

## CHAPTER 5 SECTION 10

### Turkish Employed applications under Decision 1/80 of the Association Council established by the ECAA with Turkey

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## **1. Background**

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1.1. The European Community Association Agreement (ECAA) with Turkey aims to support Turkey's bid for membership of the EU by improving economic and social links between Turkey and the EU. An Association Council was established by the ECAA to oversee implementation of the ECAA. Since the signing of the ECAA the Council has issued various decisions to develop the ECAA.

1.2. Council Decision 1/80 (the first decision to be issued in 1980) deals with the rights of Turkish national workers once they are already registered as belonging to the UK's labour force i.e. already here with leave to enter or remain in a category, the conditions of which allow employment. The text of article 6(1) is as follows.

## **2. Text of article 6(1)**

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*1. Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:*

*- shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;*

*- shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;*

*- shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.*

*2. Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment.*

*3. The procedures for applying paragraphs 1 and 2 shall be those established under national rules.*

## **3. Qualifying for leave under article 6(1)**

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3.1. In order to qualify initially a person must:

- (a) be a worker,
- (b) be duly registered as belonging to the UK's labour force, and

- (c) have been in legal employment with the same employer for at least one year.

3.2. Freedoms within the labour force increase with time, such that after three years of legal employment a worker can take up employment with any employer within the same occupation and after four years of legal employment a worker can take up any offer of employment.

3.3. It could be the case that on the first application for leave pursuant to article 6(1) the applicant has already undertaken over three years' legal employment and is therefore immediately entitled to be granted leave to work for any employer within the same occupation. Likewise, it could be the case that on the first application for leave pursuant to article 6(1) the applicant has already undertaken over four years' legal employment and is therefore immediately entitled to be granted leave to work for any employer in any occupation.

3.4. The definition of "worker" is that in EC law. In short, the person must perform services for and under the direction of another person, in return for which they receive payment. The activities performed must be real and genuine to the exclusion of activities which are on such a small scale as to be regarded as purely marginal and ancillary.

3.5. "Duly registered" is defined in EC law as when the worker is "employed on the same conditions of work and pay as those claimed by workers who pursue identical or similar activities and complies with the requirements laid down in the rules and regulations" of the UK.

3.6. "Legal employment" is defined in EC law as having a "secure and stable position in the labour force" and an "undisputed right of residence" (i.e. residence on the basis of valid and lawfully obtained leave). EC law has found that Turkish nationals in employment whilst resident on a temporary basis awaiting the outcome of an application or an appeal are not considered to be in a secure and stable position and so do not accrue rights under article 6(1) (see sections 8 and 9 for more details). In order to qualify under the first and second indent of article 6(1) employment must be *continuous*. (Please refer to section 6 for circumstances in which periods of unemployment do not impact on article 6(1) rights).

3.7. Typical applicants are those who were in legal employment by virtue of being on code 1 leave as a spouse and their marriage has broken down or on code 4 as a work permit holder where the work permit is not to be renewed.

### **3.8. Loss of article 6(1) rights**

3.8.1. There are circumstances in which periods without employment do not affect article 6(1) rights – see section 6. However, a worker who leaves the labour force and (i) objectively no longer has any chance of rejoining it, or (ii) exceeds a reasonable time limit for finding new employment after a period without work, loses any rights accrued under article 6(1).

3.8.2. Where a worker has obtained previous leave which gives an entitlement to work in fraudulent circumstances, (i.e. has practised proactive deception), they will not accrue rights under article 6(1).

3.8.3. Rights under article 6(1) can also be limited on grounds of public policy, public health and public security. The EU test in these three areas should be applied.

#### **4. Leave with a corollary employment right**

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Those who are admitted for a primary purpose other than employment but who are nonetheless entitled to work (e.g. students, au pairs, trainees) and whose employment and status meets the requirements outlined in section 3 will, by virtue of any employment that they undertake pursuant to their right to work, accrue rights under article 6(1). Consideration will still need to be given to the requirements outlined in section 3.

