



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

DECISION OF THE COMMISSION
(104th session, 24-27 April 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 104th session, on [...], delivered the following Decision.

I. PROCEDURE

1. On [...], Ms [...] (the Applicant) lodged a complaint addressed to the Commission concerning her son Mr [...] (the Child). Following the submission of all the required documents in accordance with Rule 30 of the Operating Rules of the Commission, the request concerning the Child was found admissible, and the Commission informed the Applicant thereof on [...].
2. In accordance with Article 34(1) of the Statute of the Commission (CCF Statute), the National Central Bureau of INTERPOL (NCB) of the [...] was consulted on the arguments set forth in the complaint.
3. 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 104th session.
4. During the study of the Applicant's and the Child's case, the Commission consulted the NCB of [...], in accordance with Article 34(1)/(2) of the CCF Statute, on arguments set forth in the complaint. The NCB [...] came in support of the Applicant's request.

II. FACTS

1. The Child is an [...]. He is the subject of a yellow notice issued at the request of the [...], as a missing child for his location.
2. The information related to the disappearance or discovery, as recorded in the yellow notice is the following: [...]
3. [...]

III. THE APPLICANT'S REQUEST

4. The Applicant requested the deletion of the data concerning the Child.
5. She contends in essence that:
 - a) there is no purpose for the publication of the yellow notice;
 - b) the case is of a family/private nature ;
 - c) the requirement of interest/seriousness of the data for international police cooperation is not met.

NOT INTENDED FOR PUBLIC DISSEMINATION

IV. APPLICABLE LEGAL FRAMEWORK

6. General provisions:

- 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".

7. 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.

8. Purpose of Yellow notices:

- Article 90.1 of the RPD states "*Yellow notices are published to locate a missing person or to identify a person unable to identify himself/herself.*"
- Article 90.2 of the RPD states the conditions for the publication of such notices: "*a) The person's disappearance or discovery has been reported to and recorded by the police; (b) The whereabouts of the missing person or the identity of the discovered person are unknown to the police; (c) If the person is an adult, applicable national privacy laws do not prevent a request being made; (d) Sufficient data on a person or the circumstances surrounding the disappearance or discovery of the person.*"

9. Family /Private matters:

- Article 83.1(a,i) of INTERPOL's Rules on the Processing of Data (the RPD) states that "*red notices may not be published for offences related to private family matters [...] or deriving from private disputes*".

[...]

10. Effective participation of an individual in the acts he/she is accused of :

- 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."

11. 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 84(b) of the RPD further states that the requesting National Central Bureau who has asked for the publication of a Red Notice "shall ensure (...) that extradition will be sought upon arrest of the person, in conformity with national laws and/or the applicable bilateral and multilateral treaties."
- 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

12. In reviewing the issues raised, the Commission based its findings on information provided by the Applicant, the NCBs concerned and INTERPOL's General Secretariat.
13. The Commission treats the Applicant's contentions in the order in which they are described in paragraph 5 above.
14. In view of the Applicant's claims the Commission decided to study under point A below the question of the purpose for the publication of the Yellow notice against the Child. As the Applicant is also the subject of data in INTERPOL's information System and because of the interdependence of the Applicant's contentions and of the fact that they rely on the same factual allegations, the Commission decided to study under point B below the question of the nature of the dispute and whether these two notices are of interest for international police cooperation.

A. Purpose for the publication of the Yellow notice

a) The Applicant

15. The Applicant states that representatives of the [...] had the opportunity to see her and the Child on several occasions: in particular in [...] when they took a photograph of the Child and were able to make a welfare report and lastly in [...]. Each time the welfare report of [...] confirmed the Child's location and that he is being brought up well.
16. The father talked with the Child on [...]. He also sent a consent form for the Child's passport renewal in [...]. The father's parents have also seen the Child following a court order.
17. The Yellow notice published on INTERPOL's website shows a picture of the Child that was taken from [...], , the father and the father's family in [...] know of the Child's whereabouts and welfare.

b) The [...]

