



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

DECISION OF THE COMMISSION (108th session, 15 to 19 April 2019)

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 108th session, on [...], delivered the following Decision.

I. PROCEDURE

1. During its [...] session, the Commission previously studied a request from [...] (the Applicant). It concluded that the data concerning him were compliant with INTERPOL's rules, subject to the provision of additional information by the INTERPOL National Central Bureau (NCB) of [...] within one month of the notification of the Commission's Decision.
2. As the NCB of [...] complied with the Commission's Decision within the required timeframe, the data was found compliant with INTERPOL's rules, and the Commission's Decision was communicated to the Applicant on [...].
3. On [...], the Applicant lodged an application to review the Commission's Decision adopted during its [...] session, on the basis of Article 42 of the Statute of the Commission (the Statute). 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 [...].
4. During the study of the Applicant's case, the Commission consulted the NCB of [...], in accordance with Article 34(2) of the Statute, on specific issues raised in the application for revision.

II. FACTS

5. The Applicant is a dual national of [...].
6. He is the subject of a red notice issued at the request of the NCB of [...] for [...] on the basis of an arrest warrant [...].
7. The summary of the facts, as recorded in the red notice, is the following: [...].

III. THE APPLICANT'S REQUEST

8. In both his original complaint and his application for revision, the Applicant requested the deletion of the data concerning him, contending, in essence that:
 - a) the prosecution lacks evidentiary basis and there are no evidence of any criminal offence ;
 - b) the arrest warrant has been issued by a police body and not by a judicial authority ;
 - c) since he has been discharged by several foreign judicial authorities in relation to the same case;
 - d) he will be subject to a flagrant denial of a fair trial and to death penalty in case of extradition to [...];

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IV. APPLICABLE LEGAL FRAMEWORK

9. 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.

10. Application for revision

- Article 42 of the CCF Statute provides that: *"(1) Applications for the revision of decisions of the Requests Chamber may be made only when they are based on the discovery of facts which could have led the Requests Chamber to a different conclusion if that fact had been known at the time at which the request was being processed. (2) Applications for revision must be made within six months after the discovery of the fact."*

11. Effective participation and evidentiary basis :

- Article 83.2(b,i) of the RPD requires that "Red notices may be published only when sufficient judicial data has been provided. Sufficient judicial data will be considered to include at least summary of facts of the case, which shall provide a succinct and clear description of the criminal activities of the wanted person, including the time and location of the alleged criminal activity."

[...]

- Article 12 of the RPD states that "data processed in the INTERPOL Information System must be accurate, relevant, not excessive in relation to their purpose and up to date."

12. Non bis in idem :

- Article 12(7) of the International Covenant on Civil and Political Rights states that "no one shall be subjected to a new trial for a new punishment for an offense for which he has already been acquitted or convicted by final judgement in accordance with the law and penal procedure of each country"
- Article 4(1) of Protocol 7 of the European Convention of Human Rights states that "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

13. Conditions for the publication of a Red Notice:

- Article 11 of the RPD states that "Data processing in the INTERPOL Information System should be authorized with due regard for the law applicable to the National Central Bureau, 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 83(2) (b.v) 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: [...] (v) reference to a valid arrest warrant or judicial decision having the same effect."
- Article 84(1) of the RPD states that "The requesting National Central Bureau [...] shall ensure that the authority which issued the arrest warrant [...] has the necessary power."

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- Article 84(2) of the RPD states that “The requesting National Central Bureau [...] shall ensure that if the arrest warrant has not been issued by a judicial authority, the laws of the requesting country [...] provide for a mechanism of appeal before a judicial authority.”

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 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 (UDHR) to which the said Article refers”.
- 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”.

V. FINDINGS

15. For an appropriate study of the case, the Commission first determined whether the arguments presented meet the necessary criteria for a revision, and upon concluding positively, then re-examined the most relevant contentions presented by the Applicant.

