



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

DECISION OF THE COMMISSION
(105th session, 3 - 5 July 2018)

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

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

Having deliberated in camera during its 105th session, on [...], delivered the following Decision.

I. PROCEDURE

1. On [...], Mr [...] (the Applicant) initially addressed to the Commission a request for access to 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 [...].
2. In accordance with Article 35 of the Statute of the Commission (CCF Statute), the National Central Bureau of INTERPOL (NCB) of [...] was consulted on the question of access to the data registered in INTERPOL's files.
3. The Commission informed the Applicant on [...] that he is wanted through INTERPOL's channels by Bahrain, for the charges of commercial fraud and provided the information described in paragraph 11 below.
4. On [...], the Applicant subsequently lodged a complaint.
5. 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 [...].
6. In accordance with Article 34(1) of the Statute of the Commission, the National Central Bureau of INTERPOL (NCB) of [...] was consulted on the arguments set forth in the complaint.
7. On 30 April 2018, the NCB of [...] confirmed the validity of the proceedings and of the arrest warrant, and provided answers to the questions raised by the Commission.
8. 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 105th session.

II. FACTS

9. The Applicant is a national of [...]. He served as [...].
10. He is the subject of a red notice issued at the request of the NCB of [...] for commercial fraud, on the basis of a court decision issued [...]. The Applicant was sentenced in absentia [...].
11. The summary of the facts, as recorded in the red notice, is the following: [...].

III. THE APPLICANT'S REQUEST

12. The Applicant previously sought access to the data processed in INTERPOL's files. He now seeks deletion of the data concerning him.
13. He contends in essence that:
 - a) the case is of a private nature,
 - b) the data processed is not accurate,
 - c) the proceedings do not respect the principles of due process, and
 - d) the case is of a predominantly political character.

IV. APPLICABLE LEGAL FRAMEWORK

14. 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.

15. Lawfulness of proceedings:

- Article 2(1) of INTERPOL's Constitution states that the Organization 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 11(1) of the RPD provides that "data processing in the INTERPOL Information System should be authorized with due regard for the law applicable to the NCB, national entity or international entity and should respect the basic rights of the persons who are the subject of the cooperation, in accordance with Article 2 of the Organization's Constitution and the Universal Declaration of Human Rights to which the said Article refers".
- Article 11(3) of the RPD states that "In conformity with Article 5 of the present Rules, prior to any recording of data in a police database, the National Central Bureau (...) shall ensure that (...) it is authorized to record (such) data pursuant to applicable national laws (...)."
- 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 83.2(b,v) of the RPD states that "Red notices may be published only when sufficient judicial data has been provided. Sufficient judicial data will be considered to include at least [...] reference to a valid arrest warrant or judicial decision having the same effect."

16. Lack of due process:

- Article 2(1) of INTERPOL's Constitution states that the Organization 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 11(1) of the RPD provides that "data processing in the INTERPOL Information System should be authorized with due regard for the law applicable to the NCB, national entity or international entity and should respect the basic rights of the persons who are the subject of the cooperation, in accordance with Article 2 of the Organization's Constitution and the Universal Declaration of Human Rights to which the said Article refers."

- Article 34 of the RPD requires that “the National Central Bureau [...] shall ensure that the data are in compliance with Article 2 of the Organization’s Constitution, and also that it is authorized to record such data pursuant to applicable national laws and international conventions and to the fundamental human rights enshrined in the Universal Declaration of Human Rights.”

17. Matters of political character:

- Article 3 of INTERPOL’s Constitution states that “[i]t is strictly forbidden for the Organization to undertake any intervention or activities of a political (...) character.”
- Article 34 of the 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 (...) 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.”
- The INTERPOL Repository of practice on Article 3 provides guidance on the application of Article 3 of INTERPOL’s Constitution in a variety of circumstances.

V. FINDINGS

18. In reviewing the issues raised, the Commission based its findings on information provided by the Applicant and the NCB concerned.
19. The Commission treats the Applicant’s contentions in the order in which they are described in paragraph 13 above.
20. For an appropriate study of the case, the Commission decided to study the claims related to the lack of accuracy of the data processed and to the private nature of the offense under point A below, in light of their shared factual allegations and interdependent arguments concerning an alleged lack of criminality.

