud and apply to remain under the establishment provisions of the Turkish ECAA are entitled to have their application considered in accordance with the standstill clause. Those who have overstayed their leave but who have not previously used fraud to obtain leave also benefit from consideration of their case under the standstill clause. All these cases should be considered on the basis of paragraphs 21 and 4 of the 1973 Rules HC510 (Appendix A).

Those applicants who do not meet the requirements of paragraph 21 and 4 of HC510 of the 1973 rules should be refused. The refusal notice should include the reasons why the applicant did not satisfy the decision maker that they have been able to establish themselves as a self employed business person.

HC510 provides for leave to be granted to successful applicants for a period of 12 months. If the requirements of HC510 are met then a period of 1 year's leave to remain should be granted with a code 2 condition.

### **5) Further leave to remain applications**

Turkish nationals who have been granted a total of 12 months leave in the UK under establishment (business) provisions in either the current or 1973 Rules are entitled to have their further leave to remain application considered in accordance with the standstill clause. They should be considered on the basis of the after entry Rules (HC510) and specifically the requirements for extension applications at paragraph 21 and general provisions at paragraph 4 (Appendix A).

Those applicants who clearly do not meet the requirements of Paragraph 21 and Paragraph 4 of HC 510 should be refused under the relevant sections of those paragraphs. The refusal should include the reasons why the decision-maker was not satisfied that the requirements were met.

HC510 provides for an "appropriate extension of stay" to be granted if paragraphs 21 and 4 are met. In line with the current standard duration of further leave to remain in business cases, a period of 3 years leave should usually be granted if the specific requirements of

paragraph 21 and general provisions of paragraph 4 are met. If these are not met then the application will usually fall for refusal under the relevant paragraph (4 or 21) together with the reason they did not qualify. However there may be cases which do not merit refusal outright, but where the applicant has been unable to provide all the evidence required to justify a grant of 3 years. For example, due to the way the Inland Revenue works, an applicant may not be able to provide evidence of tax payments for some or all of the initial 12 months. In these cases it may be appropriate to grant an extension of stay for a further 12 months rather than for the full 3-year period. The applicant would then be required to apply again for a further extension at the end of that period of leave.

## **6) Indefinite leave to remain applications**

Turkish nationals who apply for indefinite leave to remain and have spent 4 years lawfully in a business category are entitled to have their application considered in accordance with the standstill clause. They should be considered on the basis of the after entry Rules (HC510) and specifically the requirements for settlement under paragraph 28 (Appendix A).

The general considerations outlined in paragraph 4 of the 1973 rules should accordingly be considered before a decision is made. Those applicants who do not meet the requirements of paragraph 28 and paragraph 4 should be refused under the Paragraph of HC510 (28 and 4) where the application fell for refusal together with the reasons why the applicant did not satisfy the decision maker that they qualified for indefinite leave to remain. Applicants who qualify for indefinite leave to remain under the 1973 Rules should be granted settlement in the usual way as under the current Rules.

## **7) Third Country Cases**

The result of the Court of Appeal's decision in Dari and Tum is that persons who are otherwise returnable to another Member State under the Dublin Convention are still entitled to make an application for leave in the UK as a business person under the 1973 on entry Rules HC509. They should be considered under the Leave to Enter - On Entry guidance issued in January 2005 (available in caseworking section of IND website).

This is subject to an important exception in cases of fraud: if the applicant is an illegal entrant or has positively practised deception on arrival for example by failing to declare a previous asylum claim in another EU Member State. In those scenarios he may be removed to the relevant Convention state and be informed that he can make an entry clearance application as a business person under the current Rules, HC395 as amended, Paragraph 200 - 204. Nevertheless, it is necessary to consider whether it would be disproportionate to send such a person back to that Convention state to make such an application for entry clearance. The question of whether there might be a realistic claim under the ECHR can help inform the question.

Third Country Cases are identifiable from the Case Information Database (CID) 'Case Type'. The third country icon should be starred to show action in that field and there will be reference to "Third Country Case/EURODAC/Dublin II Regulation/Dublin Convention" under 'Associated Cases'. Any removal directions would have been set to another EU Member State rather than the country of origin. If there is any doubt, caseworkers should contact the Third Country Unit general enquiries number (0208 760 2956).