#### **5. Multiple employers and agency employment**

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5.1. The first and second indents of article 6(1) require one year or more of continuous legal employment. If employment is not continuous then the application should be refused. However, this requirement does not preclude workers from having more than one employer at the same time. Workers who have more than one employer but who can show that they have been in continuous legal employment for the appropriate period with one of these employers should be granted leave.

5.2. Registration with an employment agency does not in and of itself constitute being duly registered in the labour force, as the agency may not always be able to provide employment. Applicants whose employment is secured through an employment agency are still required to show that they have been in continuous employment with the same employer / within the same occupation, via the agency, for the appropriate period.

#### **6. Periods without employment**

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6.1. Article 6(2) states that annual leave, maternity (and thereby paternity) leave, absences for reason of an accident at work and short periods of sickness absence should still count towards legal employment.

6.2. Periods of involuntary unemployment duly certified by the relevant authorities (i.e. where the applicant has registered with Jobcentre Plus and is actively seeking employment), and long absences on account of sickness do not count as legal employment but shall not affect article 6(1) rights accrued as the result of a preceding period of employment.

6.3. Any other periods without employment cannot count towards the accrual of rights under article 6(1). Please refer to section 3.8 regarding circumstances in which article 6(1) rights are lost or cannot be accrued.

#### **7. Out of time applications**

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7.1. Applicants should not be penalised solely on the basis that they submit an application out of time. The European Court of Justice has held that rights accrued under article 6(1) exist whether or not the Member State has issued a specific administrative document and would be unlikely to look favourably on a refusal on the basis that the applicant has failed to comply with administrative formalities.

7.2. However, it is compliant with EC case-law to follow the principle that any employment undertaken more than 28 days after previous leave with a right to take up employment has expired is not legal employment, given that the worker will be residing illegally in the UK.

7.3. It is therefore the case that any application which relies in part or in full on employment undertaken whilst in the UK more than 28 days after previous leave has expired should be refused, as during this period of illegal residence the worker will not have accrued any further rights under article 6(1).

7.4. If an applicant can show that they have undertaken the appropriate period of legal employment before their last period of leave elapsed (including the 28 day grace period) and that they will continue to work in line with article 6(1) rights then leave should be granted.

## **8. Applicants on section 3C leave**

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8.1. An application submitted whilst the applicant is on section 3C leave should be treated as a variation of the existing application. If the conditions of the previous leave included permission to work then that permission is extended by section 3C.

8.2. If an applicant can show that they had undertaken one year's legal employment before the section 3C leave came into effect and that they will continue to work for the same employer then leave should be granted.

8.3. If they are relying, in part or in full, on employment whilst on section 3C leave the application should be refused on the basis that the applicant has not completed one year's employment whilst duly registered in the labour force, in a secure and stable position with an undisputed right of residence. EC case-law holds that a secure and stable position does not include those resident on a provisional basis awaiting a grant of leave or someone who is authorised to work while they appeal against a decision to refuse leave.

8.4. When an applicant on section 3C leave is subsequently granted substantive leave with permission to work, any employment undertaken whilst on section 3C leave should be treated as legal employment for the purposes of article 6(1).

## **9. Applicants on temporary admission (TA)**

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Employment undertaken whilst on TA does not constitute legal employment as TA does not represent a secure and stable position with an undisputed right of residence, rather it constitutes residence on a provisional basis. If an applicant is

relying, in part or in full, on employment whilst on TA the application should be refused.

## **10. Evidence required**

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10.1. An application under article 6(1) should normally be supported by the following evidence:

- If applying under the first indent, evidence of a previous right to take up employment
- If applying under the first or second indent, evidence that employment has been *continuous* for the relevant period
- Original payslips and corresponding bank statements covering the entirety of the appropriate period
- Evidence that employment will continue:
  - with the same employer if legal employment has been for between one and three years
  - within the same occupation if legal employment has been for three years
  - with any employer if legal employment has been for four or more years.

