Herzien Rapport

Rapport over de inspanningen van het Ministerie van Buitenlandse zaken om helderheid te verkrijgen over de weigering van de Turkse overheid om verzoeker een inreisvisum te verstrekken.

Verzoeker heeft het verslag van bevindingen niet per post ontvangen en is na het uitbrengen van het rapport alsnog in staat gesteld op de bevindingen te reageren. Zijn reactie heeft geleid tot het aanpassen van de bevindingen. Dit heeft echter niet geleid tot een wijziging van het oordeel.

Datum: 2 november 2015
Rapportnummer: 2015/149

AANLEIDING

Verzoeker/vader heeft in 2005 met zijn toenmalige levenspartner, die van Turkse afkomst is, in Nederland een dochter gekregen. Vader, moeder en dochter hebben alle drie de Nederlandse nationaliteit. Het gezin heeft tot 2009 samengewoond in Nederland. Eind 2009 zijn zij geëmigreerd naar Turkije. In 2011 heeft de vrouw de gezamenlijke dochter zonder toestemming van de verzoeker uit huis weggehaald en houdt haar sindsdien weg van verzoeker. Enkele dagen later is verzoeker door de Turkse politie, zonder aanleiding, in zijn eigen huis gearresteerd, waarbij hij gedwongen werd zijn huissleutels en al zijn bezittingen achter te laten. Sindsdien heeft hij geen enkel contact meer met zijn dochter gehad. Daarna is de relatie verbroken. Vervolgens heeft de ex-partner de Turkse overheid verzocht de verblijfsvergunning van verzoeker in te trekken. Dit is in 2013 gehonoreerd. Sindsdien is het hem nooit meer toegestaan Turkije opnieuw binnen te treden. Zonder opgaaf van reden wordt hem keer op keer door de Turkse overheid een inreisvisum geweigerd. Verzoeker heeft maar één doel en dat is om het ouderlijk contact met zijn dochtertje met onmiddellijke ingang weer te herstellen.

BEVINDINGEN

Klacht van verzoeker

Volgens verzoeker is de arrestatie door de Turkse politie, zonder enige rechtsgrond, enkel uitgevoerd in opdracht van zijn schoonvader die oud rechter-president was van de Turkse Hoge Raad. Dat is volgens verzoeker misbruik van macht. En het heeft er toe geleid dat hij daarna in Turkije nog vijf keer is gearresteerd. Verder zijn tientallen rechtszaken tegen hem aangespannen. Diverse van die rechtszaken in Turkije heeft hij niet in persoon kunnen bijwonen omdat hem een inreisvisum vanuit Nederland werd geweigerd. Hij is tot op heden nooit veroordeeld en wèl vrijgesproken van diverse aanklachten en heeft in Turkije dan ook geen strafblad.

Door verzoeker zelf zijn ook een aantal rechtszaken aangespannen in Turkije met als doel het herstellen van het contact met zijn dochtertje. Op 18 september 2012 heeft de familierechter in Ankara beslist dat verzoeker recht heeft op omgang met zijn dochter. Nadat de moeder tweemaal beroep tegen deze uitspraak heeft ingesteld, heeft de Turkse Hoge Raad het omgangsrecht in een uitspraak van 23 december 2013 bevestigd. Hoewel betrokkene dus door de hoogste Turkse rechter in het gelijk is gesteld ten aanzien van zijn omgangsrecht, kan hij dat recht niet uitoefenen. Dat komt door de praktische belemmering dat hij geen toegang krijgt tot het Turkse grondgebied waar zijn dochter verblijft.

Na doorzending van zijn klacht door de Nationale ombudsman aan de Turkse Nationale ombudsman heeft deze de klacht van verzoeker op alle punten gegrond verklaard. (Zie Achtergrond onder 1.) Ook de Turkse Centrale Autoriteit heeft bevestigd dat verzoeker toegang tot Turkije zou moeten krijgen om in staat te worden gesteld zijn dochter weer te zien.

Verzoeker klaagt er bij de Nationale ombudsman over dat de Nederlandse overheid hem in deze in de steek heeft gelaten. De Nederlandse ambassade in Ankara heeft hem onvoldoende ondersteuning geboden voor zijn problemen met de Turkse overheid. Het Ministerie van Buitenlandse Zaken heeft zich volgens hem onvoldoende ingespannen om zijn belangen te behartigen.
De Nationale ombudsman heeft reeds in een eerder stadium van de klachtbehandeling getracht verzoeker te helpen. In eerste instantie door de klacht door te geleiden naar de Turkse Nationale ombudsman en in tweede instantie door te trachten via het Ministerie van Buitenlandse Zaken de reden van het afwijzen van het inreisvisum door de Turkse overheid te achterhalen. De reactie die het Ministerie van Buitenlandse Zaken daarop per e-mail ontving in december 2014 wekte de verwachting dat verzoeker nu wel een visum kon verkrijgen. Helaas werd de aanvraag daarop toch weer zonder verdere opgaaf van reden afgewezen.

Daarop heeft de Nationale ombudsman het onderzoek formeel geopend en de klacht van verzoeker als volgt geformuleerd:

> "Verzoeker klaagt er over dat medewerkers van het Ministerie van Buitenlandse Zaken en de Nederlandse vertegenwoordiging in Turkije zich onvoldoende hebben ingespannen om bij de Turkse overheid meer duidelijkheid te verkrijgen omtrent het zonder reden stelselmatig weigeren van een visum."

Visie Minister van Buitenlandse Zaken
Op 10 maart 2015 reageert de minister van Buitenlandse Zaken op de klacht zoals die is geformuleerd door de Nationale ombudsman en beantwoordt de daarbij gestelde vragen. Hij geeft aan dat zijn ministerie zich meerdere malen heeft ingezet voor verzoeker door diplomatieke nota's te sturen aan de Turkse autoriteiten om aandacht te vragen voor de kwestie. Daarnaast is er diverse keren informeel contact geweest met de Turkse autoriteiten: via de Nederlandse ambassade in Ankara met het Turkse Ministerie van Buitenlandse Zaken en met de politiek medewerker van de Turkse ambassade in Den Haag. De ambassade in Ankara heeft zich veelvuldig ingespannen om, binnen de daarvoor geldende volkenrechtelijke kaders, aandacht en medewerking van de Turkse autoriteiten te vragen. Tot slot geeft de minister aan dat het uiteindelijk de Turkse overheid is die bepaalt of zij verzoeker een visum willen verlenen.

Van belang is hier ook een brief die de minister op 6 maart 2014 aan verzoeker heeft gestuurd waarin hij onder andere ingaat op de verantwoordelijkheid van het Ministerie van Buitenlandse Zaken in deze zaak. Hij geeft aan dat de ambassade vragen kan stellen over de beweegredenen van de Turkse autoriteiten om hem geen visum te verlenen, maar dat het de Turkse overheid is die bepaalt wat de strekking van hun antwoord is. De mogelijkheden van de Nederlandse ambassade of van het ministerie zijn in dit opzicht uiterst beperkt. Ook is er geen sprake van een ongeclausuleerd recht op consulaire bijstand, wel doet het ministerie zoveel als redelijkerwijs mogelijk is om verzoeker bij te staan. Verder geeft de minister in deze brief aan dat het een algemeen beginsel van het volkenrecht is dat de ene soevereine staat zich niet mengt in de

rechtsorde van een andere soevereine staat. De Nederlandse Staat intervenieert slechts in de rechtsorde van een andere soevereine Staat indien er sprake is van extreme detentieomstandigheden zoals foltering, marteling dan wel zware mensenrechtenschendingen zoals dreiging van de doodstraf. Een klacht over de schending van mensenrechten van verzoeker dan wel zijn dochter zou dan ook gericht moeten worden aan de Turkse Staat en niet de Nederlandse.
De minister heeft desgevraagd een overzicht van de correspondentie met de Turkse autoriteiten aan de Nationale ombudsman gestuurd. Hij verzoekt daarbij de Nationale ombudsman om te bepalen dat alleen hij kennis neemt van deze onderliggende stukken. De reden hiervoor is dat openbaarmaking en verdere verspreiding van deze stukken de betrekkingen met Turkije kan schaden. Met betrekking tot één bepaalde brief heeft de minister nog specifiek verzocht aan de Turkse autoriteiten of deze aan verzoeker mocht worden doorgestuurd. De Turkse autoriteiten hebben daarop aangegeven dat deze brief wel gedeeld kan worden met officiële instanties, maar zeker niet met verzoeker.

