



Request concerning [...] (Ref. CCF/[...])

DECISION OF THE COMMISSION (106th session, 16 - 19 October 2018)

The Commission for the Control of INTERPOL's Files (the Commission), sitting as the Requests Chamber, composed of:

Vitalie PIRLOG, Chairperson
Leandro DESPOUY,
Petr GORODOV,
Sanna PALO,
Isaias TRINDADE,
Members,

Having deliberated in camera during its 106th session, on [...], delivered the following Decision.

I. PROCEDURE

1. On [...], Mr [...] (the Applicant) lodged a complaint addressed to the Commission, requesting the deletion of the data concerning him registered in INTERPOL's files. Following the submission of all the required documents in accordance with Rule 30 of the Operating Rules of the Commission, the request was found admissible, and the Commission informed the Applicant thereof on [...].
2. In accordance with Article 34(1) of the Statute of the Commission (Statute), the National Central Bureau of INTERPOL (NCB) of [...] and INTERPOL General Secretariat (IPSG) were consulted on the arguments set forth in the complaint.
3. On 30 July 2018, the NCB of [...] confirmed the validity of the proceedings, transmitted documents and provided answers to the questions raised by the Commission.
4. During the study of the Applicant's case, the Commission consulted the NCB of the [...], in accordance with Article 34(2) of the CCF Statute, on specific arguments set forth in the complaint.
5. Both the Applicant and the NCB source of the data challenged were informed of the fact that the Commission would study the case during its 106th session.

II. FACTS

6. The Applicant is a national of [...] and of the [...].
7. He is the subject of a red notice issued at the request of the NCB of [...] for the charge of [...], on the basis of a decision handed down on [...] by the [...], and for the charge of [...] on the basis of an arrest warrant [...] issued on [...] by the [...].
8. The summary of the facts, as recorded in the red notice, is the following: [...].

III. THE APPLICANT'S REQUEST

9. The Applicant requested the deletion of the data concerning him.
10. He contends in essence that:
 - a) the case is of a predominantly political character, and the related Red Notice is not compliant with Article 3 of INTERPOL's Constitution

- b) his extradition to [...] would violate his human rights protected under the European Convention of Human Rights (ECHR) and the Universal Declaration of Human Rights (UDHR), and the related Red Notice is not compliant with Article 2 of INTERPOL's Constitution.

IV. APPLICABLE LEGAL FRAMEWORK

11. Field of competence of the Commission :

- Article 36 of INTERPOL's Constitution states that the Commission shall ensure that the processing of personal data by the Organization is in compliance with the regulations the Organization establishes in this matter”.
- Article 3(1)(a) and Article 33(3) of the Statute of the Commission establish that the powers of the Commission are limited to controlling whether the processing of data in INTERPOL's files meets INTERPOL's applicable legal requirements.

12. Communication of information :

- Article 35(1) of the Statute states that “the information connected with a request shall be accessible to the Applicant and the source of the data, subject to the restrictions, conditions and procedures set out in this article”.
- Article 35(3) of the Statute exhaustively lists the grounds on which the communication of information may be restricted at the request of one of the parties, or on the own initiative of the Commission.
- Article 35(4) of the Statute states that restrictions on the communication of information must be properly justified and the party requesting the restriction must indicate whether some information such as summaries may be provided instead. Moreover, if the improper justification of a restriction may not lead to the disclosure of the information by the Commission, it may be taken into account while analysing a request.