18. [...]
19. The NCB confirmed that the Child is still considered missing from the [...] since he was removed without permission and remains outside the country.
20. It explained that [...] authorities have consulted with officials working at the Department of State and have asked that [...] follow up with the Applicant, and that she return to the [...]. Also, [...] authorities have visited with the Child. However, the Child is still considered missing from the [...].
21. The [...] considers that a Yellow notice is a global alert to help locate missing persons. Since the Child is in [...] and the Applicant refuses to return to the Child to the [...], the Child is still considered missing from the [...].
22. The [...] added that the Government of [...] is not a signatory of the Hague Convention on the Civil Aspects of International Child Abduction. Therefore, parents whose children have been abducted from the [...] or wrongfully retained in [...] are unable to invoke the Convention to pursue their children's return or to seek access to them. Therefore, the Yellow notice should remain in place to alert other countries to which the Child may travel, including those that are cooperative parties to the Hague Convention, that the Child is missing from their custodial parent and habitual country of residence and should be lawfully returned to the [...].

c) The NCB of [...]

23. In its reply to the Commission, the NCB of [...] confirmed that representatives of [...] visited the Applicant and her son in order to assess the welfare of the Child on [...] occasions and lastly on [...]. Each time the [...] confirmed the location of the Child, and found him to be brought up in a loving, caring and secure environment. The NCB provided copies of the welfare and whereabouts reports sent following those visits.
24. The specific address and location of the Child is provided by the NCB and was confirmed by the [...].

d) Findings of the Commission

25. The Commission first highlighted that its functions, as determined in Article 36 of INTERPOL's Constitution, and reminded at Article 3(1) (a) and (b) of the CCF Statute, include the competence to "ensure that the processing of data by the Organization is in compliance with INTERPOL's Rules" and to "examine and decide on requests for (...) the deletion of data processed in the INTERPOL Information System". Therefore, the Commission is to review the compliance of data in INTERPOL's files when receiving a request for correction and/or deletion of data processed in the INTERPOL Information System. It noted that in the present case there is information processed in the INTERPOL Information System, at the request of the [...] in the form of a Yellow notice for the Child, and of a Red Notice for the Applicant. The Commission received a request from the Applicant for the deletion of the data concerned, whereby she raised a number of claims, including the fact that several welfare reports concerning the Child were sent by [...] authorities. This tended to prove that the Child was located and raised the question of the compliance of the data with INTERPOL's Rules, and therefore was within the Commission's competence.
26. Under Article 90(1) of the RPD, one of the purposes for the publication of a yellow notice is to "locate a missing person".
27. The Commission established that the [...] authorities know of the Child's location as they have communicated several occasions with the Child himself and have reported on his welfare, the last official report provided being [...]. The Applicant was also contacted on [...] by representatives of [...] to organize for a new visit. This tends to prove that the mother could be reached on a number of occasions over the last [...] years. Each time, the Child's location was established and his welfare positively assessed by the relevant [...] delegation.
28. The mere fact that the Child is not under the guardianship of the father, or in [...], is not sufficient to consider that he is not located, and to justify the publication of a yellow notice.
29. In view of the information above, the Commission found that there were strong elements to consider that [...] authorities did not need to issue a Yellow notice to establish the Child's location, as he has been located in [...] since he left the country. However, here, the Yellow notice would allow the location of the Child in case of travelling.
30. 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. Family / Private nature of the dispute

a) The Applicant

31. The Applicant provides an explanation on the context in which she left [...]. In [...], she was married [...].
32. She left the [...] and returned to [...] with her Child as they were fleeing an abusive husband/father. In proof of this, she provided copies of complaints lodged with the police. She further explained that the matter was referred to [...] as a Domestic assault case in the [...]. The father of the Child, [...] abandoned her while she was still in the [...] As she had no means to work (being on a dependent visa), she managed to return to her home in [...] with the help of an NGO.
33. The father, and the local police in the [...] with which she had filed the complaints, were informed of her whereabouts in [...] and the reasons for leaving.
34. On [...], the [...] granted her custody of the Child. The Court order also restrained the father from pursuing [...]. The father and the [...] Police were informed of this decision.

b) The [...]