Tevens heeft de Nationale ombudsman aan de minister gevraagd of hem redenen bekend zijn die het weigeren van het inreisvisum van verzoeker zouden kunnen verklaren. De minister antwoordde hierop dat uit informele navraag door de Nederlandse ambassade in Turkije bij de autoriteiten is gebleken dat er afgelopen december inderdaad in eerste instantie toestemming voor het visum was verleend, maar dat over de aanvraag nog verder consultaties hebben plaatsgevonden bij andere ministeries. Uiteindelijk heeft het Turkse ministerie voor "Family and Social Policy's" (hierna te noemen het Ministerie voor Familie) bezwaar aangetekend tegen afgifte van het inreisvisum. Zij zijn bang voor kinderontvoering. Naar aanleiding hiervan heeft de Nederlandse ambassade de Turkse autoriteiten per nota van 2 februari 2015 verzocht de reden voor de visumweigering door te geven aan verzoeker. Afgesproken is daarbij dat het Turkse ministerie van Buitenlandse Zaken het Turkse consulaat in Rotterdam vraagt verzoeker te informeren.

Geen openbaarmaking stukken
De Nationale ombudsman heeft in het kader van het onderzoek alle nota's, brieven en e-mails ingezien en bepaalt hierbij dat hij zal voldoen aan het verzoek van de minister van Buitenlandse Zaken om deze niet verder openbaar te maken. Ook met betrekking tot de brief van het Turkse Ministerie van Familie ziet de Nationale ombudsman geen aanleiding om deze openbaar te maken. Voor een adequate behandeling van de klacht acht de Nationale ombudsman het echter wel noodzakelijk de inhoud van deze brief hier te bespreken.

De brief van het Turkse Ministerie van Familie
Op 25 maart 2014 heeft het Ministerie van Familie een brief gestuurd aan de Nederlandse ambassade in Ankara. Deze brief is opgesteld op verzoek van de ex-partner van verzoeker. Het ministerie bericht hun kant van de zaak en gaat daarbij in op de beantwoording van de Nederlandse kamervragen van 3 maart 2014. In deze brief geeft het ministerie aan dat het haar wettelijk is toegestaan om deel te nemen aan juridische procedures die zien op geweld of de dreiging met geweld tegen vrouwen, kinderen en familieleden. Zij treedt in deze zaak dan ook op in het belang van het kind en de moeder

die het slachtoffer zijn geweest van geweld door de vader. Met betrekking tot de uitspraak van de Turkse Hoge Raad (Yargitay) omtrent het omgangsrecht van de vader geeft zij aan dat er, nadat deze uitspraak in werking was gegaan, geen formele stappen door de vader zijn ondernomen richting de moeder of het Ministerie van Familie met als doel zijn dochter weer te kunnen zien. Zo heeft hij er voor gekozen om de media in te schakelen en om in de Nederlandse Tweede Kamer vragen te laten stellen, in plaats van de aangewezen juridische procedures te volgen om zijn kind te kunnen ontmoeten. De vader heeft hiermee volgens het Ministerie van Familie een houding en een gedrag aangenomen alsof hij wil dat het ontmoeten van zijn kind gecompliceerd wordt.

Verder geeft het Ministerie van Familie aan dat er nog drie rechtszaken in hoger beroep lopen tegen verzoeker, die zien op aangiften van strafbare feiten die hij heeft gepleegd jegens de moeder en het kind. Nu moeder en kind het slachtoffer hiervan zijn, is het Ministerie van Familie in deze drie rechtszaken partij geworden. Bovendien is het de vader die voortdurend de moeder en het kind bedreigt. Het Ministerie van Familie geeft vervolgens in de brief een aantal voorbeelden van wat verzoeker in de loop der tijd op internet zou hebben gepubliceerd. Zo zou hij een plan voor het kidnappen van zijn dochter hebben gepubliceerd, zou hij een keer daadwerkelijk hebben getracht zijn dochter te kidnappen, en zou hij de naam van zijn dochter hebben toegevoegd aan een lijst op internet van kinderen die zijn vermoord door hun vaders omdat er scheidingsperikelen waren. Ook zou verzoeker op zijn internetsite propaganda maken voor Hüsseyin Baybasin, in de visie van het Ministerie van Familie één van de meest machtige maffialeiders van Turkije, die in Nederland een levenslange gevangenisstraf uitzit voor drugssmokkel. Verzoeker zou verder op internet hebben geschreven dat hij een getrainde commando is en melding hebben gemaakt van de infiltreer, hit en run tactieken zoals die door guerrilla's gebruikt worden. Ook zou hij hebben aangegeven enkele geheim agenten te kennen op de Nederlandse ambassade in Turkije.

Aan het slot van zijn brief geeft het Ministerie van Familie aan dat de huidige opstelling van de Turkse overheid hier is gericht op de bescherming van de minderjarige. Het is volgens het Ministerie van Familie ondenkbaar dat de Turkse Staat moeder en dochter deze bescherming zou onthouden, terwijl zij het slachtoffer waren van geweld en nog steeds aan dreiging met geweld onderworpen worden.

Reactie van verzoeker op de inhoudelijke bespreking van de brief van het Turkse Ministerie van Familie

Verzoeker reageerde op de inhoud van deze brief in een reactie op het verslag van bevindingen. Nu de brief van het Turkse Ministerie van Familie vanwege het vertrouwelijke karakter niet, zoals gebruikelijk in het kader van hoor en wederhoor, door de Nationale ombudsman aan verzoeker is voorgelegd vóór het opstellen van het verslag van bevindingen, stelt de Nationale ombudsman verzoeker alsnog in de gelegenheid om hier in zijn eigen bewoordingen zijn reactie op de brief te geven. De reactie van verzoeker is hieronder nagenoeg geheel letterlijk overgenomen:

Dit ministerie is eerst opgericht op 6 juli 2011, zes dagen nà de ontvoering van de dochter, en behoort daarmee niet toe te zien op de anterieure onderhavige zaak. Dit

nieuwe ministerie richt zich op "honor killings" en "child abuses" maar vanuit een discriminatoir oogpunt: in het algemeen word de vader altijd beschouwd als de dader/bedreiger, terwijl het in casu juist de moeder is. Vanuit deze onjuiste rechtsopvatting is de wetgeving voor "restraining orders" aangepast waarvan mijn dochter en ik slachtoffer zijn geworden. Ik heb tenminste vijf omgangsverboden gekregen, zonder enige aanleiding, bewijsgrond, zelf gehoord te zijn of beroepsmogelijkheid. Naar mijn opvatting zijn deze vonnissen uitgevaardigd met maar één doel: Om op aangifte van slechts twee personen (bijv. de ex-partner en een familielid) overtreding van dit (ten onrechte) opgelegde verbod in te roepen en daarmee de vader een gevangenisstraf en strafblad (en dus uitzetting als ongewenste vreemdeling) te verkrijgen. Ik heb alles in het werk gesteld om dit te voorkomen, waaronder zelfs dat mijn advocaat bij mij in mijn appartement is blijven slapen om dit soort geïnduceerde valse arrestaties te voorkomen. Door mij heeft dan ook nimmer enige bedreiging of overtreding van deze (iedere 6 maanden automatisch verlengde) illegale omgangsverboden plaats gehad.

Op 25 maart 2014 (dus eerst nà de beantwoording van Kamervragen) zou het Turkse Ministry of Family geantwoord hebben in een brief die is opgesteld op verzoek van de ex-partner. Gesteld wordt dat ik geen pogingen heb ondernomen om het contact met mijn dochter te herstellen. Het stelt dat de vader voortdurend de moeder en het kind bedreigt en geeft daarvan voorbeelden die op internet zouden zijn gepubliceerd. Verder zou ik propaganda maken voor Hüseyin Baybaşin. Tot slot stelt het dat moeder en dochter het slachtoffer zijn geworden van geweld en nog steeds aan deze dreiging zijn onderworpen.