A. Inaccuracy of the data and nature of the offense

a) *The Applicant*

21. The Applicant submitted that the case lacks any criminal character. Firstly, he contended that, in contravention to Article 12 of the RPD, the data processed in INTERPOL’s files in the Red Notice is inaccurate as [...] in fact represent the lawful and agreed payments of remuneration made for his benefit by virtue of his employment contract. Secondly, whilst it is denied by the Applicant that there was any offence committed (either administrative or criminal) he argued that, in contravention to Article 83 of the RPD, the dispute is of a private nature.

22. With regards to the inaccuracy of the data, the Applicant highlighted that he served as [...].
23. The Applicant emphasized that he left [...] with no indication that there were any outstanding issue as to his financial arrangements [...] connected to his employment and benefits package.
24. In support of his claims, the Applicant submitted a copy of a compromise agreement [...]. The document states in particular that “*this agreement has been made in good faith and in recognition that there are no offences to answer*”.
25. Article 1 of this compromise agreement states that: [...].
26. In addition, the Applicant provided the final correspondences between him and [...] disputed sums which were resolved and duly paid.
27. Whilst it is denied by the Applicant that there was any basis [...] refusing to reimburse him for legitimate business expenses, he explained that he nevertheless agreed for those to be deducted from his final settlement in order to resolve the matter.
28. In view of the above, the Applicant claims that [...] in fact represent the lawful and agreed payments of remuneration made for his benefit by virtue of his employment contract.
29. With regard to the private character of the case, the Applicant argued that the relationship between him and [...] was one of employer/employee and was governed by regulations within an administrative framework.
30. Consequently, he stated that the allegations by [...] relate directly to what can only be described as a private contractual dispute which was settled in the prescribed manner.

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

31. In response to the Applicant's claims, the NCB of [...] explained that the crime [...].
32. Furthermore, the NCB of [...] advised the Commission that the evidence of the Applicant's possible concrete and effective participation in the crime is specified in the court decision [...]:
 - [...]
 - The Committee uncovered that the Applicant had committed some financial violations that amount to crimes.
 - [...]
 - o The Applicant exploited the bank card [...] ar.
 - o He received reimbursements [...].
 - o He exploited the budget item [...].
 - o [...]
33. On the basis of these elements, the Court found that the Applicant embezzled [...].
34. As the sums mentioned in this Court Decision were exactly the same as those referred to in the compromise agreement [...], the Commission invited the NCB of [...] to provide its views on the impact of the compromise agreement on the proceedings against the Applicant.
35. [...] the NCB of [...] stated that any settlement [...] does not bar the launch of criminal proceedings.

c) Findings of the Commission

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36. With respect to the allegation that the conduct was not criminal in nature and constitutes a private dispute, Article 83.1(a.1) of the RPD provides that “*Red notices may not be published for offences relating to private matters and for offences originating from a violation of laws or regulations of an administrative nature, unless the criminal activity is aimed at facilitating a serious crime or is suspected of being connected to organized crime*”.
37. In addition, Article 83.2(b,i) of the RPD requires that sufficient information is provided regarding the charges and penalties, that demonstrates that the Applicant is charged with a valid arrest warrant and that shows the Applicant’s possible effective personal participation in criminal conduct of which he or she is charged. Thus, the processing of data in INTERPOL’s files requires the NCB to provide sufficient facts that link the wanted individual to the charges against him, and that demonstrate that the Applicant’s conduct is either not of a private or administrative matter, or was aimed at facilitating serious criminality or organized crime, in the sense of Article 83.1 of the RPD.
38. It appears from the Red Notice and the submissions of the parties that:
- The Applicant is charged with a criminal offense [...].
 - The conduct forming the basis for the charges against the Applicant is based on:
 - o [...] for his personal interests, [...]
 - The Applicant’s involvement in the case is detailed in the Court decision of [...].
39. However, from the supporting materials provided, it also appears that the contentious sums for which the Applicant was convicted are exactly the same as those referred to in the compromise agreement signed [...] which notably states that “*there are no offences to answer*”.
40. [...], it appears that the contentious sums only relate to a private contractual dispute which appear to be settled by agreement.
41. The responses of the NCB of [...] do not resolve the concerns of the Commission that sufficient information is required to demonstrate the existence of a criminal behavior, and therefore that a criminal offense was committed rather than that the matter constitutes a private dispute.
42. As a result, the Commission finds that the elements raised in relation to the nature of the offence and the Applicant’s possible effective and personal participation were sufficient to raise questions as to the compliance of the data with Article 83 of the RPD. Nevertheless, in view of the complexity of the case and the interdependence of arguments raised in relation to other legal issues, the Commission decided not to make a conclusive pronouncement on the compliance of the data challenged at this stage, and to continue to study the Applicant’s additional claims.