## **8) Dependants**

If an applicant for leave to remain falls to be considered under the 1973 Rules by virtue of the standstill clause then any application for leave to remain by his dependants should also be considered under the 1973 Rules. The dependant of any applicant who does not benefit from the standstill clause due to illegal/fraudulent activity, should be considered under the current Immigration Rules in the usual way. Dependants already in the UK may be granted substantive leave in line with the main applicant if that main applicant has been granted leave under the 1973 rules.

Dependants of those seeking leave to remain are referred to in paragraph 21 of HC510 which states that the main applicant's share of the business' profits must be sufficient to support him and any dependants. For a dependant application to be successful, the principal applicant will have to have shown that the business will generate sufficient funds to support both him and his dependants without recourse to employment.

For a definition of a dependant, the decision maker should refer to the on-entry guidance published on the IND website and paragraphs 35-41 of the on-entry 1973 rules HC509.

The key parts of the definition of wife and children in paragraphs 39 to 41 of HC509 are as follows:

A woman who has been living in permanent association with a man has no claim to enter, but may be admitted as if she were his wife, due account being taken of any local custom or tradition tending to establish the permanence of the association.

As this provision does not meet the need to avoid discrimination against women under both EU law and the European Convention on Human Rights, applications should be decided as if paragraph 35 of HC509 referred to husbands as well as wives. Similarly, applications from unmarried partners (including same sex partners) should be decided as if paragraph 35 of HC509 referred to them. If the requirements are met the leave granted would be in line with that granted to their partner (the main applicant).

## **APPENDIX A - HC510 AFTER-ENTRY 1973 RULES**

### **General considerations**

Pgh 4. The succeeding paragraphs set out the main categories of people who may be given limited leave to enter and who may seek variation of their leave. In deciding these matters account is to be taken of all the relevant facts; the fact that the applicant satisfies the formal requirements of these rules for stay, or further stay, in the proposed capacity is not conclusive in his favour. It will, for example, be relevant whether the person has observed the time limit and conditions subject to which he was admitted; whether in the light of this character, conduct of associations it is undesirable to permit him to remain; whether he represents a danger to national security; or whether, if allowed to remain for the period for which he wishes to stay, he might not be returnable to another country.

### **Businessmen and self-employed persons**

Pgh 21. People admitted as visitors may apply for consent of the Secretary of State to their establishing themselves here for the purpose of setting up in business, whether on

their own account or as partners in a new or existing business. Any such application is to be considered on merits. Permission will depend on a number of factors, including evidence that the applicant will be devoting assets of his own to the business, proportional to his interest in it, that he will be able to bear his share of any liabilities the business may incur, and that his share of its profits will be sufficient to support him and any dependants. The applicant's part in the business must not amount to disguised employment, and it must be clear that he will not have to supplement his business activities by employment for which a work permit is required. Where the applicant intends to join an existing business, audited accounts should be produced to establish its financial position, together with a written statement of the terms on which he is to enter into it; evidence should be sought that he will be actively concerned with its running and that there is a genuine need for his services and investment. Where the application is granted the applicant's stay may be extended for a period of up to 12 months, on a condition restricting his freedom to take employment. A person admitted as a businessman in the first instance may be granted an appropriate extension of stay if the conditions set out above are still satisfied at the end of the period for which he was admitted initially.

## **Settlement**

Pgh 28 A person who is admitted in the first instance for a limited period, and who has remained here for 4 years in approved employment or as a businessman or a self-employed person or a person of independent means, may have the time limit on his stay removed unless there are grounds for maintaining it. Applications for removal of the time limit are to be considered in the light of all the relevant circumstances, including those set out in paragraph 4. Once the time limit is removed no further permission from the Home Office or the Department of Employment is needed to engage in any kind of business or employment. Applications for variation of leave to enter with a view to settlement may also be received from people originally admitted as, for example, visitors; but permission has to be limited to close relatives of people already accepted for settlement. Particulars are set out in paragraphs 37-44 of the rules for Control on Entry dated October 1972 (HC509).

## **APPENDIX B**

On-entry general guidelines referring to HC509 of the 1973 rules - To be applied to on-entry cases and those in-country applications, where a business is not up and running and assessment is to be made on the viability of an initial business.