Het ministerie verklaart zelf dat het in haar beslissing partij kiest door de ex-partner te citeren. Vanaf de eerste brief van de ex-partner d.d. 1 juli 2011 tot nu is iedere Turkse overheidsbeslissing ingegeven enkel op het (niet onderbouwde) verzoek van de ex-partner. Daaruit blijkt dat er geen sprake is van onafhankelijkheid noch objectiviteit.

Ik heb alles wat binnen de wet mogelijk is in het werk gesteld om contact te krijgen met mijn dochter. Zelfs haar Nederlandse grootouders hebben in februari 2013 het verzoek tot een familie relatie bij de Turkse rechter gedaan. Op 25 september 2013 weigerde de Turkse rechter daarin uitspraak te doen en heeft deze beslissing doorgeschoven. Er is nooit meer iets over gehoord: "In behandeling".

Over de valse beschuldigingen wordt in de mij beschikbare gestelde samenvatting niet één bewijsstuk aangedragen. Dat kan ook niet, want die bestaan niet. Het omgekeerde bestaat wèl: mishandeling en bedreiging door de ex-partner van zowel mij als mijn dochter. Vastgelegd in onherroepelijke rechterlijke uitspraken. Daarnaast staat tevens vast dat er vele valse aanklachten zijn gedaan, meineed is gepleegd, valsheid in geschrifte, bedreiging van getuigen, verdonkeremanen van bewijsmateriaal, et cetera. Tevens blijkt uit de brief van dat het ministerie dat het juist de ex-partner is die mij stalkt, door een op Nederland gerichte website die de misstanden bij justitie aankaart intensief te volgen, kennelijk achteraf op zoek naar bewijs voor haar vele valse aangiften. Reeds eerder heeft zij opzettelijk verkeerde vertalingen aangeleverd van uit hun context gehaalde fragmenten. Daartoe heeft zij in februari 2013 zelfs een eigen vertaalbureau opgericht. Voor details en bewijsstukken verwijs ik naar mijn verklaring en eis in

reconventie zoals op 7 september 2015 ingediend bij de Nederlandse Rechter-Commissaris naar aanleiding van een rechtshulpverzoek vanuit Turkije. In de opsomming lees ik een bevestiging van het paranoïde gedrag van de ex-partner, zoals dat ook is gebleken in het door de rechter opgelegde expert-onderzoek. Ik acht het zeer verontrustend dat de Turkse overheid zich door dergelijke paranoïde denkbeelden laat leiden en maak me zeer grote zorgen om het psychische welbevinden van mijn dochter.

Moeder en dochter zijn nimmer slachtoffer geworden van geweld of dreiging door mij veroorzaakt. Daarentegen zijn mijn dochter en ik wel slachtoffer van het geweld en dreiging van de ex-partner, haar familie en de Turkse overheid. Vijf arrestaties, vijf omgangsverboden, beroving van vrijheid en bezittingen, het opleggen van een wekelijkse meldingsplicht op het politiebureau, het afdwingen van hoge kosten, et cetera. Dit alles wèl met bewijsstukken gestaafd, waaronder voornoemde onderzoeken en rechterlijke vonnissen, waaruit onherroepelijk is komen vast te staan dat het juist de moeder is die het kind mishandeld.

BEOORDELING

Behoorlijkheidsvereiste

Het vereiste van maatwerk houdt in dat de overheid bereid is om in voorkomende gevallen af te wijken van algemeen beleid of voorschriften als dat nodig is om onbedoelde of ongewenste consequenties te voorkomen. Dat impliceert onder meer dat de overheid in haar feitelijk handelen zo mogelijk zoekt naar maatregelen en oplossingen die passen bij de specifieke omstandigheden van de individuele burger.

Oordeel

Het verlenen van consulaire bijstand of diplomatieke bescherming is maatwerk. De wijze, vorm en mate van hulpverlening worden afgestemd op de speciale omstandigheden in de ontvangende staat, in dit geval Turkije. De Nederlandse wet kent geen juridisch afdwingbaar recht op consulaire bijstand of bescherming. De hulp kan ook bestaan in de verlening van diplomatieke bescherming. Dat is wanneer een Staat optreedt om zijn onderdanen of hun belangen in een ander land, bescherming te bieden tegen onrecht.
Voor een beoordeling van de onderzochte gedraging op dit punt is allereerst van belang dat sprake is van een relatie tussen twee soevereine staten. Dit brengt met zich dat het actief volgen van elkaars werkzaamheden en het elkaar aanspreken op verantwoordelijkheden op diplomatiek verantwoorde wijze dient te geschieden en zodoende daaraan zekere beperkingen zijn verbonden. Daarnaast is van belang dat harde criteria ontbreken om te bepalen in welke situatie de Nederlandse autoriteiten de buitenlandse autoriteiten dienen aan te spreken. De Nederlandse overheid kan zich in ieder geval niet mengen in de rechtsgang zelf, de schuldvraag, het bewijs of de te bepalen strafmaat.

Gelet op het voorgaande is de Nationale ombudsman van oordeel dat het consulaat en het ministerie zich, binnen de marges die zij daartoe hadden, voldoende hebben ingespannen om verzoeker bijstand te verlenen. Bestudering van de stukken toont aan

dat men op diverse momenten aan de Turkse overheid om opheldering heeft gevraagd over de weigering van het inreisvisum. Zowel formeel als informeel hebben ambtenaren van Buitenlandse Zaken meermalen om aandacht voor deze zaak gevraagd bij de Turkse overheid. Deze impliciete politieke druk heeft echter niet geleid tot het verstrekken van een inreisvisum. Hiermee heeft het miniserie van Buitenlandse Zaken zich naar het oordeel van de Nationale ombudsman voldoende ingespannen om de belangen van verzoeker in Turkije te behartigen, ook buiten de minimum kaders voor consulaire bijstand in het buitenland.

De onderzochte gedraging is daarmee behoorlijk.

Uit het onderzoek van de Nationale ombudsman blijkt dat de waarschijnlijke oorzaak van de weigering van een inreisvisum ligt in de visie van het Ministerie van Familie dat verzoeker een gevaar vormt voor de veiligheid van moeder en dochter. De Nationale ombudsman hecht er aan om aan te geven dat voor de juistheid van deze visie van het Ministerie van Familie in de informatie die hem bekend is geworden geen aanknopingspunten worden gevonden. De Nationale ombudsman zal een kopie van dit rapport en de brief van het Ministerie van Familie sturen aan de Turkse Nationale ombudsman met het verzoek de mogelijkheden te bekijken om het handelen van het Ministerie van Familie te beoordelen.

CONCLUSIE

De klacht over de onderzochte gedraging van de minister van Buitenlandse Zaken te Den Haag is niet gegrond.

De Nationale ombudsman,

Reinier van Zutphen

Achtergrond/bijlagen

1. Het rapport van de Turkse Nationale ombudsman

REPUBLIC OF TURKEY
OMBUDSMAN INSTITUTION
COMPLAINT NO : 2014/765
DATE OF DECISION : 16/07/2014
RECOMMENDATION
ATTORNEYS OF
THE COMPLAINT The complaint pertains to the request of the complainant to enter Turkey in order to participate in the trials pending before the Turkish courts in Ankara and meet with his own child who is under the mother's guardianship.