A. Application for revision

a) The Applicant

16. The Applicant claims that, since the study of his request during the Commission’s [...] session (and the letter informing him of the Decision and its implementation dated [...]), new developments have occurred in the case which further demonstrate the well-founded nature of his claims, and which may have led the Commission to a different decision if they were initially known, in the sense of Article 42 of the Statute.
17. He alleges that [...] authorities have rejected a Mutual Legal Assistance request from [...] authorities concerning the criminal case at the basis of the Red Notice (centered on his father, [...]), through a letter dated [...] of the [...] Prosecution Office.
18. He claims that the request was rejected notably due to the lack of response from the [...] authorities to a request for clarification dated [...], and due to doubts as to the coherence of the charges and as to alleged violations of fair trial rights in the [...] proceedings. On the same date, freezing measures on bank accounts previously ordered by [...] authorities on [...] on the basis of the [...] letter were lifted. The [...] did not appeal this measure, showing their lack of interest in the matter.
19. The Applicant argues that these new elements, which could not be presented at the time of the previous study of his case in [...], have a strong influence on the compliance of the data challenged with INTERPOL’s rules, notably with Article 83 of the Rules on the Processing of Data and with Article 2 of the Constitution, and that they should lead the Commission to reevaluate its earlier conclusions.

b) Findings of the Commission

20. The Commission recalled that under Article 42 of the CCF Statute “(1) *Applications for the revision of decisions of the Requests Chamber may be made only when they are based on the discovery of facts which could have led the Requests Chamber to a different conclusion if that fact had been known at*

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the time at which the request was being processed. (2) Applications for revision must be made within six months after the discovery of the fact.”

21. The Commission reviewed its previous conclusions adopted during the [...] session, and the arguments previously raised by the parties at that time. The Commission held that the decision by [...] authorities to refuse to cooperate with [...] authorities on the criminal case involving the Applicant constitutes a new fact, which could not have been communicated to the Commission before it was materialized in the letter dated [...] of the [...] Prosecution Office.
22. It also found that this decision, which appears grounded on the risks of serious violations of the Applicant’s human rights in case of extradition to [...] and on incoherencies in the charges, may potentially have a direct impact on the compliance of the data challenged with INTERPOL’s Rules and on the general outcome of the case.
23. In view of the above considerations, the Commission found that the application for revision set forth new facts, which meet the required criteria established in Article 42 of its Statute. It decided that it would study anew the compliance of the data challenged, on the basis of both this new fact and the information previously provided by the parties during the prior study.

B. Lack of due process and fair trial rights

a) The Applicant

24. The Applicant claims that the decision of the [...] authorities recognizes that there are real risks that his right to a fair trial may be violated in [...] in the context of this criminal case. In this regard, he also submits that his lawyers [...] have been consistently refused a [...] by the investigator in the case, and that they are hence deprived of any possibility to access the case file and to present submissions.
25. Moreover, he contests the statement presented by the NCB of [...] during the initial study of the case that he may have access to a proper remedy before [...] judges, in view of numerous international reports documenting executive interferences with the judiciary and the lack of independence of the judicial system in [...].
26. Finally, he claims that despite an official moratorium on death penalty and the assurances transmitted by the NCB of [...], capital punishment is still routinely carried on in secrecy, even for economic crimes. He submitted several international reports and press releases, concerning recent judicial decisions sentencing individuals to capital punishment in [...] for corruption-related crimes. He concludes that there are real risks that he would be subject to unfair proceedings in [...], and that he would be facing death penalty.

b) The NCB of [...]

27. The NCB of [...] was consulted by the Commission, and was asked to confirm the authenticity of the letters from the [...] Prosecution Office provided by the Applicant. The NCB indicated that it was not authorized to reply on this matter, due to its own national legislation.

c) Findings of the Commission

28. The Commission carefully considered the documents provided by the Applicant in relation to the decision made by [...] authorities to decline cooperation on the criminal case linked to the Red Notice, including the letter dated [...] from the [...] Prosecution Office.
29. The Commission noted that this decision has been reported in the media, and that on the basis of the documents provided by the Applicant, it has no reason to doubt its veracity. The mere inability by the NCB of [...] to provide explicit confirmation of a fact due to its national legislative framework should not be construed as leading to detrimental consequences for the Applicant. In the present case, the Commission considered that it may be established beyond reasonable doubt that Swiss authorities have decided not to cooperate and to respond to the [...] mutual legal assistance request.

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30. The Commission considered the Applicant's arguments that his lawyers have been refused the issuance of a [...] by the investigating bodies, and that they cannot obtain access to the criminal file, thereby depriving him of the essence of his defense rights. In this connection, the Commission paid particular attention to the content of the letter dated [...], and notably to the following ground :

[...]