13. Matters of a political character :

- Article 3 of INTERPOL's Constitution states that it is “strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character.”
- Article 34 of INTERPOL's Rules on the Processing of Data (RPD) states the following:
 - 34(2): “(...) prior to any recording of data in a police database, the National Central Bureau, national entity or international entity shall ensure that the data are in compliance with Article 3 of the Organization's Constitution”.
 - 34(3): “To determine whether data comply with Article 3 of the Constitution, all relevant elements shall be examined, such as:
 - (a) nature of the offence, namely the charges and underlying facts;
 - (b) status of the persons concerned;
 - (c) identity of the source of the data;
 - (d) the position expressed by another National Central Bureau or another international entity;
 - (e) obligations under international law;
 - (f) implications for the neutrality of the Organization;
 - (g) the general context of the case.”
- Resolution ref. AGN/20/RES/11 (1951) requires applying the predominance test (even if in the requesting country the facts amount to an offence against the ordinary law). It states that “(...) no request for information, notice of persons wanted and, above all, no request for provisional arrest for offences of a predominantly political, military, religious or racial character is ever sent to the International Bureau or the NCBs, even if - in the requesting country - the facts amount to an offence against the ordinary law.”
- INTERPOL's Repository of practice on Article 3 provides guidance on the application of Article 3 of INTERPOL's Constitution in a variety of circumstances.

- The diffusion addressed by INTERPOL General Secretariat to the NCBs on 5 April 2012 states that “for red notice requests and diffusions seeking the arrest of a person, it is important to provide sufficient facts that link the wanted individual to the charges against him/her. Providing such facts is crucial for facilitating international police cooperation”.

14. Compliance with human rights:

- Article 2(1) of INTERPOL’s Constitution states that the Organisation should “ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights.”
- Article 34(1) of the RPD states that “the National Central Bureau, national entity or international entity shall ensure that the data are in compliance with Article 2 of the Organization’s Constitution.”
- Article 5 of the Universal Declaration of Human Rights (UDHR) states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
- Article 9 of the UDHR states that “No one shall be subjected to arbitrary arrest, detention or exile.”
- Article 10 of the UDHR states that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.
- Article 12 of the UDHR states that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to protection of the law against such interference or attacks.”

15. Extradition issues:

- Article 31 of INTERPOL’s Constitution states that a member country shall do all within its power which is compatible with the legislation of its country to participate diligently in INTERPOL’s activities.
- Article 82 of the RPD states that “Red Notices are published (...) in order to seek the location of a wanted person and his/her detention, arrest or restriction of movement for the purpose of extradition, surrender, or similar lawful action.”
- INTERPOL General Assembly Resolution AGN/53/RES/7 of 1984 states that “if certain countries refuse extradition, this is reported to the other NCBs in an addendum to the original notice”.

V. FINDINGS

16. In reviewing the issues raised, the Commission based its findings on information provided by the Applicant, the NCBs concerned and INTERPOL’s General Secretariat.
17. The Commission decided to assess the Applicant’s contentions in the order in which they are described in paragraph 10 above. In addition, it resolved to analyze first the issue of the communication of information between the parties.

A. Communication of information

a) *The Applicant*

18. The Applicant requested access to data concerning him registered in INTERPOL’s files, on the basis of Article 18 of the Rules on the processing of data and of Article 29 of the Statute of the Commission, in the context of his request for deletion. He did not request any restrictions to the communication of information to the NCB of [...].

b) The NCB of [...] (NCB source of the data)

19. In its reply, the NCB of [...] requested that the Commission does not share any information with the Applicant “to protect the confidentiality of investigation”. Additional messages were exchanged between the Commission and the [...], to precise the grounds and the justifications for the restrictions, as provided for in Article 35 of the Statute, but no counter-balancing measure were authorized by the source of the data.

c) Findings of the Commission

20. The Commission recalled that Article 35(1) of the Statute affirms the principle that “the information connected with a request shall be accessible to the Applicant and the source of the data, subject to the restrictions, conditions and procedures set out in this article”.

21. In this connection, paragraph 3 of the same Article provides that the communication of information may be restricted by the Commission, on its own initiative or at the request of a party to the case, for one or more of the following reasons: “a) to protect public or national security or to prevent crime, b) to protect the confidentiality of an investigation or prosecution, c) to protect the rights and freedoms of the Applicant or third parties, or d) to enable the Commission or the Organization to properly discharge their duties”.

22. Moreover, pursuant to paragraph 4 of the same Article, any restriction on the communication of information must be properly justified and the party requesting the restriction must indicate whether some information such as summaries may be provided instead. In addition, if the improper justification of a restriction may not lead to the disclosure of the information by the Commission, it may be taken into account while assessing and deciding on a request.