I. PROCEDURE
A. Complaint Application Process
(…)
B. Preliminary Examination Process
(…)

II. MATTER AND FACTS
A. Statements and Claims of the Complainant about the subject matter of the Complaint
3) In the application filed by the complainant who is a Dutch citizen, it has been stated that;

- The complainant resided in the Netherlands with a woman of Turkish origin as of 17 June 2003, they had an extramarital child on 20 April 2005, biological and legal paternity of the complainant was determined on 13 October 2004 and the child was placed under the guardianship of the mother when she refused joint guardianship,
- In November 2009, he emigrated with his family from the Netherlands to Turkey, began to stay in Turkey on a tourist visa as they were not married formally and his legal domicile is still in the Netherlands,
- The complainant's wife kidnapped their child on 17 June 2011 and held the child hostage with her Turkish family; they threw him out of the house with the help of the police on 30 June 2011 without any court ruling and he had to leave all his belongings, except for his passport and clothes, in the house; everything he possessed except his passport and clothes he had on was stolen and that his wife's father was a retired member of the Supreme Court had a major effect at this point,
- The complainant was detained by the Turkish police on 30 January 2013 based on unrealistic charges made up by his wife's family although there was no court ruling in this respect; the police wanted to deport him upon the request of his wife's father, but they couldn't deport and had to release him as he had a valid residence permit to stay in Turkey,

- He left Turkey on 28 February 2013 to file a lawsuit in the Netherlands and was informed by the authorities at Esenboğa Airport that he had to contact officials in the Turkish Consulate in the Netherlands before he returned to Turkey,
- He couldn't enter Turkey again after the hearing held in Ankara on 3 April 2013 and was thus unable to attend the hearings and enjoy the right granted by the court to see his child,
- He was unable to attend the hearings held in Turkey in the past and his right to a fair trial was thus violated; he wanted to participate in various hearings to be held in Turkish courts in February, March and April 2014;
- He had the right to see his child on 1-2 February 2014 as per the ruling of the court, but couldn't as he was unable to enter Turkey and Article 10 of the UN Convention on the Rights of the Child was thus violated;

Therefore, the complainant requests to enter Turkey in order to participate in the trials pending before the Turkish courts in Ankara and meet with his own child who is under the mother's guardianship.

B. Explanations of the Administration about the Complaints

4) In the letter no. xxx dated 29.01.2014 obtained from the Ministry of Foreign Affairs, it was stated that the "Permit-N decision" was taken about the Dutch citizen applicant and that the applicant had to apply for **entry permit/visa** to the Turkish representative offices in the Netherlands in order to enter Turkey.

5) However, in the letter no. xxx dated 11.02.2014 obtained from the General Directorate of Security of the Ministry of Interior, it was stated that a criminal case had been filed **in Ankara 25th Criminal Court of General Jurisdiction** against the applicant with the bill of indictment prepared by the Ankara Chief Public Prosecutor's Office with docket no. xxx and dated 18.10.2012 **on the grounds of** violation of the right to privacy and **defamation and threat** through an audio, written and video message,

That when the opinion of **the court in question** was asked with regard to whether there were any advantages and necessity for the complainant to come to Turkey and attend the hearings, the court noted that **the testimony of the applicant was taken at the hearing held on 03.04.2013 and there was no legal obligation for the applicant to attend the subsequent hearings as he would be represented by his attorneys,**

Therefore, the visa request of the applicant on whom a "Permit-N Visa" (prior authorization requirement for granting of a visa and entry to the country) decision was taken by **the Ministries** on 12.02.2013 **was not deemed appropriate (negative) in accordance with the provisions of the Passport Law No. 5682 and Law No. 5683 on Residence and Travel of Foreigners in Turkey.**

6) In the letter no. xxx dated 21.03.2014 obtained from the Ministry of Foreign Affairs, on the other hand, it was stated that the complainant applied for visa to the Consulate General of Turkey in Rotterdam on 07.03.2013 for the first time **after the prohibition on entry to Turkey was introduced about the Dutch citizen applicant with the court decision dated 12.02.2013** and **the person concerned was granted a visa by the aforesaid Consulate General on 31.03.2013 upon the positive opinion taken (from the General Directorate of Security of the Ministry of Interior),**

That the same person applied to the afore-named Consulate General on 04.09.2013 and 14.01.2014 to enter Turkey to attend the hearings to be held in Turkey, but was rejected based on the negative evaluation of the General Directorate of Security of the Ministry of Interior.

C. Incidents

7) In the light of the documents available in the file, the Dutch citizen applicant is understood to have a child from his relationship with a Turkish citizen woman, have duly entered and left Turkey several times and have lived in Turkey for a certain period of time by taking residence permit.

8) In the meantime, a dispute between the applicant and the Turkish citizen woman arose and this dispute was referred to the relevant Turkish courts. Details and nature of this dispute have not been investigated as it was referred to the court and does not fall within the remit of our Institution. It is clearly seen that the applicant is a party to the proceedings arising from the dispute concerned and has trials between the dates of February, March and April 2014 as from the date of application.

9) It is understood that in accordance with **the decision no. xxx and docket no. xxx of the Ankara 6th Family Court**, **a personal relationship will be established** between **the joint child and the father (applicant)** for 6 months at the first weekend of each month between 10:00 and 17:00 **under the supervision of a psychologist**; as from the 6th month, a relationship will be established for 1 year at the first weekend of each month between Saturday 10:00 and Sunday 17:00, on the birthday of the joint child, on Father's Day, in the first week of the semester holiday and from July 1st to July 10th; after the completion of 1 year, a relationship will be established at the first weekend of each month between Saturday 10:00 and Sunday 17:00, on the birthday of the joint child, on Father's Day, in the first week of the semester holiday and from July 1st to July 20th, and that it was decided that the father would be informed about the special occasions and education and health status of the joint child who had been legally placed under the guardianship of the mother, and the details of the decision concerned were approved as given in the paragraph 47.

It has been determined that the applicant filed a lawsuit before **Ankara 2nd Administrative Court** on the grounds that legal action was taken against him many times due to the unrealistic complaints of the intervening party, the complaints were repeated in order to prevent him from seeing his child and the procedure no. xxx dated 15/2/2012 followed by the Ministry of Inferior regarding the shortening of the duration of residence permit of the complainant had no legal basis, and that the Court ruled in its decision no. xxx and docket no. xxx that "... **Although the complainant has not been convicted by the judicial authorities due to the allegations that the complainant threatened the intervening person and her family or attempted to kidnap their joint daughter, shortening of the duration of the residence permit of the complainant is not against the law provided that necessary precautions are taken by the defendant administration because of the hostility that has formed between the complainant and the Turkish intervening person due to the suspension ruled by the Family**

Court, and that the decision concerned taken by the local court is at the stage of appeal before the Council of State.

10) The applicant was not allowed to enter Turkey at about 18.30 on 19.03.2013 in order to attend the hearing to be held in the Ankara 25th Criminal Court of General Jurisdiction **as he did not appear with a "Consulate Visa with Special Annotations" and he was notified that he would be granted a Visa with Special Annotations valid for a residence duration of 5 days in order for him to be able to attend the hearing to be held in Ankara on 03.04.2013 in the event that he applied to the Consulate General of Turkey in Rotterdam.**

11) The applicant **attended the trial held in Ankara** on 03.04.2013 with reference to the letter no. 3467-28106 dated 11.02.2014 obtained from the General Directorate of Security of the Ministry of Interior (paragraph 5) and the letter no. xxx dated 21.03.2014 obtained from the Ministry of Foreign Affairs (paragraph 6).

12) In light of the information and documents available in the file (paragraph 5, 6), it is understood that **the complainant was not allowed to enter Turkey after the trial held in Ankara on 03.04.2013, was unable to attend the trials and enjoy the rights that were granted by the court regarding his child and set out in paragraph 9.**

13) That the applicant is not allowed to enter Turkey is confirmed by the letter no. xxx dated 11.02.2014 obtained from the General Directorate of Security of the Ministry of Interior and the letter no. xxx dated 21.03.2014 obtained from the Ministry of Foreign Affairs, and it is recorded that he was not granted a visa as a consequence of the negative evaluation of the visa applications filed on 04.09.2013 and 14.01.2014.

14) As a result, the Dutch citizen applicant is unable to participate personally in the hearings and meet with his child as he cannot enter Turkey.

D. Examination and Investigation Findings of the Ombudsman Mehmet ELKATMIŞ

15) Following the complaint made via official mail, the applicant made other complaints and notifications regarding that he was still unable to enter Turkey, attend the hearings and was prevented from seeing his child, and all this information has been preserved in his file.

16) The fact that he had to apply for a "Visa with special annotations" to the Turkish representative offices in the Netherlands was reminded to the applicant by means of the telephone calls made through the applicant's attorneys, and it was identified that the applicant was unable to enter Turkey, participate personally in the hearings and enjoy the right to establish a legal relationship with his child that was granted by the court, although he applied for the aforementioned visa.