31. In this context, the Commission paid particular attention to the numerous reports and statements issued by reliable sources such as the United Nations High Commissioner for Human Rights and the UN Committee Against Torture, diverse foreign governments and regional entities (United States Department of State Country Reports, European Parliament) as well as various human rights organizations (Freedom House, Human Rights Watch, International Federation for Human Rights, International Commission of Jurists), which all express serious concerns over the procedural safeguards under [...] criminal law and document instances of witness intimidation, prosecution of defence counsel, media censorship, pressure to convict from the government, lack of independence of judges, amounting to gross violations of international fair trial standards.

32. The Commission underlined that it is not its role to assess a country's law enforcement or judicial system *in abstracto*, and that therefore it does not usually rely on general statements concerning the situation in a country to ground its findings. It rather examines the compliance of data with INTERPOL's rules based on specific information related to the case under study or to the person who is the subject of the request. Yet in some instances where multiple international and national reliable sources all present a consistent, documented, and concurring account of a situation characterized by serious human rights violations, the Applicant's individual allegations echoing such a context may then appear as reinforced and be seen as additionally supported.

33. The Commission concluded that the decision of the [...] authorities, which is grounded at least partly on potential risks for the Applicant's right to a fair trial, in conjunction with previous doubts already identified during the initial study of the case, raise together serious concerns as to the compliance of the data challenged with Article 2 of INTERPOL's Constitution. Yet, in view of the interdependence of arguments raised in relation to other legal issues, the Commission decided not to make a final pronouncement on the compliance of the data challenged at this stage, and to continue to study the Applicant's additional arguments.

C. Lack of criminal character and of elements of effective participation

a) The Applicant

34. The Applicant contests that any crime has been committed in the context of the set of facts presented by the NCB of [...]. He submitted previous declarations by [...] authorities on the case clearing [...].

35. He has submitted documented evidence disputing the version alleged by the investigators regarding the financial transactions concerned. He also contends that [...] authorities have concluded that there are strong inconsistencies and discrepancies in the factual accounts presented by the [...] authorities, leading to a finding that no criminal conduct attributable to him could be identified. Finally he claims that the successive acquittal decisions or refusals to cooperate on this case by [...] judicial authorities, based on the absence of constitutive elements of offences should be taken into consideration by the Commission in its assessment of the coherence of the charges.

b) The NCB of [...]

36. The NCB of [...] was consulted by the Commission, and was asked to confirm the authenticity of the letters from the [...] Prosecution Office provided by the Applicant. The NCB indicated that it was prevented from replying to the Commission on this matter, due to its own national legislation.

c) Findings of the Commission

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37. The Commission considered, as explained above at paragraph 29, that it may be established beyond reasonable doubt that [...] authorities have decided not to cooperate and to respond to the [...] mutual legal assistance request, despite the absence of explicit confirmation by the NCB of [...].
38. In this connection, the Commission particularly noted the content of the letter dated [...], and notably to the following ground for the refusal to execute the MLA request :

[...]
39. Likewise, the Commission recalled its findings in relation to the earlier decisions adopted by [...] and [...] authorities to cancel proceedings or discharge the Applicant or his father in relation to the same facts of the case as presented by [...] authorities. The Commission held that three INTERPOL member countries have successively now declined to cooperate on this case, due to issues linked to the evidentiary basis and the coherence of the accusations, which have not been addressed or clarified by the [...] authorities.
40. The Commission once again underlined that the determination of the applicability of the *ne bis in idem* principle must be left to the national competent courts to decide at trial or during extradition proceedings, since there are no clear legal instruments regulating the interplay of national proceedings between [...] and their possible consequences on the Applicant's situation.
41. However it found, taking into account the inconsistencies raised in relation to the facts of the case, as well as the alternative factual account documented by the Applicant, that the multiple above-mentioned national decisions declining to cooperate on this case raise serious concerns as to the overall coherence of the charges and as to the effective personal participation of the Applicant and his father [...] to criminal acts, hindering the possibility of actual international police cooperation.
42. In conjunction with the earlier doubts as to the compliance of the data challenged with Article 2 of INTERPOL's Constitution, these new concerns linked to the consistency of the charges with the facts of the case led the Commission to conclude that the data concerning the Applicant are not compliant with INTERPOL's Rules applicable to the processing of personal data.

FOR THESE REASONS, THE COMMISSION

1. Establishes that the conditions for revision have been met.
2. 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.

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