B. Lack of due process

a) The Applicant

43. The Applicant complained of several breaches in the procedures followed at national level. Firstly, he was never informed of the opening of proceedings against him nor of the trial; therefore, he could not exercise his right of defense. Secondly, at no stage of the proceedings he was provided with any information or material which substantiate the allegations against him.

b) The NCB of [...]

44. In its reply, the NCB of [...] explained that the Applicant has not been informed of the *in absentia* ruling given that he fled and left the country of [...] since [...].
45. In addition, the NCB of [...] stated that [...] allow retrial by objection to *in absentia* judgment.

c) Findings of the Commission

46. In order to respect the spirit of the UDHR while at the same time respecting the limited role of the Commission, the simple assertion of procedural irregularities cannot rise to the level of an Article 2 violation. Rather, in carrying out an Article 2 analysis, the Commission considers all relevant information to determine whether the Applicant has convincingly demonstrated the likelihood that a flagrant denial of a fair hearing took place.
47. With respect to the allegation that the rights of the defense were not respected, the Commission noted that the Applicant was not informed of the opening of proceedings against him nor of the trial. The Commission, however, underlined that the Applicant would be given the right to have his case retried in his presence, which would be sufficient remedy to address such concerns for due process.
48. Therefore, the Commission decided to study the Applicant's remaining arguments before making a final decision in this case.

C. Political nature of the proceedings

a) The Applicant

49. In view of the elements developed before in point A, the Applicant argues that the proceedings against him are politically motivated.
50. The Applicant claims there is evidence that he is being pursued because of a personal dispute with a high ranking and powerful government official in [...].
51. [...]
52. [...]
53. [...]
54. [...]
55. The Applicant ultimately argued that, following the discovery of his conviction in [...], he gave press interviews in [...] and published articles on his blog site which were highly critical [...].
56. [...] the red notice against him is part of a politically motivated attack against him.
57. [...]

b) The NCB of [...]

58. In its reply, the NCB of [...] did not provide any comment on this element.

c) Findings of the Commission

59. Under Articles 3(1)(a) and 33(3) of the Statute of the Commission, the function of the Commission is to review whether the processing of data in INTERPOL's files meets INTERPOL's applicable legal requirements in accordance with Article 36 of INTERPOL's Constitution. The Commission is not empowered to conduct an investigation, weigh evidence, or make a determination on the merits of a case. That is the function of the competent national authorities.
60. With respect to the assertion that the matter is of a political character, the Organization applies the predominance test, i.e., it evaluates all relevant information and pertinent elements, as provided for by the rules, to determine whether the offense is of a predominantly political character.
61. The rule reflected in RPD Article 34(3) requires analysis of all relevant factors, as to which the following appear to the Commission to be key in the present case:
 - the nature of the offense, namely the charges and underlying facts;
 - the status of the person concerned; and

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- the general context of the case.
62. In reviewing the applicable criteria under the predominance test, the Commission first established that here it had doubts concerning the criminal nature of the offense, as established at paragraph 42 above.
 63. The Commission then considered that the Applicant, with regards to his status, is not a politician nor former politician. However, the general context of the case tends to show that [...].
 64. In view of all these elements, and recalling the prior doubts identified concerning the sufficiency of criminal elements of the case as well as the political elements surrounding the proceedings, the Commission concluded that on the balance, the data challenged are not compliant with INTERPOL's rules applicable to the processing of personal data.

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.