Approach to assessing compliance with the Immigration Rules:

- The onus is on the applicant to show that he meets the requirements under the relevant Immigration Rules (HC509)
- The Immigration Officer (IO) may look behind any evidence provided by an applicant in order to satisfy himself that the requirements under the Immigration Rules have been complied with.
- The circumstances of the application should be looked at as a whole by reference to the requirements under the Immigration Rules.
- The IO should not grant leave to enter if he is not satisfied that the application is a credible one and that the applicant really will be able to comply with the requirements in practice.

The decision should be based on a reasonable judgement, which assesses the strength of the application overall.

Indicative evidence required for an application to be successful

This evidence should either be in the form of reliable documentation (see section on forgery below) and/or established to the satisfaction of the ECO or IO through an interview of the applicant. The evidence listed is indicative only; an applicant should not be refused solely on the basis that one piece of evidence listed here has not been provided, unless that evidence is critical to the credibility of their application. Equally some applications may require further specific evidence depending on their particular nature. For example, if an applicant was applying to establish themselves in a capacity where specific qualifications would be required in the UK in order to work in that capacity, evidence of such qualifications, or equivalent qualifications that would be recognised in the UK, would need to be provided.

Evidence which might be required in order to demonstrate compliance with the rules governing funding, ability to maintain the applicant and his/her dependants, and ability realistically to establish (under paragraph 30 and 31 or 32 of HC509) might include:

## **Funding**

- 6 months' bank statements;
- a letter from the bank confirming status of account;
- work history;
- detailed financial records of companies currently owned;
- a credible explanation of any extraordinary payments evident in a bank statement which cannot readily be attributed to the work history or business interests of the applicant
- where the applicant is taking over an existing company, or taking over or joining an existing business a written statement of terms on which applicant is to take over business and audited accounts for previous years.

## **Establishment**

- detailed breakdown of set-up costs of the intended business in the UK
- proper understanding of practical and financial requirements for establishment in the UK
- timetable for establishment
- projections regarding performance over the first 12 months of operation which takes account of all potential expenses (such as overheads, administration, and marketing) and which convincingly demonstrates a reasonable chance that profits will be such as to maintain the applicant and any dependants over that time (see cost of living section below)

It is important that if required any applicant is able convincingly to demonstrate an understanding of any written evidence submitted on his behalf.

## **Worker status**

The Turkish ECAA only provides for this standstill clause to apply in relation to freedom of establishment and the freedom to provide services (i.e. self-employment). This should not amount to concealed or disguised employment. There is no identifiable sole determining factor for distinguishing employment from self-employment, but there are a number of indicative factors. When trying to establish an individual's status, these factors should first be considered in turn in light of the circumstances of the applicant. Then the whole picture should be examined to establish whether the overall effect indicates a person who is employed or who is self-employed.

### **Factors indicating self-employment :**

- A lack of control or supervision over work
- Work being incidental to the business activities of the company receiving the services
- The provision of one's own equipment
- Terms of engagement for a limited period or a specific assignment
- The ability to provide services to other companies simultaneously (or in sequence)
- Being under no obligation to accept work offered
- Having flexible work routines without fixed hours
- Payment on a fee basis or on the basis of the amount of work completed
- Lack of benefits such as sick pay and pension contributions
- Being able to influence the profitability of the work and being responsible for management and investment decisions
- Having contractual terms indicating self-employment
- Being responsible for one's own liabilities and carrying appropriate insurance
- Putting in capital and assuming financial risk
- Being able to sub-contract or use one's own employees to perform all or part of an assignment
- Having a personal business address, business stationery etc.
- Agreeing with the Inland Revenue to tax on Schedule D basis
- Being registered for VAT purposes

Other relevant considerations when assessing the overall credibility of the application and the ability in practice to comply with the requirements of the Immigration Rules:

### **Cost of living**

Assessments of the adequacy of the funds available and those to be generated by the business once established to maintain the applicant and their dependants must take into account the general cost of living in the UK (including any regional variations). The credibility of any proposed arrangements for major expenses such as accommodation should be examined. The potential income of dependants should be discounted when assessing the adequacy of the funds generated by the business to maintain the applicant and dependants, but not discounted when assessing the funds available to maintain themselves when establishing the business.