10.2. As regards this last bullet point, this is usually a letter from the employer confirming their intent to retain the applicant for a period that meets the relevant requirement of article 6(1), subject to the granting of leave. The evidence provided by applicants who have been in legal employment for four or more years will be of relevance to the length of leave granted – see section 14.

### **10.3. Evidence required from au pairs**

Au pairs are in a unique position. Their status in relation to the host family does not normally have typical employment characteristics such as a formal contract or PAYE. However, under EC law they are recognised as having worker status. In order to show that they have rights under article 6(1) they need to show that they are performing au pair services under the direction of the host family in return for payment. Each application should be evidenced by the following.

- Evidence of the ability of the host family to accommodate the au pair (e.g. legal documents relating to the host family's home).
- Evidence that the au pair can be and is being paid (e.g. bank statements and / or wage slips for members of the host family and bank statements for the au pair if available).
- Evidence that the au pair is living with the host family, (e.g. correspondence addressed to the applicant at the host family's address, notification to the local council that the au pair is part of the household, any involvement of an au pair agency in placing the au pair with the family).

- Evidence that au pair duties have been and will continue to be undertaken (e.g. a statement from the host family detailing the au pair's historical and future working pattern, including when the au pair has and will be working, and for how long and for how long they intend to retain the services of the au pair, photographic evidence)

## **11. Indefinite leave to remain (ILR)**

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Article 6(1) does not provide for settlement, only the freedom to take up any employment after four years' legal employment. Applications for ILR should be refused and further leave to remain granted, assuming the applicant continues to meet the requirements of article 6(1). See section 14 for further guidance on grants of leave.

## **12. Family members**

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12.1. Article 7 of Decision 1/80 states the following.

*The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorized to join him:*

*- shall be entitled – subject to the priority to be given to workers of Member States of the Community – to respond to any offer of employment after they have been legally resident for at least three years in that Member State:*

*- shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.*

*Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.*

12.2. Applicants will need to show that they are genuinely a family member in order to be authorised to join, or remain with, the principal applicant. Family members for the purposes of Decision 1/80 are considered to be partners (being spouses, civil partners, unmarried and same-sex partners) and children. The criteria to be met are those available at **annex A**, which are based on the criteria for family members of PBS migrants.

12.3. In order to accrue rights under article 7 a family member will, having originally been authorised to join or remain with a Turkish worker, need to cohabit with them for three years, during which time the family member must continue to meet the criteria in annex A. Further, the principal worker will have to be legally resident and duly registered as belonging to the labour force for the whole duration of that time (although they need not actually have been in employment for the whole duration of that period – see section 6).

12.4. After three year's lawful residence a family member acquires their own right of access to the labour force set out in the first indent of article 7 *and with it a corollary right of residence*. This right of residence is protected by EU law and so once a family member has been resident for three years as set out above they no longer have to meet the requirements in annex A. They have a right to reside deriving from EU law and only lose that right in the following circumstances.

12.5. Rights acquired by family members under article 7 can only be lost on grounds of public policy, public health and public security (as defined in EU law) or if the family member leaves the UK for a significant length of time (two years or more) without legitimate reason.

12.6. EC law has found that rights accrued under article 7 are retained in the following circumstances:

- the principal worker leaves the UK or stops working in the UK but retains an *entitlement* to work (subject to the circumstances in section 3.8)
- the principal worker is shown to have fraudulently obtained the right to work
- the family member chooses not to seek and take employment pursuant to rights under the first and second indents of article 7
- the family member was a child at the time of being authorised to join the principal worker and, having cohabited with the worker for three or more years whilst the worker has been legally resident and duly registered as belonging to the labour force, reaches the age of 18 and/or ceases to be dependent on the principal applicant and/or starts to live independently from the principal applicant
- the family member is unable to work for a period of time because he/she is serving a prison sentence (notwithstanding public policy or public security considerations that arise from the crime committed).