23. The Commission reaffirmed that, in analysing the justification of requested restrictions, it tries on the one hand to protect the interests of the parties, while preserving at the same time the essence of an adversarial procedure in order to provide an effective remedy. In doing so, the Commission takes into account, *inter alia*, the general context of the case, the other avenues available to the Applicant to obtain access to the information at the national level, the potential violation of other rules or international obligations, the possible risks for INTERPOL.

24. The Commission held that restrictions under Article 35(3) of the Statute are an exception to the general principle of communication of information, bearing consequences on the rights of the parties, and which must therefore be interpreted strictly. Such restrictions to the communication to the Applicant of information connected with his request must be necessary and proportionate to their stated purpose. Furthermore, the Commission itself must be allowed unlimited access to the information concerned in order to make an effective determination. In addition, in order for a decision not to be based solely or decisively on non-disclosed information, counter-balancing measures must be undertaken to compensate, up to the extent possible, the interferences with the rights of the parties.

25. In the context of the present case, the Commission observed that the information registered in INTERPOL’s files (*i.e* the Red Notice) is known to the Applicant, as it was disclosed to him in the course of extradition proceedings in the [...]. In this connection, the Applicant has not requested any restrictions to the communication of specific information to the NCB of [...], as the arguments presented before the Commission have already been submitted before the [...] Court and included in its final decision, and are therefore known to [...] authorities.

26. Despite this context, the NCB of [...] has opposed any disclosure to the Applicant and has requested an absolute restriction of communication of information to the Applicant, making explicit reference to the grounds mentioned in Article 35(3)(b). The Commission analysed the elements transmitted by the NCB of [...] to justify the restriction sought, and considered that they were not linked to the particular case at hand but were rather general comments on the potential consequences of a disclosure. Such vague comments could virtually apply to every request for disclosure of information connected to a criminal case and therefore defeat the essence of the right of access enshrined in the Statute.

27. The Commission also underlined that despite exchanges with the NCB of [...], the source of the data has not consented to counter-balancing measures (such as the provision of a redacted summary of arguments, of a minimum set of information), which may have minimized the impact of the restrictions on the rights of the Applicant, as requested under Article 35(4) of the Statute.
28. The Commission concluded that the restrictions requested by the NCB of [...] were not properly justified, and that the NCB did not demonstrate their relevance and proportionality in the context of this case. It established, further to Article 35(4), that such improper justification would not lead to the disclosure of additional information without the consent of the NCB of [...], and that the relevant information provided to the Commission will therefore be redacted from its decision.
29. Although the Applicant has already obtained access to the Red Notice in the course of his extradition proceedings, he has not been able to present observations on the arguments raised by the NCB of [...] before the Commission. The Commission held that the restrictions by the NCB of [...] were hindering the adversarial nature of the proceedings by preventing the Applicant from being able to present specific counter-arguments, and that the imbalance between the parties would be taken into account in the study of the merits of the request.

B. Political character of the case :

[...]

C. Compliance with Human Rights :

a) The Applicant

30. In addition to his claim of political motivation behind the request for his extradition, the Applicant alleges that he would be subjected to serious violations of his human rights if he were to return to [...]. Indeed, on the basis of his past traumatic experiences in detention in [...], which have been recognized by the [...] authorities, and an analysis of prospective risks in the current context, the [...] equally discharged the extradition request on the grounds that his surrender would violate Articles 2, 3, and 6 of the ECHR (respectively his right to life, the prohibition of torture, and the right to a fair trial).
31. Secondly, the judge also considered that his extradition to [...] would be a disproportionate infringement on his right to a private and family life in the [...] (protected under Article 8 of the ECHR). The decision lastly mentioned his mental health and inadequate medical treatment in the [...] prison system to conclude that his extradition would not be permissible.
32. On the basis of these findings, as well as numerous international sources on the current situation of human rights in [...], the Applicant claims that the Red Notice published against him is not compliant with Article 2 of INTERPOL's Constitution and the Universal Declaration of Human Rights to which it directly refers.

b) The NCB of [...]