## **Previous immigration history**

Previous immigration history may be taken into account in assessing the intention behind the application, the applicant's potential to establish the business, and therefore the overall credibility of the applicant. As such it may point towards further investigation and exploration of particular aspects of the application. But a "negative" history, including previous unlawful presence in the UK does not prevent the application of the standstill clause. This means that applications continue to be considered under HC 509. HC 509 does not contain the same provision as the current immigration rules permitting applications to be refused on the basis of a negative immigration history and previous immigration history cannot, in itself, be conclusive in refusing an application. The exception is an applicant who is currently subject to a deportation order.

## **Circumstances of the content of the application and manner of its delivery**

These may be relevant to an assessment of the overall credibility of the applicant. When, for example, it is apparent that the individual does not match up to the profile suggested by a pro forma business plan which may have been prepared by another party (whether paid or unpaid), it would be appropriate to discount such a plan in the overall assessment of the application. An inability to demonstrate understanding of the plan would cast doubt on whether the applicant could be expected in practice to put it into place. However it would not be impossible to demonstrate compliance with the rules when an application is prepared in conjunction with another party and contains similarities to other plans previously or simultaneously submitted.

## **Proficiency in English**

Fluency in English cannot be an absolute test for the application, but it is reasonable for the level of proficiency to be taken into account as part of the assessment. If it is apparent that the applicant has little or no English, this should be looked at in the context of the nature of proposed business alongside the other considerations that would determine its viability. It should be borne in mind that an inability to speak good English might not necessarily be an insurmountable barrier to successful establishment in some circumstances. However, in others it would clearly present severe difficulties.

The level of proficiency would also be of relevance in consideration of aspects such as the timetable for establishment and the rate of growth of the proposed business, which would be significant when considering whether the applicant has sufficient funds to maintain him/herself and any dependants.

## **Experience in sector / Qualifications**

These should also be examined in the context of the proposed business alongside the other considerations that would determine its viability. It is possible to demonstrate an ability to establish without prior experience in some circumstances; equally it is clear that success in others would require considerable experience and/or formal qualifications. Any such qualifications would need to be recognised in the UK and acceptable for the purposes for which it is proposed that they are to be used.

## **Forgery / Falsification of documents**

ECOs and IOs should be aware of all current guidance regarding forgery and falsification of relevant documentation, and should take expert advice, whether locally or elsewhere, whenever there is doubt regarding a document submitted as evidence. This is especially so when a document is considered to be critical to the application.

## **APPENDIX C**

After-entry general guidelines referring to HC510 of the 1973 Rules - To be applied where a business is already up and running.

In all cases, the onus is on the applicant to demonstrate that he meets the requirements under the Rules. The easiest way for him to do this is to provide all the information requested in the Turkish ECAA application form [work on this is to be undertaken by MM Sheffield], and for the documentation to be provided wherever possible in a recognisable format that is easily verifiable by the decision maker.

### **Establishment of business**

In order to demonstrate that Paragraph 21 of HC510 (the 1973 Rules) are met, we would expect to see supporting documentation. Possible evidence to demonstrate this will depend on the sector in which the applicant is operating, but might include:

- Employers or Public Liability Insurance Certificate
- copies of contracts awarded to or by the applicant - copy of the tax return (P35) for any staff that the applicant engages
- business rental documents for premises or equipment
- copies of invoices for work done or materials purchased

We would also expect to see sufficient testimony and verifiable references to support the claims made in the application about work that has been undertaken.

It is permissible for the applicant to be engaged in more than one business simultaneously as long as all are legally established.

### **Maintenance and accommodation**

It is important for decision makers to examine the particular circumstances of each individual case to establish to their satisfaction that Paragraph 21. The income required for an applicant realistically to maintain and accommodate themselves and any dependants without recourse to employment or public funds should be assessed on a case by case basis, taking any relevant factors into account, and bearing in mind that income derived from sources other than businesses established in the UK under the terms of the Agreement should not be included. This includes anything earned by dependants of the primary applicant.

Applicants need not have generated the level of profit required to maintain and accommodate themselves solely from the business that forms the basis of their ECAA application throughout the first year of their stay, while the business was being set up (although they must be able to demonstrate how, in the absence of such profits, they have maintained themselves in that time), but the decision maker must be satisfied that such a

level can be generated consistently in the future in order for further leave to be granted. For those seeking indefinite leave to remain, the applicant should provide evidence that such profits have been generated for the full three years following their initial 12 months leave.