12.7. For example, the child of an employed person who arrives in the UK as a 15 year old and remains as a family member for three years will then have a right to reside in their own right even if the principal worker leaves the UK or ceases working.

12.8. In addition to the above, it should also be noted that a qualifying family member will be granted code 1 leave with permission to work and if they chose to work will themselves accrue rights under article 6(1) after one year of legal employment. Before they have worked for one year they will need to continue to meet the requirements in annex A but if they work legally and continuously for one year they will thereafter have a right of residence by virtue of article 6(1) rights.

### **13. Decision letters**

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All decision letters should make it clear that the application is one for leave to remain as a worker under the provisions of article 6(1) or as a family member under article 7 of Decision 1/80 of the Association Council established by the ECAA with Turkey. Refusal notices should therefore quote article 6(1) or article 7 of Decision 1/80 of the Association Council established by the ECAA with Turkey.

### **14. Granting leave**

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14.1. Leave is granted in line with rights accrued under article 6(1). Those rights are to be determined in accordance with Decision 1/80 and related caselaw, as set out by the guidance in these instructions. Leave granted remains effective only for as long as a person has rights under article 6(1) i.e. extant leave is invalid where rights under article 6(1) are lost.

14.2. If the amount of time between granting leave and the applicant accruing rights under the next indent is going to be short (two months as a guide) consideration should be given to granting leave in line with the rights that are soon to be accrued under the next indent, thereby avoiding the need for the applicant to re-apply within a short period. When this happens the grant letter should make clear on what date the new rights will be accrued, that by virtue of article 6(1) these rights will not be accrued until that date and that employment should at all times be only in accordance with rights accrued.

14.3. Dependents should be granted in line with the principal worker and should be granted code 1 leave.

#### First Indent

14.4. Applicants who fall within the first indent of article 6(1) should be granted code 4 leave. The endorsement will specify which employer they are entitled to work for. Applicants should normally be granted to the date before which they will fall within the second indent. This means that applicants will be granted a maximum of two years leave.

Examples;

- A worker who has been in continuous legal employment for 12 months would normally be granted leave for two years.
- A worker who has been in continuous legal employment for 18 months would normally be granted leave for a further 18 months.

#### Second Indent

14.5. Applicants falling within the second indent should be granted code 2 leave. The endorsement will specify which occupation field they are entitled to work in. Applicants should normally be granted to the date before which they will fall within the third indent. This means that applicants will be granted a maximum of 12 months' leave.

Examples;

- A worker who has been in continuous legal employment for three years would normally be granted leave for a further 12 months.
- A worker who has been in continuous legal employment for three years and four months would normally be granted leave for a further eight months.

#### Third Indent

14.6. Applicants who fall within the third indent should be granted code 1 leave. There will be no specified employer/occupation on the endorsement as the worker

will have free access to the labour force. In terms of duration of leave a balance needs to be struck between the rights of free access that have been accrued under the third indent and the fact that the applicant's right to reside is still dependent on them being duly registered as belonging to the labour force and that those rights can still be lost (see section 3.8). Duration of leave in such cases should therefore take account of the length and stability of the applicant's employment in the UK and the evidence they can produce in support of their ongoing employment. Grants under the third indent should not normally exceed three years.

Examples:

- An applicant who has acquired rights under the third indent and who has been working for the same employer continuously for two or more years and who produces evidence of the continuation of their employment may be granted leave for up to three years.
- An applicant who has acquired rights under the third indent and who has had periods of involuntary unemployment and can only produce evidence of short term future employment may be granted for a shorter period of between one and two years.

## **15. Refusal - rights of appeal**

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15.1. Although the rights conferred under article 6(1) are not currently included in the Immigration Rules, section 88(2)(d) of the NIA Act 2002 – ineligible to appeal on the grounds that the reason for refusal is not covered by the Immigration Rules - does not apply. To the extent that the Rules are inconsistent with article 6(1) they are unlawful and any right of appeal cannot lawfully be excluded by section 88(2)(d).