17) It was also identified that **the applicant lodged an application on 18 March 2013 before the European Court of Human Rights against the Republic of Turkey and the United Kingdom of the Netherlands** on the grounds of violation of Articles 3, 5, 6, 8, 10, 13, 14 and 17 of the European Convention on Human Rights and Articles 3,5,7,8,9,10 and 11 of the UN Convention on the Rights of the Child.

18) The ECHR stated in its responsive letter with reference no. 16393/13 dated 19/3/2013 about the application of the complainant that the request of the applicant did not contain elements that would require "interim measures" within the scope of Rule 39 of the ECHR and thus, the Court could not impose any sanctions on Turkish government

with regard to the applicant's entry to Turkey; that the interim **measures could be adopted** under Rule 39 of the ECHR **only when the case was considered to contain elements that required immediate actions to be taken in the event that the right to life or physical integrity of the applicant was under threat or in the presence of a serious and substantial threat that the applicant would suffer ill-treatment and torture**, and the applicant was asked to notify the Court until 1/4/2013 whether the application filed was still valid in the light of this information. It was not identified in light of the information and documents available in the file of the applicant whether the applicant renewed its request from the ECHR.

III. LEGAL ASSESSMENT AND JUSTIFICATION

A. Related Legislation

19) Article 36 titled "A. Freedom to claim rights" of the Chapter Two titled 'Rights and Duties of the Individual' of the Constitution No. 2709 of the Republic of Turkey; *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures..."*

Article 41 titled "I. Protection of the family, and children's rights" of the Chapter Three titled 'Social and Economic Rights and Duties'; *"**(Additional Paragraph: 7/5/2010-5982/Article 4)** Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests..."*

20) Article 2 titled "Scope" of the Law No. 6458 on Foreigners and International Protection published in the Official Gazette No. 28615 dated 11/4/2013; *"(2) This Law shall be implemented without prejudice to provisions contained in international agreements to which Turkey is party and to provisions in other specific legislation."*

Article 7 titled "Foreigners who shall not be permitted entry into Turkey"; *"(1) A foreigner shall not be permitted entry into Turkey and shall be turned away in case:*
a) it is determined that his or her passport, passport substituting document, visa or residence permit or work permit is absent or fraudulent; or that he or she has obtained these permits fraudulently
…
(2) Procedures undertaken with regard to this Article shall be notified to foreigners who are turned away. The notification shall include the way in which foreigners can effectively use their right of appeal against the decision as well as information on their other rights and obligations in this process."

Article 9 titled "Ban on entry into Turkey"; *"(1) Obtaining the views of related public institutions and organizations when necessary, **the Directorate General shall issue a ban on entry against foreigners whose entry into Turkey is found objectionable on grounds of public order or security or public health.***
(7) The Directorate General may make the admission of certain foreigners into the country conditional on the attainment of a prior permission from the Directorate General on grounds of public order or security."

Article 15 titled "Foreigners who will not be granted a visa"; *"(1) Visa shall be refused to foreigners who:*

a) Do not possess a passport or a passport substitute document with a validity of at least sixty days longer than the requested visa period,
b) Are prohibited entry into Turkey,
c) Are found unfavourable on grounds of public order or public security,
ç) Carry a disease that is identified as a threat to public health,
d) Are suspects or convicted of a crime or crimes that are subject to extradition under agreements or treaties to which the Republic of Turkey is party,
e) Are not covered by a valid medical insurance covering the intended duration of stay,
f) Cannot provide justification for the purpose of their intended entry into, transit through or stay in Turkey,
g) Do not possess sufficient and regular means of subsistence for the duration of the intended stay,

ğ) Refuse to pay fines deriving from a violation of a previous residence permit or visa, or those to be followed up and collected, as per the Law on the Procedure of Collection of Public Claims No. 6183 of 21/7/1951 or debts or penalties to be followed as per the Turkish Penal Code No. 5237 of 26/9/2004.
(2) Those who fall under the scope of this Article, but for whom issuing a visa is deemed necessary, may be issued a visa upon approval of the Minister."
Article 17 titled "Notification of visa proceedings"; *"(1) A decision to refuse a visa request or a decision to cancel a visa shall be notified to the related person."*
21) Article 6 titled "Right to a fair trial" of the European Convention on Human Rights; *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) to have adequate time and facilities for the preparation of his defence;
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8 titled "Right to respect for private and family life";
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
22) Article 14 of the United Nations International Covenant on Civil and Political Rights; *"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt..."

23) Article 9/c of the UN Convention on the Rights of the Child; *"States Parties shall respect the right of* ***the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."***

Article 10; *In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*

"A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention."

Article 12; *"States Parties* ***shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child****. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

B. Applications on the Subject Matter of the Complaint

24) CILIZ v. the Netherlands judgement of the European Court of Human Rights, 11/7/2000, (Application No. 29192/95)

The applicant came to the Netherlands on 31 March 1988 where he married a Turkish woman on 29 December 1988. The couple had a son on 27 August 1990 and the divorce took place in November 1991. The request of the applicant to meet with his child and for an arrangement concerning parental relation to be established was rejected by the Utrecht Regional Court and this decision was confirmed by the Court of Appeal. At a later stage, the applicant reiterated his request in this respect and upon the decision of the Utrecht Regional Court of 15 December 1999, he referred the case to the Court of Appeal and the European Court of Human Rights.

In its ruling in the case of Ciliz v. the Netherlands, the European Court of Human Rights underlined that the essential object of Article 8 was to protect the individual against arbitrary action by the public authorities and noted that **there were positive and negative obligations of the States inherent in effective respect for family life**.

In its decision in question, the Court emphasized that with regard to the expulsion of the Turkish citizen applicant from the Netherlands, there would be a family life between parents and children even after the divorce and the State had a positive obligation to ensure that this family life could continue (that the father could see his child) within the scope of the positive obligation of the State. In the same case, the Court defined the negative obligation of the State as **refraining from measures which might cause family ties to rupture**.

The Court underlined that the **"discretion" must be interpreted very narrowly** in the interferences of the State Parties in the family life in order to protect the "children" in the same case. That is to say, the Court pointed out that the elements such as "national security", "public safety" or the "economic well-being of the country", which are the grounds for state interference laid down in Article 8(2) of the Convention that is in the nature of interference with the exercise of the right to respect for family life, did not contain broad discretion and that the state must use the power of interference in this field within a limited scope and with due diligence. **In the case concerned, the Court held that the rights, set out in Article 8 of the Convention, of the applicant father, who was unable to see his child as he was expulsed from the Netherlands and not allowed to enter the country, had been violated.**

25) PASAOGLU v. Turkey judgement of the European Court of Human Rights, 8/7/2008, (Application No: 8932/03)

The applicant who was born in 1963 and resides in Thessaloniki is married to a Greek citizen woman and has a child. The applicant applied to the Consulate General of Turkey in Thessaloniki on 18 October 1999 with the request for the extension of the validity of his passport and this request of the applicant was rejected on the instruction of the Ministry of Interior. The applicant's attorney applied to the administration several times in order to obtain information about the grounds on which the applicant was issued a bill of restriction. *The General Directorate of Security of the Ministry of Interior informed the applicant's attorney that the applicant's stay abroad and issuing of a passport for him were objectionable in terms of national security under Article 22 of the Passports Law No. 5682 and that a bill of restriction was thus issued in relation to the applicant*.