The level of income from the business should be demonstrated through professional accounts, together with invoices and evidence of work undertaken that is in accordance with the original business plan and any other evidence submitted by the applicant. These accounts should also show expenditure on items crucial to the running of the business for the whole of the period in which it has been operative, such as essential equipment and travel costs. Evidence of personal expenditure should be provided through bank statements and documents relevant to significant expenditure such as tenancy agreements, utility bills, and Council Tax. Accounts should be compiled by a fully qualified or chartered accountant. Checks should be undertaken where necessary to verify the professional status of these individuals.

## **Employment Status**

When considering whether an applicant has met the requirements of paragraph 21, it is particularly important to consider whether the work on which the applicant has been engaged amounts to concealed employment. There is no statutory definition of self-employment, although previous decisions by the courts have established a number of criteria to distinguish between employment and self-employment. The kind of factors which need to be taken into account in deciding whether a particular engagement is one of employment or self-employment include:

- the degree of financial risk involved;
- the amount of control the worker has over what, when and how he / she does the work;
- the way in which pay is determined - set fee or regular payment based on hourly/daily/weekly or monthly rates;
- whether the worker is required to work at the premises of the person worked for;
- whether the worker provides the services personally or has the right to send someone else in his/her place.

The common thread running through these indicators is that no single factor is conclusive; for each engagement the whole picture needs to be looked at in the light of all the facts.

The applicant, or the person who is engaging him, cannot simply choose that an engagement is one of self-employment. It will depend on the terms, conditions and facts of the relevant working engagement. The fact that someone has registered to pay tax and National Insurance contributions as a self-employed person with the Inland Revenue is not sufficient evidence that they are truly self employed as the system is one of self assessment.

If 'yes' can be answered to all of the following questions, it will usually mean they are not self-employed.

- Will the person have to do the work themselves?
- Can someone tell the person at any time what to do, where to carry out the work or when and how to do it?
- Will the person work a set amount of hours?

- Can someone move the person from task to task?
- Will the person be paid by the hour, week, or month?
- Can the person get overtime pay or bonus payment?

However any combination of some of these factors might also indicate employment.

If 'yes' can be answered to all of the following questions, it will usually mean they are self-employed.

- Can the person hire someone to do the work for him/her or engage helpers at his/her own expense?
- Will the person risk his/her own money?
- Will the person provide the main items of equipment they need to do their job (not just small tools many employees provide for themselves)?
- Will the person agree to do the job for a fixed price regardless of how long the job may take?
- Will the person be able to decide what work to do, how and when to do the work and where to provide the services?
- Can the person regularly work for a number of different people?
- Will the national have to correct unsatisfactory work in their own time at their own expense?

Again, any combination of these factors might also indicate self-employment.

Broadly, someone is self-employed if they can demonstrate that they are in business on their own account and bear the responsibility for the success or failure of that business.

### **Consideration and verification procedures**

Decision makers should seek to verify key aspects of the application wherever practicable through the checking of references and documents, and confirmation of any relevant agreements and business activities. In some cases it may not be possible to establish, solely on the basis of the documents available to the decision maker, the true nature of the circumstances surrounding the application with sufficient confidence to allow an informed and reasonable judgement to be made. This may be due to doubts about the authenticity of documents, apparent inconsistencies in the evidence submitted, or significant omissions which seem unlikely merely to be a result of oversights in the preparation of the application. In these cases, consideration should be given to interviewing the applicant in person before making a decision in order to explore further the areas of doubt, and to contribute to the overall assessment of the application. There may also be cases where the application has been submitted by a third party and it would be helpful to test the credibility of the claims being made on their behalf through a face to face interview with the applicant. This may especially be so if a number of similar applications have been made by the same representative on behalf of different clients.

### **Immigration History**

In accordance with Paragraph 4 of HC510 previous immigration history may be taken into account, and may point towards further investigation and exploration of particular aspects of the application. Evidence of fraudulent actions will determine which category the case falls into for consideration. However a "negative" history, including unlawful presence in the UK, cannot, in itself, be conclusive in refusing an application.

## **Forgery / falsification**

Decision makers should be aware of all current guidance regarding forgery and falsification of relevant documentation, and should take expert advice, whether locally or elsewhere, whenever there is doubt regarding a document submitted as evidence.