33. The NCB of [...] contested the Applicant's claims, highlighting that he would have access to all defence rights under [...] Constitution and legislation, and that he would be entitled to lodge a request before the European Court of Human Rights as [...] has accepted the right to apply individually under Article 34 of the European Convention on Human Rights (ECHR).
34. Moreover, in the context of the extradition proceedings in the [...], the [...] authorities have given assurances that although the Applicant's trial is not considered in absentia under the [...] legislation (as he was present at the initiation and represented by lawyers throughout the trial), he would nonetheless be granted the right to a re-trial.

c) The NCB of the [...]

35. As indicated above under heading B(c), the NCB of the [...] confirmed the content of the [...] Court handed down on [...].

d) Findings of the Commission

36. The Commission first established that the mere fact that one of INTERPOL's Member countries has denied the extradition of an individual subject to a Red Notice does not, in itself, directly affect the compliance of the corresponding data registered in INTERPOL's files. In this regard, it should be noted that INTERPOL General Assembly resolution AGN/53/RES/7 of 1984 states that "*if certain countries refuse extradition, this is reported to the other NCBs in an addendum to the original notice*".
37. Extradition proceedings are undeniably complex processes, often involving considerations based on the national laws of the requesting and the requested States, on the provisions of criminal cooperation agreements (bilateral, regional or international), and on their interplay with other international obligations (human rights law or refugee law). The grounds for extradition refusals can therefore be very diverse, depending on the particular bilateral extradition situations. They can be either related to procedural or to substantive elements, connected to a specific criminal case or rather linked to the requested person's individual situation. Moreover, they are not always ascertainable to the Commission, or not always conveyed to it.
38. Yet, the Commission acknowledged that in some cases, national decisions denying the extradition of an individual on the basis of the risks that his human rights would be violated upon surrender to the requesting State may be regarded as additional evidence supporting the Applicant's claims of non-compliance with Article 2 of INTERPOL's Constitution and with the Universal Declaration of Human Rights. Likewise, national decisions denying the extradition of an individual on the basis of the political character of the case may be taken into account as additional evidence supporting the Applicant's claims of political predominance and non-compliance with Article 3 of INTERPOL's Constitution.
39. In this context, the Commission recalled that it is not its role to assess a country's law enforcement or judicial system *in abstracto*. Hence, it does not rely on general statements concerning the situation in a country and only examines the compliance of data with INTERPOL's rules on the basis of specific information related to the case under study or to the person who is the subject of the request.
40. However in the present case, the decision of the [...] Court, authenticated by the NCB of the [...], denies the extradition of the Applicant to [...], notably on the basis of the risks that his right to life may be infringed, that he may be submitted to torture in the context of his detention and that he would face an unfair trial. These fundamental human rights are enshrined in Articles 2, 3 and 6 of the ECHR, to which the decision directly refers, and they are equally protected through Articles 5 and 10 of the UDHR. The Commission noted that the decision highlights that the Applicant would face heightened individuals risks on account of his political opinions and ethnic origins, as well as on the basis of contextual considerations, and it paid particular attention to the conclusion of the judge on these issues : [...]
41. Although this decision is not legally binding on other States, who remain at liberty to decide sovereignly to cooperate on this case and extradite the Applicant should he be later apprehended on their territories, the conclusions drawn by an independent [...] judicial body on the risks faced by the Applicant in case of extradition cannot be ignored by the Commission in the course of its own review.
42. All these elements contribute to a body of corroborating evidence, which makes the retention of the data concerned in INTERPOL's files not compatible with the Organization's obligation to ensure effective cooperation between police authorities within "the spirit of the Universal Declaration of Human Rights".
43. In light of all of the aforementioned circumstances, and the previous interim findings regarding the alleged political character of the case, the Commission concludes that the data challenged are not compliant with Article 2 and 3 of INTERPOL's Constitution.

D. Remaining contentions

[...]

FOR THESE REASONS, THE COMMISSION

Decides that the data concerning the Applicant are not compliant with INTERPOL's rules applicable to the processing of personal data, and that they shall be deleted from INTERPOL's files.