15.2. Those who apply in time under the provisions of Decision 1/80 and are refused leave to remain have an in-country right of appeal by virtue of section 82 and section 92(2) of the NIA Act 2002.

15.3. Those who apply out of time under the provisions of Decision 1/80 and are refused leave to remain have no right of appeal as they are not covered by section 82(2) of the NIA Act 2002.

## **16. Example refusal wordings**

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The following are examples only and may need amending to address the case in question. Alternatively, these examples may not cover the circumstances of the refusal in question. It may also be necessary to use more than one of the wordings in a refusal. Please consult a Senior Caseworker for further advice when necessary.

### *Employment for less than the period required*

You have only provided evidence to show that you have been employed by [employer's name] for a period of [length of employment]. You do not therefore qualify for leave to remain to continue working for [employer] / to pursue employment within the same occupation / to pursue any offer of employment in the United Kingdom.

*Employment for a year or more but not continuous*

You have provided evidence to show that you have been in employment with [employer's name] for [period of time] but you have not provided sufficient evidence to show that this period of employment has been on a continuous basis.

*Employment not continuing*

You have provided evidence to show that you have been in employment with [employer's name] for [period of time] but you have not provided evidence to show that you will continue to work for [employer's name].

*Employment entirely undertaken beyond 28 days since the expiry of last leave*

Your last period of leave to remain in the United Kingdom [extended by virtue of section 3C of the Immigration Act 1971] expired on [date]. However, the period of employment upon which you are basing this application did not begin until [date, that must postdate 28 days after last period of leave expired]. Since that date you are not considered to have been legally employed in the United Kingdom as you have had no lawful basis for remaining in the United Kingdom.

*Employment in part undertaken beyond 28 days since the expiry of last leave*

Your last period of leave to remain in the United Kingdom [extended by virtue of section 3C of the Immigration Act 1971] expired on [date]. However, the period of employment upon which you are basing this application includes [X months/ years] of employment undertaken 28 days after your last period of leave expired on [date that last leave expired]. Since that date you are not considered to have been legally employed in the UK as you have had no lawful basis for remaining in the UK. You have not therefore undertaken legal employment for a period of [1/3/4 or more year(s)].

*Employment entirely whilst on section 3C leave*

Your last period of leave to remain in the United Kingdom expired on [date] and was extended by virtue of section 3C of the Immigration Act 1971 until [date]. However, the period of employment upon which you are basing this application did not begin until [date, that must postdate the beginning of section 3C leave], at which time you were on section 3C leave. EC law defines "legal employment" as having a stable and secure position in the labour force and an undisputed right of residence" and states explicitly that this does not include those "resident on a provisional basis awaiting the grant of [leave] or someone who is authorised to work whilst he or she appeals against a decision refusing [leave]". Your employment with [employer's name] does not therefore meet the EC threshold for legal employment.

*Employment in part whilst on section 3C leave*

Your last period of leave to remain in the United Kingdom expired on [date] and was extended by virtue of section 3C of the Immigration Act 1971 until [date]. The period of employment upon which you are basing this application began on [date] and includes [X months/ years] on section 3C leave. EC law defines "legal employment" as having a stable and secure position in the labour force and an undisputed right of

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residence” and states explicitly that this does not include those “resident on a provisional basis awaiting the grant of [leave] or someone who is authorised to work whilst he or she appeals against a decision refusing [leave]”. You have not therefore undertaken employment that meets the EC threshold for legal employment for a period of [1/3/4 or more year(s)].

*Employment whilst on temporary admission*

The period of employment upon which you are basing this application was undertaken whilst you were in the United Kingdom on the basis of temporary admission as a person liable to detention pending a decision to give or refuse leave to enter (paragraphs 21 and 16 of Schedule 2 to the Immigration Act 1971 refer). EC law defines “legal employment” as having a stable and secure position in the labour force and an undisputed right of residence” and states explicitly that this does not include those “resident on a provisional basis awaiting the grant of [leave] or someone who is authorised to work whilst he or she appeals against a decision refusing [leave]”. Your employment with [employer’s name] does not therefore meet the EC threshold for legal employment.