In the case brought by the applicant before the ECHR, the applicant claimed that the administrative restriction introduced on passport issuance was not based on any actual events and that the Government did not make any explanations about which one of his behaviours caused harm to the national security and public order, and stated that the opportunity to return to Turkey offered to him under Article 3 of the Passports Law would not be effective unless he was given the opportunity to leave Turkish territories. The applicant also noted in this context that he learnt that he had been accused of making separatist propaganda. **Stressing that his mother, brothers and sisters as well as his aunts and uncles lived in Turkey, the applicant claimed that his restriction damaged his family life, commercial activities and access to goods and properties.**

After noting that depriving someone of a travel document such as a passport due to a measure taken would be considered as an interference with **the exercise of the freedom of movement** as safeguarded by Article 2 of the Protocol No. 4 (Baumann - France, no: 33592/96, paragraph 62, Sissanis -Romania, no: 23468/02, paragraph 63, 25 January 2007), the ECHR emphasized that **this Protocol was signed, but not ratified by Turkey and thus, the provisions of the Protocol in question couldn't be applied to the case concerned** and the provisions of Article 8 couldn't be altered with the provisions of **Article 2 of the Protocol No. 4**, and noted that **there was a tight bond between the protocol provision in question and Article 8. The ECHR also held that administrative restrictions with regard to the issuance of a passport and the rejection of the request for the extension of the validity period of the passport of the applicant by the competent authorities constituted an interference with the private life and right to respect for family life of the applicant.**

Although the ECHR accepted that this interference was provided for in the Passports Law No. 5682 and was intended for a legitimate purpose such as the protection of the national security within the meaning of the second paragraph of Article 8 of the European Convention on Human Rights, it pointed out **the necessity of determining whether the interference concerned was mandatory in a democratic society, that is to say, whether it responded to an immediate social need and whether it was proportional to the purpose observed**. After determining that the subject matter measure of dispute constituted a preventive measure that was taken by the administrative law enforcement based on a "bill of restriction" issued by the Ministry of Interior, but did not arise from a criminal proceeding or execution of an imprisonment for debts, the ECHR pointed out that the continuity of the subject matter measure of dispute that was **based on confidential ministerial data and lacked clarity** must take into consideration the uncertainty and shock it caused in the life of the applicant and that the benefit to be obtained from the legitimate purpose of the preventive measures would gradually lose their effect, and concluded that the continuity of the measure in question for such a long time (for more than 4 years) although the applicant was not charged with any criminal offence was **non-proportional and couldn't be regarded as "mandatory in a democratic society", and ruled that Article 8 of the ECHR had been violated**.

C. Recommendation of the Ombudsman Mehmet ELKATMIŞ to the Chief Ombudsman

26) The relevant Ombudsman has identified that *in relation to the visa policy of the states*, determining which foreigners can enter a country falls within the sovereignty of that state according to the established precedents of the international law and diplomacy; however, the sovereignty of the states in this area is limited by the laws driven by international law as well as international economic and political relations; that the visa is not a right corresponding to the fundamental rights and freedoms in terms of "foreigners" at this point and is only a document that governs the conditions necessary for someone to enter a state, of which he/she is not a citizen.

27) The Ombudsman has concluded that *within the framework of the principle of right to a fair trial,* the "right to defend himself in person or through legal assistance of his own choosing" is set out in Article 6/3-c of the European Convention on Human Rights; that in term of the criminal procedures of first instance, everyone charged with a criminal offence has the absolute "right to defend himself in person"; that the right in question is guaranteed under Article 14 of the UN International Covenant on Civil and Political Rights; that the Article 36 titled "Freedom to claim rights" of the Constitution No. 2709 of the Republic of Turkey deals with this issue; that the opinion of the Ankara 25th Criminal Court of General Jurisdiction to which a reference was made in the letter of the General Directorate of Security of the Ministerie van Familie of Interior dated 11 February 2014 is in contradiction with the "right to a fair trial", which is laid down in Article 36 of the Constitution No. 2709 and basic principles of which have been set out in the European Convention on Human Rights; that forcing someone to defend himself through his legal representative instead of defending himself in person results in violation of the "right to defend himself in person" and thus, the "right to a fair trial" of the applicant who wants to enter Turkey in order to attend the hearings to be held in Turkey, but is rejected as stated

in the letter of the General Directorate of Security of the Ministry of Interior dated 11.02.2014 has been clearly violated by the said Ministry.

28) *In terms of family relations and children's rights;* the Ombudsman has determined that not accepting the applicant, who is granted the right to see his child with the judgement no. 2012/1105 of Ankara 6th Family Court with docket no. 2011/1038 which has placed the child under the guardianship of the mother, into the country prevents the father from seeing his child that is one of the most essential elements of the family life, and thus the "right to respect for the family life", which is guaranteed under Articles 9 and 10 of the UN Convention on the Rights of the Child, Article 8 of the European Convention on Human Rights and Article 41 of the Constitution No. 2709 of the Republic of Turkey, of the applicant has been violated.

29) *In terms of effective remedies;* it has been determined that it is essential that the right to an effective remedy is guaranteed under the domestic law and there are mechanisms in force that will ensure the exercise of this right; that as per Article 13 of the European Convention on Human Rights, everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority, and that under Article 74 of the Constitution No. 2709, citizens and foreigners resident in Turkey, with the condition of observing the principle of reciprocity, have the right to apply in writing to the competent authorities and to the Grand National Assembly of Turkey with regard to the requests and complaints concerning themselves, but arising from the violations of general human rights.

30) *In terms of the balance between the public order and individual rights;* as pointed out in the Decision no. 2013/24 taken by our Institution, it has been indicated that the public order and security and the regime of freedoms are two basic social needs, of which borders are intertwined and which cannot be sacrificed for another; that the fair solution will be the steps to be taken with regard to the protection of public security and human rights; that, in such a case, the risk to be caused by the entry of someone considered to be unfavorable into the country and the grievance to be suffered by the same person in the event of not entering the country need to be compared, and that the states are expected to shift towards more liberal and emancipatory visa policies in the face of gradually increasing movement demands of the individuals of the society.

31) *In terms of conformity with the principles of good governance; d*etermining that the attitude of the Ministry of Interior towards the applicant is contrary to the principles of "adherence to the law", "sense of justice based on human rights", "conformity to the justified expectation", "justification" and "indication of effective means of appeal/remedies"; that the attitude of the administration in rejecting the visa application without stating any justification is inconsistent with the principles of democracy and respect for human rights, and that the applicant is required to be notified of the nature of the legal case to which he is a party and whether there are any effective remedies to which he can resort in order to challenge this legal case in question; Our Institution has been proposed to make recommendations to the relevant administrations to accept that the Ministry of Interior acted wrongly and request from the Ministry of Interior and the Ministry of Foreign Affairs to notify our Institution of what sort of administrative measures will be developed to correct this wrong attitude.

D. Evaluation and Justification in Terms of Compliance with the Fairness and the Law

32) Evaluation of the Rejection of the Visa Request in Terms of National Sovereignty that Dominates the Visa Policies of the State

As the problem has been explained in detail in paragraph 3 and 5 (to avoid repetition), in this concrete case, the visa request of the applicant, about whom the Ministry of Interior took a "Permit-N Visa" decision on 12/2/2013, was not considered appropriate as a result of the evaluation carried out within the framework of the provisions of the Law No. 5682 and 5683 (abolished).

33) According to the established precedents of international law and diplomacy, deciding on which foreigners can enter a country falls within the sovereignty of that state. States hold the power to determine which foreigners can enter their countries and what conditions they are to be subjected to or a list of persons who are objectionable to enter their countries. **As a result, it goes without saying that the entry of a foreigner into the territories of another country falls within the sovereignty of that state to the extent permitted by international law and diplomacy**. At this point, **the states exercise these sovereignty rights in accordance with the laws they enact in line with the international law -through provisions and mechanisms on the protection of fundamental rights and freedoms- and international economic and political relations.**

34) In terms of the issues it governs, the Law No. 6458 on Foreigners and International Protection (OG 28615, 11.04.2013), which is the main legal text in the Turkish law of foreigners, covers significant legal and administrative regulations with regard to the entry of foreigners to Turkey, their residence in Turkey, their deportation and enjoying international protection.