35. The NCB explained that [...] had not made a formal request to [...] for the extradition of the Applicant because [...] has consistently taken the position that it will not extradite for this offense because it does meet the dual criminality requirement of the applicable extradition treaty.

36. In any event, the Applicant remains wanted in [...] for the charges on which the red notice is based. The [...] remains committed to requesting her extradition should she be apprehended in a country from which her extradition is legally possible.
37. In response to the Applicant's claim that she had obtained custody of the Child in [...], the [...] stated that it was without merit or effect in the [...]. The NCB added that [...] authorities have not participated in any type of custody or attempted resolution of the [...] criminal prosecution in court proceedings in [...]. The [...] is not a party to any proceedings in [...] related to custody, and any involvement by the father in such proceedings would be undertaken by the father in his personal capacity and without effect on criminal proceedings in the [...].
38. Finally, the NCB highlighted that the Applicant would be free to raise this issue in her defense at trial when she is returned to the [...].

c) *The NCB of [...]*

39. The NCB of [...] explained that by order of the [...] in [...] of [...], the Applicant was appointed as guardian *ad litem* to the Child. In addition, the court restrained the father of the child and his parents from taking the custody of the Child, and from pursuing any matrimonial and custodial remedies under the laws of [...] against the Applicant. The decision of the court is based on the fact that the Applicant did not participate or submit to the jurisdiction of the [...] has not been married under the [...] and was never a permanent resident of the [...].
40. The NCB confirmed that no extradition request was received from [...] authorities in this case.

d) *Findings of the Commission*

41. First, the Commission noted that the Applicant and the father were married under [...] laws. It also observed the context in which the Applicant and her Child left the [...], and the decisions of the [...] Courts restraining the father from pursuing any matrimonial matter in the [...].
42. The Commission highlighted that the information provided by the [...] in this case appeared to be conclusive in stating that the Applicant is still wanted by [...] authorities, and that extradition had not been requested because of [...]’s position that it will not extradite for this offense, for lack of dual criminality.
43. Then, the Commission considered the elements of the case and that the Applicant is charged with “International Parental Kidnapping” of the Child who is her biological son. In that context, the Applicant submitted documents to support her contention that she has obtained legal and exclusive custody of the Child in [...] and that the Child’s father provided his consent for the renewal of the Child’s passport in [...], thus after the alleged kidnapping.
44. The Commission recalled that the existing field of application of the exception of family matters in the meaning of Article 83 (1,a,i) of the RPD, i.e. to exclude controversial offences, which is not the case for parental child abduction, even though some countries will not act upon a red notice issued for this offence.
45. Nevertheless, the Commission highlighted INTERPOL’s policy that it is generally not the appropriate forum for cases, which derive from competing or contradicting national court decisions. In this particular case, the Commission observed a decision of the [...] Courts granted custody of the Child to the Applicant on [...]. It also noted that the father was granted sole legal and physical custody of the Child by [...] courts on [...]. Both [...] authorities consider that the decision taken in the other country is without merit or effect in their own country.
46. Therefore, the Commission is faced with a case that concerns, in essence, a situation of a dispute between member countries, which derives from competing and contradicting national court decisions, namely where the court in the requesting country granted custody to one parent, while a court in another country granted custody to the other parent.
47. Since INTERPOL is not the appropriate forum to address situations of competing custodial disputes, in view of the all of the elements above and its previous reservations concerning the purpose for the publication of the Notices against the Child and the Applicant, the Commission finds that it cannot determine that the retention of the data concerned would be compliant with INTERPOL’s rules, and

that a decision concerning custody or to extradite the Applicant should be left to national competent police authorities and national courts.

FOR THESE REASONS, THE COMMISSION

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