## **Annex A – family member requirements**

- **Partners (spouses and civil, unmarried and same-sex partners)**

1. To qualify for entry clearance or leave to remain as the Partner of a *Turkish ECAA worker*, an applicant must meet the requirements listed below. If the applicant meets these requirements entry clearance or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

2. Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal, and if applying for leave to remain, must not be an illegal entrant.

(b) The applicant must be the spouse or civil partner, unmarried or same-sex partner of a person who:

(i) has valid leave to remain as a *Turkish ECAA worker*, or

(ii) is, at the same time, being granted leave to remain as a *Turkish ECAA worker*

(c) An applicant who is the unmarried or same-sex partner of a *Turkish ECAA worker* must also meet the following requirements:

(i) any previous marriage or civil partnership or similar relationship by the applicant or the *Turkish ECAA worker* with another person must have permanently broken down,

(ii) the applicant and the *Turkish ECAA worker* must not be so closely related that they would be prohibited from marrying each other in the UK, and

(iii) the applicant and the *Turkish ECAA worker* must have been living together in a relationship similar to marriage or civil partnership for a period of at least 2 years immediately prior to the application being made.

(d) The marriage or civil partnership, or relationship similar to marriage or civil partnership, must be subsisting at the time the application is made.

(e) The applicant and the *Turkish ECAA worker* must intend to live with the other as their spouse or civil partner, unmarried or same-sex partner throughout the applicants stay in the UK.

(f) The applicant must not intend to stay in the UK beyond any period of leave granted to the *Turkish ECAA worker*.

(g) An applicant who is applying for leave to remain, must have, or have last been granted, leave:

(i) as the Partner of a *Turkish ECAA worker*, or

(ii) as the spouse or civil partner, unmarried or same-sex partner of a person with leave under another category of these Rules who has since been granted, or is, at the same time, being granted leave to remain as a *Turkish ECAA worker*.

- **Children**

3. To qualify for entry clearance or leave to remain under this route, an applicant must meet the requirements listed below. If the applicant meets these requirements entry clearance or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

4. Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal, and if applying for leave to remain, must not be an illegal entrant.

(b) The applicant must be the child of a parent who:

(i) has valid leave to enter, leave to enter or remain as a *Turkish ECAA worker*, or

(ii) is, at the same time, being granted entry clearance, leave to enter or leave to remain as a *Turkish ECAA worker*.

(c) The applicant must be under the age of 18 on the date the application is made, or if over 18 and applying for leave to remain, must have, or have last been granted, leave as the child of a *Turkish ECAA worker* or as the child of the parent who had leave under another category of the Immigration Rules and who has since been granted, or, is at the same time being granted, leave to remain as a *Turkish ECAA worker*.

(d) The applicant must not be married or in a civil partnership, must not have formed an independent family unit, and must not be leading an independent life.

(e) The applicant must not intend to stay in the UK beyond any period of leave granted to the *Turkish ECAA worker* parent.

(f) Both of the applicant's parents must either be lawfully present in the UK, or being granted entry clearance or leave to remain at the same time as the applicant, unless:

(i) the *Turkish ECAA worker* is the applicant's sole surviving parent, or

(ii) the *Turkish ECAA worker* parent has and has had sole responsibility for the applicant's upbringing, or

(iii) there are most exceptional serious or compelling family or other considerations which would make it desirable not to refuse the application and suitable arrangements have been made in the UK for the applicant's care.

(g) An applicant who is applying for leave to remain must have, or have last been granted leave:

(i) as the child of a *Turkish ECAA worker*, or

(ii) as the child of a parent who had leave under another category of the Immigration Rules and who has since been granted, or is, at the same time, being granted leave to remain as a *Turkish ECAA worker*.