35) Although the legal framework of the obligation of foreigners to obtain a visa has been regulated by provisions set out in Articles 11 to 17 of the Law No. 6458, **that the provisions related to this issue contained in international agreements to which Turkey is party prevail has been clearly indicated in Article 2(2) of the Law No. 6458.** Moreover, Article 90 of the Constitution ensures that the international agreements duly put into effect have the force of law and the provisions of international agreements prevail in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter. Thus, **implementing the international agreements in the case of differences in provisions on the same matter in international agreements concerning fundamental rights and freedoms and the laws is a constitutional order. .**

36) Although there is no doubt that the administration has discretionary power in rejecting the visa request of the applicant, on whom a "Permit-N Visa" (prior authorization requirement for granting of a visa and entry to the country) **decision was taken by the Ministry of Interior on 12/2/2013, to the extent permitted by the international law and diplomacy, it is accepted that the fact that provisions related to this issue contained in international agreements to which Turkey is party prevail determines the limits of the discretionary power of Turkey in this regard.**

37) In addition, as pointed out in the Decision no. 2013/24 (National Port and Land Stevedores Union of Turkey (Liman-Is) taken by our Institution, **public order and**

security and the regime of freedoms are two basic social needs, of which borders are intertwined and which cannot be sacrificed for another. The fair solution to the problem is the steps to be taken with regard to the protection of public security and human rights. In such a case, the risk to be caused by the entry of someone considered to be objectionable into the country and the grievance to be suffered by the same person in the event of not entering the country need to be compared. Satisfying the security requirement (or flaw) likely to arise by the entry of the applicant to the country and the requirement of absolute violation of a right or freedom to occur in the event that he is not allowed to enter the country, not by opting for one of them, but ensuring both within reason is what is required of a modern and democratic state that is loyal to the law and respects fundamental rights and freedoms.

38) As a matter of fact, the ECHR pointed out in its judgement of CILIZ v. the Netherlands (see paragraph 24) that the elements such as "national security", "public safety" or the "economic well-being of the country", which are the grounds for state interference laid down in Article 8(2) of the Convention, did not contain broad discretion and that the state must use the power of interference in this field within a limited scope and with due diligence. In its judgement of PASAOGLU v. Turkey (see paragraph 25), the ECHR once again **pointed out the necessity of determining whether the interference to be made by the state within the scope of Article 8 of the Convention was mandatory in a democratic society, that is to say, whether it responded to an immediate social need and whether it was proportional to the purpose observed.**

39) As a result, it has been concluded that *a lawsuit had been filed in Ankara 25th Criminal Court of General Jurisdiction against the applicant with the bill of indictment prepared by the Ankara Chief Public Prosecutor's Office on the grounds of violation of the right to privacy and defamation and threat through an audio, written and video message; that the opinion of the court in question was asked with regard to whether there were any advantages and necessity for the complainant to come to Turkey and attend the hearings,* and that the rejection of the visa request of the applicant by the Ministry of Interior mentioning that the court asserted that the testimony of the applicant was taken at the hearing held on 03.04.2013 and there was no legal obligation for the applicant to attend the subsequent hearings as he would be represented by his attorneys should have observed the fair/sensitive balance between the public order and security and fundamental rights and freedoms and whether such a measure was mandatory in a democratic society, but this measure, which contributed to the applicant's not entering the country since 3/4/2013, is not commensurate with the purpose observed.

40) Evaluation of the claims of violation of the right to a fair trial

With regard to the claims of the complainant regarding the violation of his right to a fair trial by the Ministry of Interior because of its denial of the complainant's request for a visa; When analysed, it can be seen that the elements of the right to a fair trial (see paragraph 21) regulated under Article 6 of the European Convention on Human Rights cover many dimensions necessary for the proper functioning of the law. Such as right of access to court, defendant's presence at trial, freedom of not testifying against himself, equality of arms, right to adversarial proceedings and justified decision. Some of these elements have been clearly indicated in Article 6 while the others have been created and adopted by the Court as elements implicitly included in the provisions of the article as the mandatory conclusions of the concept.

It is accepted that the guarantees ensured under Article 6 of the European Convention on Human Rights will be applied not only to the proceedings in the court, but to the processes before and after these proceedings as well. It has been concluded that the basis of the rejection of the Ministry of Interior to grant visa to the complainant is the opinion submitted by Ankara 25th Criminal Court of General Jurisdiction and the actions taken by both administrations cannot be separated from one another as the request was rejected based on this opinion; thus, the rejection of visa by the Ministry of Interior is required to be handled and evaluated within the scope of the principle of right to a fair trial.

41) In Article 6 titled "Right to a fair trial" of the Convention, the concept is defined as "*... the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him*", and the rest of the article reads as ***"everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"***. *Regarding the aspect of the concept that is directly related to the subject of the application, the point (c) of the third paragraph of Article 6 guarantees everyone's* ***"right to defend himself in person or through legal assistance of his own choosing"****.*

The "right to defend himself in person" that comes forth especially in terms of criminal proceedings is one of the most fundamental guarantees of the fair processing of cases. This right covers the elements of **"self-defence", "questioning the witnesses", "equality of arms", "access to court",** Produced with Secure Electronic Signature in accordance with the Electronic Signature Law No. 5070. Document confirmation can be made from **http://ebys.ombudsman.gov.tr/sorgu/Sorgula.aspx** with the code: **C0BZ-MP3D-8R7R**.

"defendant's presence at trial and publicity", "effective participation" and "provision of adequate time and facilities for the defence".

42) Although the wording of Article 6 of the ECHR does not contain a clear expression related to the "*right of access to court*", it is clear that an individual seeking to claim his rights before the court needs to protect his right of access to courts. As a matter of fact, in the decision taken in the case of **Golder v. the United Kingdom (Application No: 4451/70, 21/2/1975)** where this right was evaluated, the guarantees provided for parties under Article 6 were described in detail and it was stated that the "*right of access to courts*", which enables individuals to enjoy these guarantees, needed to be secured first.

In addition, the ECHR held that the defendant had to be present in the trial in criminal cases.

(See Ektabani v. Sweden, 26/5/1988, paragraph 25) However, **the right to be present at hearings** can be renounced provided that it is clearly stated**.** Moreover, it is accepted that the right to have legal assistance shall be kept reserved even in the event of renunciation. As for civil cases, the requirement that the parties must be present at trial is valid only for certain cases; for example, the case where personal behaviour of one of the parties is to be evaluated. **The ECHR accepts that the "right to defend himself in person" held by an individual charged with a criminal offence is absolute in terms of criminal procedures of first instance.** (See Handbook of the Council of Europe, Protection of the Right to a Fair Trial under European Convention on Human Rights, Guidelines on the Implementation of Article 6 of the Convention, 2012)

Although the European Convention on Human Rights does not contain a definition comprising the words "**equality of arms**", as a consequence of the interpretations of the ECHR, this principle has been **defined as ensuring full equality between the parties in terms of rights and obligations possessed and maintaining this balance throughout the whole trial process (Del court/Belgium, Monnel and Morris/the UK 1987, Ekbatani v. Sweden, 1988).** As the purpose is to set a fair and just balance between the arguments and the defence, it needs to be accepted that this concept will undergo alterations in each case depending on the nature of the dispute. **In this respect, it goes without saying that in this present case, the "request of the applicant to be brought before a judge and be present at the hearings" requires the establishment of full equality between the parties in terms of rights and obligations they possess before the judicial body and the maintenance of this balance throughout the whole trial process.**

(Journal of the Union of Turkish Bar Associations, issue 57, 2005, p. 283-285)

43) The right to a fair trial has also been secured in Article 14 of the United Nations International Covenant on Civil and Political Rights. In paragraph 3 of the article, it is stated that everyone shall be entitled to a series of minimum guarantees in the determination of any criminal charge against him, and in addition to other rights that fall within this scope, the "**right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing**" has been safeguarded.

44) In Article 36 titled "Freedom to claim rights", the Constitution No. 2709 of the Republic of Turkey states that everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. **What needs to be understood by the "right to a fair trial" set out in the article has been considered to be the universal principles of international law and, in particular, the provisions of the above-mentioned Article 6 of the European Convention on Human Rights**.

45) The opinion of Ankara 25th Criminal Court of General Jurisdiction regarding that "*as the testimony of the applicant was taken at the hearing held on 03/04/2013 there was no legal obligation for the applicant to attend the subsequent hearings as he would be represented by his attorneys*" referred to by the General Directorate of Security of the Ministry of Interior in its letter no. xxx dated 11 February 2014 should be perceived as an explanation as to whether the participation of the defendant in the hearings is necessary. That is to say, it is a technical interpretation regarding that it is possible for the defendant

to be represented by his attorney instead of attending the trials in person for the fair continuation of the trial. **The Court has only underlined the presence of such possibility when asked by the General Directorate of Security of the Ministry of Interior. This situation should not be interpreted as limiting or prohibitive.** Any situation to the contrary, in other words, interpretation of the situation in a way to eliminate the defendant's "right to defend himself in person" will constitute a violation of the aforementioned provisions of international and national legislation. People, at their own will, can always exercise this right, especially in terms of criminal procedures of first instance. As a matter of fact, the right to defend himself in person is an absolute right in terms of criminal procedures of first instance according to the precedents of the European Court of Human Rights.

46) As a result, as the individual's right to defend himself in person in the criminal proceedings that take place within the country of the Republic of Turkey has been secured under the provisions of Article 6 of the ECHR, Article 14 of the United Nations International Covenant on Civil and Political Rights and Article 36 of the Constitution, it has been concluded that the "right to a fair trial" of the applicant who wants to enter Turkey in order to attend the hearings pending before the Turkish courts, but is rejected as stated in the letter no. xxx of the General Directorate of Security of the Ministry of Interior dated 11.02.2014 has been clearly violated.

47) Evaluation of the claims of violation of the UN Convention on the Rights of the Child

Based on the judgement no. 2012/1105 of Ankara 6th Family Court with docket no. xxx that is available in the file, the applicant has been granted the right to establish relationships with his child, whom has been placed under the guardianship of the mother, within the first 6 months, the next 1 year and the following process under conditions, intervals of which have been stated in the aforementioned Judgement. (See paragraph 9) In addition, the Court held that the father would be informed about the education and health status and special days of the joint child.

The judgement dated 18/09/2012 taken by the aforesaid Court was appealed by the attorneys of the party. It was decided that the wording "on Saturday" would be added and come after the wording "first weekend of each month" under the heading "arrangement of the personal relationship between the joint child and the father" in point 1-A in the decision section of the verdict no. 2013/18946 of the 2nd Criminal Chamber of the Supreme Court with docket no. xxx dated 04/07/2013, and that **this part of the decision would be approved as altered**. Then, the attorneys of the party requested the revision of the decision and the **judgement became final on 23/12/2013** as the **2nd Criminal Chamber of the Supreme Court** rejected the request for revision of the decision with the verdict no. xxx and docket no. xxx dated 23/12/2013.

48) Third paragraph of Article 9 of the UN Convention on the Rights of the Child indicates that "*States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*" It is understood that, in principle, the applicant who is allowed to establish personal relationship with his child, who has been placed under the guardianship of the mother and is understood to be 8 years old, at

frequent intervals in accordance with the decision of Ankara 6th Family Court that is mentioned above and approved by the Supreme Court can see his child only in Turkey as it can be easily predicted that leaving the country to meet with the father in a country outside Turkey at frequent intervals will be too difficult for an 8-year-old child in terms of the general flow of life. **By stating that "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents.", the second paragraph of Article 10 of the Convention points out to the importance of a healthy relationship between the child and the parents.**

49) In the first paragraph of Article 8 titled "Right to respect for the private and family life" of the European Convention on Human Rights, it is indicated that everyone has the right to respect for his private and family life, his home and his correspondence while the second paragraph states that there shall be no interference by a public authority with the exercise of this right except "such as is in accordance with the law" and is necessary in a democratic society in the interests of "national security", "public safety" or "the economic wellbeing of the country", "for the prevention of disorder or crime", or "for the protection of the rights and freedoms of others".

50) In its decision in the case of CILIZ v. the Netherlands, the European Court of Human Rights emphasized that there would be a family life between parents and children even after the divorce and the State had a **positive obligation to ensure that this family life could continue (that the father could see his child)**. In the same case, the Court defined the **negative obligation of the State as refraining from measures which might cause family ties to rupture** and ruled that the "discretion" must be interpreted very narrowly in the interferences of the State Parties in the family life in order to protect the "children". In its **judgement of PASAOGLU v. Turkey**, the ECHR once again **pointed out to the necessity of determining whether the interference to be made by the state within the scope of Article 8 of the Convention was mandatory in a democratic society, that is to say, whether it responded to an immediate social need and whether it was proportional to the purpose observed**.

51) By stating that "Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests", the additional paragraph of Article 41 titled "Protection of the family, and children's rights" of the Constitution No. 2709 of the Republic of Turkey has guaranteed that the parents can establish a personal and direct relationship with their children.

In the justification of the Additional Paragraph concerned, "*... the universal principles, which are laid down in the Convention on the Rights of the Child, European Convention on the Exercise of Children's Rights and other international instruments, and recognized with regard to the children's rights, are incorporated into the text of the Constitution and it is stated that every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests*", and it is emphasized that the purpose of the text of the article is the universal principles set out in international conventions to which Turkey is party in the field of children's rights.

52) In our specific case, it has been identified that the cautionary judgement taken by the Family Court about the applicant was taken based upon the accusations of the applicant and the criminal proceedings related to the actual accusations continue; that **there is no final judgement about the complainant** as a result of the criminal record inquiry conducted by the General Directorate of Criminal Records and Statistics of the Ministry of Justice on 14/4/2014 within the scope of the case file and **there is a judgement providing for the establishment of a personal relationship between the applicant and his child** that was ruled by Ankara 6th Family Court and approved by the Supreme Court, and that there is no new court ruling that alters or limits the judgement taken about the applicant regarding his establishing a personal relationship with his child due to the alleged actions of the applicant within the scope of the file, considering that according to the family law, a decision taken regarding the establishment of a personal relationship with the child can be altered upon the application of the parties in the later process due to any actions that may arise between the child and the parents and cause any sort of negativity against the child.

53) Moreover, it needs to be accepted that the Court ruling that has become final when affirmed by the Supreme Court and provides for the establishment of personal relationship between the father and the child cannot be discussed, that **implementing court judgements in accordance with the Constitution as required by the public authority is mandatory**, that it is compulsory to abide by the Court judgement in terms of the applicability of the personal relationship between the father and the child until a new regulation is made by the Family Court and **this judgement is equivalent to national interests in terms of European acquis**.

54) As a result, it has been concluded that **Articles 9 and 10 of the UN Convention on the Rights of the Child, Article 8 of the European Convention on Human Rights and Article 41 of the Constitution No. 2709 of the Republic of Turkey have been violated** when the applicant, who is granted the right to see his child within the first 6 months, the next 1 year and the following process under conditions, intervals of which have been stated in the judgement no. xxx of Ankara 6th Family Court with docket no. xxx which has become final with the verdict no. xxx and docket no. xxx of the 2nd Criminal Chamber of the Supreme Court dated 23/12/2013 and has placed the child under the guardianship of the mother, was not allowed to enter Turkey.

IV. LEGAL LEGISLATION CONCERNING THE FREEDOM TO CLAIM RIGHTS

A. Resumption of the Term of Litigation

55) Pursuant to Article 21(2) of the Law on Ombudsman Institution No. 6328 of 14.06.2012, if no procedure or action is taken upon this recommendation within thirty days, the suspended term of litigation shall resume.

B. Legal Remedies

56) In paragraph 2 of Article 40 titled "Protection of fundamental rights and freedoms" of the 1982 Constitution No. 2709, it is stated that "The State is obliged to indicate in its proceedings, the legal remedies and authorities the persons concerned should apply and time limits of the applications." and pursuant to Article 20(2) of the Law on Ombudsman Institution No. 6328, Ankara Administrative Court may be resorted to for the legal remedies against the action of the relevant administration within the time remaining from the 60-day term of litigation.

V. DECISION

By **ACCEPTING THE COMPLAINT** with the above-described justifications and according to the scope of the file,

the Chief Ombudsman of the Republic of Turkey has decided that:

The complainant's right to a fair trial and right to respect for family life, which have been guaranteed by national and international legislation, have been violated and the **MINISTRY OF INTERIOR SHALL BE RECOMMENDED** to take necessary actions (granting visa, residence permit etc.) in a way to enable the complainant to exercise these rights and resolve his grievances within a reasonable time;

Pursuant to paragraph three of Article 20 of the Law No. 6328 on the Ombudsman Institution, it is compulsory that our Institution is notified of the reasons within thirty (30) days where the action to be taken based on this decision or the solution recommended is not deemed applicable by the relevant administration,

This Decision shall be communicated to the legal representative of the complainant, the Ministry of Interior and, for their information, the Ministry of Foreign Affairs.

M.Nihat ÖMEROĞLU
Chief Ombudsman